REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG DIVISION, JOHANNESBURG

CASE NO: A315/17

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

16/08/19
DATE

SIGNATURE

ZWELITHINI WONDERBOY NHLOZI **APPELLANT**

And

STATE **RESPONDENT**

JUDGMENT

KEKANA AJ:

Introduction

[1]The appellant was charged in the Germiston Regional Court on the following counts:

Count 1: Kidnapping

Count 2: Rape in terms of section 3 of Act 32 of 2007, read with the provisions of section 51 of Act 105 of 1997.

He was found guilty on the count of rape and sentenced to (10) years imprisonment. He is appealing both his conviction and sentence.

[2] The version of the State is that the appellant and his co-assailant accosted the complainant and forced her to go with them to an RDP house where they raped her and kept her for approximately 6 hours against her will. The appellant's defense is an alibi in that he was in Port Elizabeth during the time when the rape is alleged to have taken place.

[3] It is submitted on behalf of the appellant that the complainant failed to describe the appellant and thus the identification is unreliable. It is further submitted that the chain of evidence regarding the DNA has not been established as the doctor who took samples from the complainant was not called to testify at the trial. It is contended that the trial court ought to have found that the appellant's version that at the time of the alleged offence he had gone to Port Elizabeth to see his pregnant girlfriend was reasonably possibly true.

[4] It is trite that the powers of the appeal court to interfere with the factual findings of the trial court are limited to where there has been a material misdirection on the part of the trial court (see S v Hadebe 1997 (2) SACR 641 (SCA) at 645f); R v Dhlumayo and another 1948 (2) SA 677 (A). The state bears the onus to prove its case beyond reasonable doubt. The corollary to the abovementioned onus of proof is that the accused is entitled to be acquitted if it is reasonably possibly true that he might be innocent.

Identification

[5] It is submitted on behalf of the appellant that there is not sufficient evidence of identification to prove beyond reasonable doubt that, the appellant was one of the perpetrators especially since the complainant did not know the appellant. The complainant

is the single witness regarding the identity of the person that raped her. She identified the appellant in court as one of the assailants that raped her and could not furnish any features with which she was identifying the appellant.

[6] According to the complainant when they arrived at the RDP house, the assailants switched on the light which was an electric light bulb. She spent about 6 hours in that house with the assailants and therefore had ample opportunity to observe his assailants. She indicated when she reported the matter to the police that she would be able to recognize her assailants if she saw them again.

[7] It is a well-established principle that it is not sufficient for the identifying witness to be honest, the reliability of her evidence must also be tested. Sincerity and subjective assurance are not enough. Various factors such as lighting, proximity of the witness, opportunity for observation, corroboration, the height, built of the appellant and evidence of the appellant ought to be taken into account. These factors are not individually decisive but must be weighed one against the other in light of the total evidence (see S v Mthetwa 1972 (3) SA 766 (A) at 768 A-C; S v Charzan and Another 2006 (2) SACR 143 SCA at 147 I-J).

[8] The trial court found the complainant to be a credible witness. It concluded that the complainant had properly identified the appellant as she had sufficient time to observe her assailants. This was so despite the fact that the complainant did not provide any description of her assailants. It is not sufficient for the witness to be honest as identification is not merely a matter of credibility but one of objective reliability. The court is required to guard against the inherent risk of misidentification by an otherwise honest witness. There was no identity parade in this case and therefore the complainant's evidence regarding the identity of her rapist needed to be tested with great care. The complainant did not provide any description of the appellant such as the features, marks by which she identify the rapist. There was also no evidence regarding the height, built, clothing or complexion of the rapist either at the trial or when she first reported the case at the police station. see S v Sithole and Others 2002 (1) SACR 585 (W) at 591; R v Shekelele 1953 (1) SA 636 (T). I have to agree with the appellant that the complaint's identification of the appellant was not sufficient and the trial court erred in accepting her evidence in this regard.

Chain of evidence

[9] I now turn to deal with the submission made on behalf of the appellant that the state failed to establish a chain of evidence regarding the DNA evidence. It is submitted that the state failed to call Dr Keshav to testify as to how the sample of the sexual assault kit was collected to complete the chain of how the exhibit was handled.

[10] The evidence before the trial court in this regard was that the complainant was examined by Dr Keshav who compiled a J88. The appellant was later arrested as a result of the investigation due to forensic link. A computer matched the DNA in the database from different cases in which the appellant was involved. The investigative lead was provided to the investigating officer who arrested the appellant. Sergeant Mpuka took a Buccal sample from the appellant and submitted it to the forensic laboratory.

[11] Ms Reynolds tested the semen from the sexual assault kit obtained from the complainant and the saliva swab obtained from the appellant. She found that the sample from the sexual assault kit was exactly the same as the DNA result obtained from the sample obtained from the appellant. The abovementioned evidence was largely uncontested.

[12] The trial court noted the following information from the J88, that: (a) the complainant reported the rape on the 6th June 2013; (b) forensic evidence was collected from her vaginal vault and cervix the same day; (c) the complainant was examined by Dr Keshav; (d) the sample was taken and the number of evidence collection kit was recorded as 10DIAA0251TF; (d) that the specimens were handed to Constable Modiba.

[13] The trial court further noted that the state did not file section 212(4) statement by Dr Keshav and admitted the J88 provisionally by agreement between the parties. The respondent did not call Dr Keshav to testify. Despite noting that Dr Keshav was not called the trial court proceeded and placed much reliance on the evidence contained in the J88 which is hearsay and thus inadmissible.

[14] It is not in dispute that the complainant was taken to the hospital where she was examined by Dr Keshav, a J88 was completed and a rape kit was compiled. There is however no evidence regarding the collection of specimen, receipt of specimen, custody, packing and marking and delivery of specimen to the forensic laboratory. In my view the

trial court erred in finding that the evidence of Mpuka, Reynolds and Ntini established the necessary chain of evidence and therefore, both the conviction and sentence falls to be set aside.

[15] However, the appeal court has the power to remit the matter to the trial court for correction of an irregularity in terms of Section 322(3) of Act 51 of 1977 which provides as follows:

"where a conviction and sentence are set aside by a court of appeal on the ground that a failure of justice has in fact resulted from the admission against the accused of evidence otherwise admissible but not properly placed before the trial court by reason of some defect in the proceedings , the court of appeal may remit the case to the trial court with instructions to deal with any matter, including the hearing of such evidence, in such manner as the court of appeal may think fit."

[16] The abovementioned section is in my view applicable to the present circumstances. The trial court admitted the J88 and the rape kit despite the fact that Dr Keshav was not called to testify and the section 212(4) affidavit had not been filed. Constable Modiba who received the rape kit from Dr Keshav did not testify as to the receipt, the marking and the delivery of the specimen to the forensic laboratory. The court erred in admitting the above evidence and the evidence of the DNA results while there was this missing link. This constitutes an irregularity. It is therefore my view that the matter should be remitted to the trial court for the above evidence to be properly placed before it.

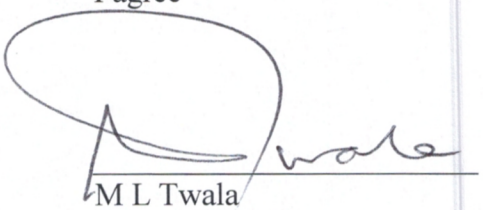
[17] In the result I make the following order:

1. The conviction and sentence of the appellant is set aside.

2. The matter is remitted to the trial court for the evidence regarding the collection and receipt of specimen, custody, packing marking and delivery of specimen to the forensic laboratory to be placed properly before the trial court.

P D Kekana
Acting Judge of the High Court

I agree



M L Twala
Judge of the High Court

Date of hearing:	28 May 2019
Date of judgment:	16 August 2019
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