IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A691/2012

Date: 9/11/16

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

PAULUS VELAPHI SIBANYONI **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

PRETORIUS J

(1) The appellant was charged in the Regional Court Evander with two counts of rape and one count of pointing a firearm. He pleaded not guilty to all the charges on 10 May 2007. He was convicted on one charge of rape and the pointing of a firearm on 24 February 2010. He was sentenced to 8 years' imprisonment on each of the two charges on 27 January 2011 - almost a year after he had been convicted and 4 years after he had been arrested. It was ordered that the two sentences had to be served concurrently.

(2) The magistrate did not grant leave to appeal. Leave to appeal was granted by this court on 19 April 2012 and we are adjudicating this matter more than 4 years after leave to appeal had been granted. The appellant was legally represented during the hearing. It is common cause between counsel for the appellant and counsel for the State that, although all parties tried their utmost to obtain a reconstructed, full record that it was impossible to do so. The Director of Public Prosecutions subsequently enrolled the matter. Both parties are satisfied to proceed on the record as is.

(3) Counsel for the appellant set out that the learned Regional Court Magistrate had erred in finding that the State had proved the guilt of the appellant beyond a reasonable doubt, due to the fact that the Magistrate had not considered the facts, contradictions and improbabilities of the State witnesses properly and correctly. This is so, according to the defence, due to the fact that Ms T. K., the complainant, was heavily under the influence of liquor at the time the incident took place.

(4) Ms K., the complainant, testified *in camera.* Her evidence was that on 17 February 2006 she attended a party at the Highveld Inn in Evander. She met the appellant at the party and he told her to tell him when she wanted to return home, as he would take her home. She knew and trusted him and told him she was leaving together with her friend Ms P. S. at 2h00. The appellant was accompanied by a male friend at the time. According to the complainant she was in the front passenger seat and the appellant was driving. He first dropped off her friend. He pointed a firearm at her, whilst the car was moving. She shouted and screamed, but he informed her that her mother had sent him to kill her, but that he would not kill her, but rape her.

(5) At a certain veldt he stopped and placed her seat in "a *lying position".* He then alighted, came around the car to her side, undressed her by taking off her trousers and raped her, after taking off his trousers and placing the firearm next to it. The appellant's friend was in the backseat of the car whilst this rape took place. Her evidence was that after he had finished raping her, he pointed the firearm at her again and instructed his friend to rape her. She closed her eyes and as a result of this could not explain what the firearm looked like. She did not try to run away as she was scared that the appellant would shoot her.

(6) She admitted that her mother had obtained a protection order against her and that was the reason she was not living with her mother at the time. Thereafter the appellant took her home where she was crawling out of the vehicle and shouting and crawled into the house. She then immediately told the lady, Ms Mgune, who lived in the house everything that had happened and that the appellant had raped her.

(7) The complainant eventually went to the police during March 2007 after her stepfather and grandmother urged her to report the incident. Her evidence was that she did not want to open a case as she did not want to damage her relationship with her mother any further. During further cross-examination the complainant testified that the appellant approached her family and offered to pay money. This was denied by the appellant and it was put to the complainant by the appellant's counsel that he could not pay the money to have the case withdrawn as he had not raped the complainant. According to the complainant the appellant apologised to her, also on behalf of his friend.

(8) The complainant's mother only became aware of the rape incident during September 2006 and spoke to the complainant about it. The appellant had approached her mother at her house and apologised and wrote down that he would pay an amount of money to have the matter withdrawn. This note was taken to the police, but did not find its way to court. Thereafter she and the complainant were re-united and the complainant is once more staying with her mother.

(9) Ms P. S.'s evidence was that she was the complainant's friend who had accompanied the complainant to the Highveld Inn on 17 February 2006. She and the complainant got into the appellant's vehicle after she had asked him to take her home as well. They were four people in the vehicle. The complainant had *"consumed* a *lot of alcohol"* and *"I saw her drinking and she was, she had episodes of being, of dozing off in the car and I would wake her".* Her evidence was that she and the complainant had been seated in the back of the car. The next morning she went to the complainant as she was anxious to find out if the complainant had returned home safely, as the appellant had driven past the complainant's home to first drop Ms S. and did not drop the complainant first when passing her house.

(10) Ms Mgune confirmed the complainant's evidence that in the early hours of 18

February 2006 the complainant came home and immediately told her that she had been raped by the appellant. Although Ms S.'s evidence was that she had seen injuries in the form of red marks on both her arms and on her leg, Ms Mgune did not see any injuries. Ms Mgune was surprised that the complainant did not want to go to the police. Her evidence was that the complainant entered the house, walking slowly, contrary to the complainant's evidence that she had crawled to the house.

(11) The application in terms of section 174 of the **Criminal Procedure Act**[1] by counsel for the appellant was refused.

(12) The appellant testified that he was at the Highveld Inn on the night in question where the complainant asked him for a lift home. He and three of his friends then got into his car with the complainant and Ms S.. According to him, his friend Machako proposed to the complainant, which resulted in her slapping him. He then let him out of the car. He then dropped off Ms S. and then dropped the complainant off. The first time he saw the complainant again was in September. The appellant confirmed Ms S.'s evidence that she was sitting in the front. After the complainant's family had approached him, he went to her family as his wife indicated that he should do anything to get this incident to go away. After negotiations he was prepared to pay the complainant R70 000. His wife was prepared to help him as she just wanted the whole matter to go away. This evidence was in contrast to the version put to the complainant by appellant's counsel.

(13) The appellant did not call any witnesses to confirm his evidence that his wife would do and pay anything to make the case to go away. He also did not call Sussie, who according to him accompanied him to the complainant's house to negotiate a settlement. One would have expected him to call either his wife or Sussie. No explanation was given that there was no attempt to call these witnesses. He furthermore did not call any of the two friends who were with him in the car on the night in question, and gave no explanation as to why they were not called as witnesses.

[1] Act 51 of 1977

(14) In **Scagell and Others v Attorney-General, Western Cape, and Others**[2] O'Regan J held:

> *"It is well established in our law that, when an evidential burden is imposed upon an accused person,* ***there needs to be evidence sufficient to give rise to a reasonable doubt to prevent conviction."*** (Court emphasis)

(15) In the **South African Law of Evidence, Zeffert and Paizes, 2nd edition, Lexis Nexis,** the learned authors set out at page 132:

> *"If it lies exclusively within the power of* a *party to show what the true facts were, his failure to do* so *may entitle the court to infer that the truth would not have supported his case."*

(16) In **S v Veldthuizen**[3] the Appellate Division held:

> *"The words 'prima facie evidence' cannot be brushed aside or minimised. As used in this section they mean that the judicial officer will accept the evidence as prima facie proof of the issue and, in the absence of other credible evidence, that that prima facie proof will become conclusive proof.* "

(17) In **S v Van Der Meyden**[4] Nugent J held:

> *"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."*

(18) In **S v Chabalala**[5] Heher JA found:

> *"The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA).* ***The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and***

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[2] 1997(2) SA 368 CC at paragraph 12
[3] 1982(3) SA 413 (A) at 416 G-H
[4] 1999(2) SA 79 (W) at 82 E

improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. *The result may prove that one scrap of evidence or one defect in the* case *for either party (such as the failure to call* a *material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and* a *trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear."* (Court emphasis)

(19) It is thus clear from the above authorities that the court has to consider all the evidence presented to court, before making a decision. According to the *dicta* in **Veldhuizen and Scagell cases**[6] there should be evidence to give rise to a reasonable doubt to enable a court to acquit an accused. The court has to consider all the evidence and not rely on parts of the evidence only.

(20) It is so that there were some contradictions in the evidence of the state witnesses, but it is clear that the learned magistrate dealt with all these contradictions in the evidence in his judgment. His finding that the version of the appellant that his friend, Machaka, had proposed to the complainant, which resulted in her slapping him, was never canvassed with the victim, was correct. The evidence that the appellant had met the complainant a few months later, where she tried to borrow R100 from him, was similarly not put to the complainant.

(21) It is further important to note that the complainant had immediately informed Ms Mgune that she had been raped when she returned home. The complainant maintained throughout that she was scared that the appellant would shoot her and that was the reason she did not go to the police. She conceded that on her mother's insistence she eventually reported the case of rape to the police.

(22) Ms S.'s evidence corroborates the complainant's evidence that they were only four

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[5] 2003(1) SACR 134 (SCA) at paragraph 15

people in the car, and not five as testified by the appellant. The complainant's mother, Ms K.'s evidence that she insisted on the complainant laying the charge, as she had never asked the appellant to kill her daughter, is accepted as the true version. The question of the offer of money to the complainant's mother by the appellant, after the complainant had testified, was first disputed. The court a *quo* was correct in dealing with the State's evidence and accepting it but was conceded when the appellant gave evidence.

(23) The court a *quo* dealt extensively with the fact that the complainant was a single witness at trial, but then her version was corroborated by Ms Mgune. Ms Mgune's evidence was accepted as that of an independent witness. She was the first person to see the complainant after the rape. Her evidence was not challenged that she had not known the appellant. When she saw the complainant, the complainant's clothes and hair were in disarray and she was crying.

(24) This court cannot find that the learned magistrate had misdirected himself in this regard.

(25) In **S v Matyityi**[7] the Supreme Court of Appeal held:

> *'"Rape is* a *topic that abounds with myths and misconceptions. It is* a *serious social problem about which, fortunately, we are at last becoming concerned. The increasing attention given to it has raised our national consciousness about what is always and foremost an aggressive act. It is* a *violation that is invasive and dehumanising.* ***The consequences for the rape victim are severe and permanent. For many rape victims the process of investigation and prosecution is almost as traumatic as the rape itself."'*** (Court emphasis)

In the present matter the complainant's evidence that she was too scared to go to the police as she was afraid the appellant would shoot her, as he had threatened to do, was accepted by the learned magistrate. I cannot find any fact to upset the magistrate's finding in this regard.

(26) The court agrees that the court a *quo* applied the approach as expounded in **State**

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[6] *Supra*

v Van Der Meyden[8] by carefully considering all the evidence in convicting the appellant.

(27) It is furthermore clear from the complainant's evidence that she believed that the item she was threatened with by the appellant was a firearm. The court finds that objectively that the item was likely to lead her to believe that it is a firearm.

(28) The court finds that the convictions on both counts must be confirmed.

(29) The court has carefully considered all the submissions made in regard to sentence.

(30) In **S v Vilakazi**[9] the court held:

> *"If* a *court is indeed satisfied that* a *lesser sentence is called for in* a *particular case, thus justifying* a *departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in Malgas, which said that the relevant provision in the Act vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require* a *different sentence to be imposed. And* a *different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which justify' ... it."*

(31) In **S v Matyityi**[10] the court found:

> *"As Malgas makes plain, courts have* a *duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and, like other arms of State, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. "*

In this case the learned magistrate, after carefully considering both the aggravating and

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[7] 2011(1) SACR 40 (SCA) at 46 A
[8] *Supra*
[9] 2009(1) SACR 552 (SCA) at paragraph 15

mitigating circumstances, imposed a lesser sentence than the prescribed sentence.

(32) The court *a quo* dealt with all the aggravating and mitigating circumstances and came to the conclusion that there were substantial and compelling circumstances to impose a lesser sentence than the prescribed sentence of 10 years.

(33) This court can find no reason to interfere with the sentence on the rape charge.

(34) The 8 years' imprisonment for the charge of pointing a firearm is extremely harsh, as conceded by counsel for the State, even if it was ordered to be served concurrently with the sentence on count 2. In the circumstances the court will interfere and impose a lesser sentence on count 1.

(35) In the result the following order is made:

1. The appeal on conviction against both counts is dismissed;
2. The conviction on both counts 1 and 2 is confirmed;
3. The sentence on count 2, that is 8 years' imprisonment on the count of rape is confirmed;
4. The sentence on count 1, pointing of a firearm is set aside;
5. A sentence of 2 years' imprisonment on count 1 is imposed.
6. It is ordered that the sentence on count 1 is to be served concurrently with that on count 2.

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Judge C Pretorius

I agree.

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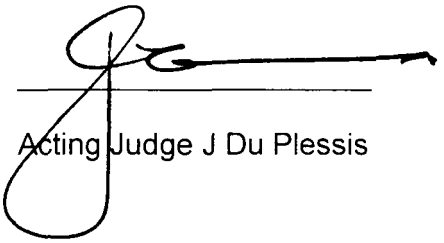
[10] *Supra* at paragraph 23



Acting Judge J Du Plessis

Case number	: A691/2012
Matter heard on	: 1 November 2016
For the Appellant	: Adv F Roets
Instructed by	: TMN Kgomo and Associates
For the Respondent	: Adv PW Coetzer
Instructed by	: Director of Public Prosecutions
Date of Judgment	