REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A805/2012
DATE: 11/6/2014

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

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SIGNATURE **DATE**

In the matter between:

CLAAS SUNNYBOY MOSETHLA 1st Appellant

GLADSTONE MANDLA MEYA 2nd Appellant

CHARLES VUYANE QHALANE 3rd Appellant

and

THE STATE Respondent

JUDGMENT

BASSON, J

[1] The three appellants were convicted and sentenced on the following charges:

(i) Count 1: Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977;

(ii) Count 2: Rape read with the provisions of section 51(1) of Act 105 of 1997;

(iii) Court 3: Assault with intention to do grievous bodily harm.

[2] All three appellants were legally represented during the trail and all three pleaded not guilty to all counts. They were sentenced as follows:

(i) Count 1 – fifteen years imprisonment to all three appellants;

(ii) Count 2 – life imprisonment to all three appellants;

(iii) Count 3 – three years imprisonment to appellant no 1 only.

All sentences were ordered to run concurrently.

[3] Appellant no 1 and 2 were granted leave to appeal against sentence only and appellant no 3 was granted leave to appeal against conviction and sentence.

[4] In brief it was the case before this court that on 4 June 2006 the complainant in counts 1 and 2 was walking together with her boyfriend Mr B.P. and one Mr Sipho Masilela (the complainant in count 3) when they met a group of men sitting at a fire. Appellant no 1 assaulted Sipho Masilela with a stick causing serious injuries. The complainant in counts 1 and 2 ran away and was chased by three men. She was caught and was forced at gunpoint into a nearby veld.

She was then raped repeatedly by three men. She was also robbed of her property. According to her she was robbed by appellant no 3 of her cell phone and R100.00.

[5] Because the conviction of appellant 1 and 2 is not before us, I will firstly briefly deal with the conviction and sentence of appellant no 3.

Appellant no 3

[6] In respect of appellant no 3, the complainant testified that although she did not see him at the fire where a group of men sat when she and two others passed them, he was one of the three that raped her and that he was the one that searched her and took her cell phone and her money.

[7] Appellant no 3 disputes that he was involved in the crimes although he does place himself in the vicinity of the fire where the group of men was sitting. Appellant no 3 was not arrested immediately after the incident but was only arrested one year later.

[8] Appellant no 3 was identified by Sipho Masilela at a second identity parade. The complainant was, however, not able to identify appellant no 3 at the identity parade.

[9] Genetic material was found from the three condoms found at the scene in the field where the complainant was raped linking appellant 1 and 2 to the rape.

The third condom found on the scene was broken. No DNA material was found linking appellant no 3 to the rape.

[10] Despite the fact that no genetic material could be found at the scene of the rape linking appellant no 3 with the rape, the Court *a quo* nonetheless found that the complainant had sufficient opportunity to observe accused nr 3 from the time they forced her out of the toilet to the time appellant no 3 penetrated her sexually. The Court *a quo* also took into account that Sipho Masilela saw appellant no 3 during the assault.

[11] From the record it appears that the complainant only identified appellant no 3 in Court. Although it is accepted that a so-called dock identification has very little probative value, a dock identification is not *per se* inadmissible. See In *R v Rassool*[1] where the following was said:

> "Therefore it seems to me that the evidence of previous identification should be regarded as *relevant* for the purpose of showing from the very start that the person who is giving evidence in court identifying the prisoner in the dock is not identifying the prisoner for the first time but has identified him on some previous occasion in circumstances such as to give real weight to his identification."

See also*: S v Bailey:*[2]

[1] 1932 NPD 112 118 (emphasis added).
[2] 2007 (2) SACR 1 (C)

> "[25] Furthermore, there is of course ample authority for the proposition that a dock identification by itself, without more, has limited (if any) evidential value (see, for example, *S v Daba (supra*); *S v Moti* 1998 (2) SACR 245 (SCA) at 257*h*; Du Toit *et al Commentary on the Criminal Procedure Act* at 3-4B (Service 24) and cases referred to therein). It is completely unnecessary, in my respectful view, to go one step further by ruling a dock identification inadmissible 'save in certain special circumstances'. For these reasons I respectfully decline to follow the approach suggested in *Marudu*'s case with regard to a 'dock identification'."

In arriving at this conclusion, the Court in *Bailey* referred with approval to the following academic authority:

> "[27] In a useful article by Prof Steph E van der Merwe titled 'Parade-uitkennings, hofuitkennings en die reg op regsverteenwoordiging: Enkele rondwetlike perspektiewe' (1998) 9 *Stell LR* 129 the learned author deals with this issue (at 137 - 41). His conclusion, after referring to American and Canadian authorities on the topic, is summed up as follows (at 141):
>
> > 'Soos hierbo aangetoon is, is daar goeie redes om op grond van art 35(5) van die Grondwet 'n parade-uitkenning uit te sluit waar 'n beskuldigde sy grondwetlike reg op regsverteenwoordiging by die parade ontsê is. Beteken dit egter dat die daaropvolgende hofuitkenning noodwendig ook uitgesluit behoort te word?

Hierdie vraag - so word aan die hand gedoen - sal telkens beantwoord moet word in die lig van die bewese feite van elke saak. As die Staat die hof kan oortuig dat die gewraakte hofuitkenning gebaseer is op waarnemings wat onafhanklik staan van die waarnemingsgeleentheid wat die onreëlmatige parade gebied het, kan die hofuitkenning toegelaat word omdat dit nie nou gaan om getuienis wat bekom is op 'n wyse wat 'n reg in die Handves skend nie. Die hofuitkenning staan los van die parade-uitkenning. In hierdie verband kan aansluiting gevind word by die volgende passasie uit die meerderheidsbeslissing van die Hooggeregshof van die VSA in *United States v Wade* (388 US 218 (1967)):

> "We come now to the question whether the denial of Wade's motion to strike the courtroom identification by . . . the witnesses at trial because of the absence of his counsel at the line-up required, as the Court of Appeals held, the grant of a new trial at which such evidence is to be excluded. We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the line-up identification. Where, as here, the evidence of the line-up identification itself is not involved, a *per se* rule of

exclusion of courtroom identification would be unjustified."

"Wat moet egter gebeur as die hof sou bevind dat die hofuitkenning geen "independent origin" het nie en bloot berus op die parade-uitkenning wat ingevolge art 35(5) uitgesluit moet word? In hierdie geval het 'n mens te doen met 'n uitkenningsproses wat - alhoewel dit tegnies steeds uit 'n parade- en hofuitkenning bestaan - nie splytbaar is vir doeleindes van art 35(5) nie: As die parade-uitkenning uitgesluit word, moet die hofuitkenning noodwendig ook ontoelaatbaar wees. Die Staat kan tog nie toegelaat word om die hofuitkenning - wat op die parade-uitkenning berus en dus eintlik maar 'n vermomde parade-uitkenning is - by die agterdeur in te bring in die hoop dat dit nie uitgeken sal word as 'n herhaling van die parade-uitkenning nie. Die hof sal konsekwent moet wees. Die uitsluiting van sowel die parade-uitkenning as die hofuitkenning is 'n ongelukkige resultaat. Maar dit is ook 'n onvermydelike resultaat."

See finally: *S v Tandwa and Others:*[3]

"[129] This brings us to the question whether the accused's conviction can stand in the light of the exclusion of the real evidence against him. The principal remaining evidence against him is Dlamini's dock

[3] 2008 (1) SACR 613 (SCA).

identification, which - in contrast to the same witness's identification of accused 2 - was not reinforced by any preceding description of traits specific to the accused. Dock identification, as our previous allusions to it in this judgment indicate, may be relevant evidence, but generally, unless it is shown to be sourced in an independent preceding identification, it carries little weight: 'taken on its own it is suspect'. The reason is apparent:

> “(T)here is clearly a danger that a person might make an identification in court because simply by seeing the offender in the dock, he had become convinced that he was the offender.”

[130] In ordinary circumstances, a witness should be interrogated to ensure that the identification is not in error. Questions include -
what features, marks or indications they identify the person whom they claim to recognise. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. Bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplored, untested and uninvestigated, leaves the door wide open for the possibility of mistake.

[131] Where the State relies solely on a dock identification, however, these questions carry little weight. This is because the witness can look at the accused in the court - as happened in the present case, to the indignant objection of the accused and their counsel. Under these circumstances, dock identification is similar to a leading question. As a result, in certain circumstances it could carry no weight at all.”

[12] From the record it appears that, but for the dock identification, nothing else links appellant no 3 to the scene of the rape and the rape itself: Although appellant no 3 is placed at the scene where the group of men initially sat next to the fire, no independent evidence links his presense at the rape: (i) Although the complainant testified that it was appellant no 3 that searched her and robbed her of her cell phone and her money, Captain Letsoalo testified that he found parts of a cell phone and the cover of the cell phone that belonged to the complainant at the house of appellant no 2. Appellant no 3 can therefore not be linked to the robbery despite the evidence of the complainant. (ii) The complainant was not able to identify appellant no 3 at the identity parade. (iii) The complainant in her own statement to the police immediately after the incident stated that she was only able to identify one of her assailants. In her statement she gave no identification of any features of appellant no 3. (iv) Despite the fact that three condoms were found on the scene and despite the fact that DNA tests were done which positively linked the first two appellants to the rape, no traces of appellant no 3's DNA could be found at the rape scene.

[13] In these circumstances I am of the view that the State has not discharged the onus of proof in respect of appellant no 3. His conviction on all three charges is therefore set aside.

Sentence in respect of appellants no 1 and 2

[14] In respect of sentence it is trite that a Court of Appeal will not lightly interfere with a sentence and will only do so if it is persuaded that the court *a quo*

materially misdirected itself or committed a serious irregularity in evaluating the factors relevant to the exercising of a discretion in respect of sentence.[4]

[15] In the present case the appellants were charged with rape as contemplated in Schedule 2 of Part 1(a)(ii) of the Criminal Law Amendment Act[5] which imposes a mandatory life sentence.[6] The Court is therefore obliged to impose the prescribed minimum sentence unless there are substantial and compelling circumstances which justify the imposition of a lesser sanction. I am of the view that no such circumstances are present. More in particular, the Court cannot disregard the seriousness of the offence. The complainant in this case was repeatedly raped and robbed of her possessions at gun point. This is a reprehensible crime and one that robs the victim of her dignity. In this regard I am in full agreement with the sentiments expressed by the Supreme Court of Appeals in *S v Chapman* where the Court had the following to say about this horrendous crime that mars our society:[7]

> "Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution* and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to

[4] *S v Rabie* 1975 (4) SA 855 (A) at 857D – E and *S v Pillay* 1977 (4) SA 531x (A) at 535E – F.
[5] 105 of 1997.
[6] Section 51(1) of the Criminal Law Amendment Act 105 of 1997.
[7] 1997 (3) SA 341 (SCA) at 354C – D.

enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

[16] Although the sentence imposed by the Court is undoubtedly a severe sentence, I am of the view that it is warranted in the circumstances. I am not persuaded that the Court *a quo* misdirect himself in any relevant respect in imposing that sentence. Moreover, I am also in agreement with the sentiments expressed in *S v Chapman*[8]

"The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights."

[17] In the event the appeal against the sentence imposed on appellant no 1 and no 2 is dismissed.

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AC BASSON
JUDGE OF THE HIGH COURT

I agree

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M MVUNDLA
JUDGE OF THE HIGH COURT

[8] Ibid at 345C – D.

I agree

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N JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT