IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

30/09/2014

Case number: A389/12

In the matter between

[(A) APPEAL]

MPHO GIVEN MOLOKOANE — Appellant

and

THE STATE — Respondent

[(B) REVIEW]

MPHO GIVEN MOLOKOANE — Applicant

MAGISTRATE PW NEL — First Respondent

THE STATE — Second Respondent

JUDGMENT

BAM J

1. On 11 October 2011 the appellant/applicant, accused 1 at the trial, was convicted in the Regional court, Pretoria North as accessory on two counts of rape, counts 1 and 2. He was also convicted on count 3, robbery with aggravating circumstances. On 30 November 2011 the appellant was sentenced to 10 years imprisonment on each of counts 1 and 2 and 15 years imprisonment on count 3. Accused 2 was convicted on all three counts and sentenced to life imprisonment on each of the

counts of rape and to 15 years on count 3. Both appellant/applicant and accused 2 were acquitted on count 4, malicious injury to property.

2. The appellant's application for leave to appeal against the convictions and sentences was refused by the trial court but subsequently granted upon petition.

3. The grounds of appeal, in summary, were that the State did not prove that the appellant raped or robbed the complainant.

4. The appeal was enrolled on 30 January 2014. From the appellant's heads of argument it however appeared that what the appellant actually complained about were certain irregularities allegedly committed during the trial by the presiding regional magistrate. Due to the fact that these so-called irregularities were not brought to the attention of the magistrate, an order was made that the appellant, with assistance of the Legal Aid Board, should lodge an application for the review of the matter. Notice in terms of the provisions of Rule 53 was then issued by the applicant and served on the magistrate, cited as the first respondent. The complete record had already been filed and the first respondent and two representatives of the Director of Public Prosecutions, one of them Mr Conradie, the prosecutor at the time, duly filed opposing affidavits. The review application and the appeal were simultaneously argued before this Court.

5. The list of irregularities alleged by the applicant reads as follows:

   1.Applicant had been treated as a legal object as opposed to a legal subject.

2. *Applicant was granted bail on 13 June 2008 which order was later revoked on 4 September 2008, for reasons which were untenable to Applicant.*
3. *Applicant did not have sufficient time in which to prepare for his own defence, and according to his dictates.*
4. *Applicant was then afforded poor legal service, in the person of Mr Mphila, who was later struck of the roll and who did not cross examine the complainant, or put Applicant's version to her as well as to another State witness.*
5. *The Honourable Magistrate Nel then had Applicant bear the brunt of such omissions from his erstwhile legal representative, during judgment.*
6. *There was no evidence about the state in which the sole witness was, when she was found by the police, and where her money had been retrieved from, which money was later given to her by the police.*
7. *A lengthy postponement, 11/10/2010 until 26/09/2011 was granted for this purpose.*
8. *On the appointed trial date, no such evidence was adduced by the State and no reasons for the inability were given to Applicant, by the Honourable Court of First Instance.*

6. Both the first respondent, the presiding regional court magistrate, Mr Nel, and Mr Conradie, the prosecutor, denied that any irregularity had been committed.

7. Adv Malende represented the appellant/applicant. Adv Kotze represented the respondents in the review application and the State in the appeal.

8. The appellant and his co-accused were charged with 4 counts. Counts 1 and 2 - Rape, count 3 - Robbery with aggravating circumstances and count 4 - Malicious injury to property. The appellant, who was initially legally represented by Mr Mphila, pleaded not guilty and elected not to give any plea explanation. After the complainant, the first witness, had testified, Mr Mphila was replaced by Adv Combrinck.

9. What transpired in this matter, according to the evidence of the complainant, was the following:
On 11 October 2010 the complainant, a mature female person, told the court that on 31 May 2008 at about 1h00 she was at a place called North Park, in the area of Pretoria North. She was on her way to buy air time at a garage. Whilst walking through the park, passing next to bushes, two men stopped her. The one on her left punched her in the face. She was then grabbed on each arm, dragged into the bushes where she was undressed and raped. She had also been slapped and indecently assaulted. She said she heard somebody walking by but her mouth and nose were covered by the assailants' hands. She was then picked up under her arms and dragged to another spot where she was dropped to the ground with her head hitting a slab of concrete. She was again raped, apparently by the same assailant as before. She heard voices but a hand was again put over her nose and mouth. She however managed to move the hand and screamed for help. The rapist then removed himself from her. She subsequently noticed that security guards had caught one of her assailants. A security guard then assisted her. She said that whilst she was being raped by one man the other one robbed her. Her two cell phones, her bank card, R300 in cash, the key to her house, and her purse were taken. She said she did not want to look at her attackers because she thought if she *"played dead"*, they would leave her alone. The complainant said she would have been unable to identify

her assailants. Her purse was later retrieved from the bushes without anything in it. She sustained injuries to her eye and cheekbone and her face was swollen. She said she felt dizzy after the punch. The police later handed her just over R60 that was apparently found in the pocket of the assailant who was apprehended. It was a traumatic experience and she suffered from nightmares even at the time of the trial, almost 2 1/2 years after the incident.

Mr Mphila had no questions.

Mr Beukes, appearing on behalf of the accused 2, put to the witness that accused 2 would say that they knew each other, that they used drugs together and that they would afterwards have consensual sexual intercourse. This she denied. She also denied that they had consensual sex the night in question. She was adamant that there were two attackers.

10. The standard J88 Medical Examination report in respect of the complainant and a Section 212 Statement, concerning DNA results of accused 2, were handed in by consent.

11. Mr Kingsley Mkhabela, a security guard, told the court that he was inside the shopping centre that night when he heard a noise. He and a colleague went to investigate. He then noticed a broken door, referred to as a side glass door. At that stage he heard a cough and saw a man getting up in the garden next to the entrance. This man ran away. They surrounded the area and apprehended the appellant. The complainant then arose from the bushes and complained that she had been raped by *"them"*. The complainant was crying and her lower body was naked. She also complained that she had been robbed. They took her to a bath room. Her clothes were later retrieved from the garden.

During cross examination by Mr Combrinck he said that the appellant wanted to run away but that he was then caught. They did not search him because they were waiting for the police. He conceded that the applicant had no object in his hands. He denied that appellant was walking past and that he was asked about the broken door. When it was put to him that the applicant was walking through on his way from a drinking place, the witness replied that they found the appellant and his co-accused as well as the complainant in the garden.

12. Captain C M Leballo of the SAPD told the court that on 14 June 2008 he arrested accused 2 on a charge of rape upon information received from the investigating officer.

13. The matter was then postponed until 26 September 2011 to enable the State to call the investigating officer as a witness. However on that date the State's case was closed without any further evidence being adduced. Both Mr Combrinck and Mr Beukes applied for the discharge of the two accused. The application was was refused.

14. The appellant testified. He said he was walking along past the business centre. When he came in line with the door of the centre he was called by the security guards. He went to them and was arrested. He said the guards asked him about the window. He denied that he knew anything about the window. He also denied that he ran away. He said he only saw the complainant when the guards brought her to him. She was totally naked. The guards asked him whether he knew her which he denied. He said the guards persisted that he had broken the window.
Mr Beukes had no questions.
During cross examination by the prosecutor the appellant said that he was taken into the centre by the security guards and that he found the complainant at the escalators. He said the complainant, in her naked

condition remained in his presence for about 10 minutes until the police arrived. Nobody gave her something to cover herself. When he was asked whether he related this to his lawyer, he said he was unable to do so because he did not understand Afrikaans or English very well. He then added that he conversed with his lawyer, apparently Mr Mphila, in Setswana, but that he was not asked to tell his version. He said he had consumed about 8 bottles of beer that night and although he was under the influence of liquor he was aware of what was going on. He said that he was on his way from a tavern called Noise Boys when he was called by the security guards. He denied that he had seen accused 2 at any time that night. The first time he saw him was in court.

15. Accused 2 told the court about his relationship with the complainant, that they used drugs together and that they had sexual intercourse before that day. That night they were at Noise Boys from where they went to the park where they used drugs and had sexual intercourse. He said he ran away because he was afraid in that he knew it was illegal to use drugs in the park. He did not know the appellant and had not seen him at Noise Boys.

16. In regards to the review application, Mr Malende, appearing on behalf of the appellant/applicant before us, initially persisted with all the grounds for review recorded above in paragraph 5. Subsequently, however, after some discussion, Mr Malende abandoned ground 2 in view of the fact that the record in respect of the cancellation of the applicant's bail did not form part of the record before us, and, that cancellation of the applicant's bail was dealt with by another magistrate and not the first respondent. The first respondent was obviously unable to contribute anything in respect of the bail issue.

17. The applicant's complaint that he was treated as a *"legal object"* as opposed to a *"legal subject"*, despite Mr Malende's endeavours to explain it to us, remained incomprehensible. The grounds that the applicant was not afforded the opportunity to prepare for his own defence and that his defence was not properly put to the complainant as well as to another State witness, were without substance. The applicant was afforded the services of an interpreter in court and from the record it appears that the applicant had more than sufficient time to prepare for trial. His complaint that his defence was not put to the complainant must be considered against the context of the complainant's evidence who was unable to identify the applicant as one of her attackers. It is therefore not surprising that the complainant was not cross examined by Mr Mphila. The applicant's defence was properly put to the second State witness by Adv Combrinck after detailed cross examination. The applicant's defence as put by Adv Combrinck was consistent with his evidence in court.
    The fact that the magistrate criticised the quality of his evidence is obviously no ground for review.
    The *"lengthy postponement"* was not irregular and did not render the trial unfair.

18. The alleged irregularities were not substantiated. The criticism levelled at the magistrate was clearly ill founded and frivolous.

19. The magistrate considered the evidence and in a comprehensive judgment found that the State's evidence should be accepted and the defence of the appellant be rejected. The magistrate was correct.

20. I am in full agreement with the magistrate's finding that the appellant was an accessory to rape. The appellant clearly assisted his co-accused to attack the complainant and also assisted in subduing her. He was at all relevant times present during the two incidents of rape.

21. In respect of the robbery charge the accepted evidence of the complainant proved beyond reasonable doubt that the appellant robbed her whilst his companion was raping her.

22. This Court's powers to interfere with the sentence are limited. It must be established that the trial court erred in some or other material respect, or misdirected itself or imposed a sentence that is disturbingly inappropriate.

23. In imposing 10 years imprisonment in respect of each of counts 1 and 2, the magistrate took into consideration that there is no prescribed minimum sentence for accessory to rape. The magistrate further took into consideration the applicable standard issues, including the personal circumstances of the appellant, the nature of the crime and the interests of the community.

24. In respect of count 3 a minimum sentence of 15 years imprisonment is prescribed unless substantial and compelling circumstances exist justifying a lesser sentence.

25. Rape is a very serious offence and has been described as reprehensible and despicable. Despite continuous campaigns against violence against

women it appears from recent statistics that there has been no decline in the number of reported rapes. The converse seems to be the case. In *Snyman*: *Criminal Law*, 6th edition, 2012; it is stated that according to statistics it was estimated in 2011 that in our country a woman is raped every 25 seconds.

26. In respect of counts 1 and 2 the magistrate ordered that the sentences on those two counts should run concurrently. In my view the appellant can regard himself rather fortunate. In respect of count 3 the magistrate found that no substantial and compelling circumstances existed justifying a lesser sentence than the prescribed minimum of 15 years imprisonment. There is no reason to interfere with this finding. It is indeed aggravating that the perpetrators mercilessly attacked the complainant, a defenceless woman.

27. Accordingly I propose that the following order be made.
    1. The review application is dismissed.
    2. The appeal against the convictions on counts 1, 2 and 3 and the sentences imposed on those 3 counts is dismissed. The convictions and sentences are confirmed.

A J BAM

JUDGE OF THE HIGH COURT

I agree and it is so ordered

M L MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

24 September 2014