IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A523/2012
Date: 20 MARCH 2016

In the matter between:

S V N	First Appellant
N S	Second Appellant
S M	Third Appellant
E D	Fourth Appellant

And

THE STATE	**Respondent**

JUDGMENT

DE KLERK AJ:

Introduction:

[1] The four appellants were charged in the Regional Court, Graskop, with one count of housebreaking with intent to rape and rape and one count of kidnapping.

[2] The first appellant denied all knowledge of the crimes and pleaded not guilty. His defence was an alibi. (He was not linked to the rape by the DNA results.)

[3] In his plea explanation he averred that on the day in question he and his friend, the second appellant, went to S. On their arrival they met with his friends from S Township and they went together to The R Tavern. After his girlfriend, a certain L M (who had knocked off from work at about 21:00) arrived at the tavern he started to feel sick. He then told L that he wanted to go to sleep. L, accompanied by the second appellant, took him to a shack where he got into bed. L and the second appellant locked him inside the shack and went back to the R Tavern. When he woke up the next morning, L was asleep next to him in bed.

[4] The second, third and fourth appellants also pleaded not guilty. They admitted that they had sexual intercourse with the complainant at the time and place as indicated in the charge sheet but averred that the sexual intercourse took place with her consent. (They were linked to the rape by the DNA results.)

[5] Save for the identity of the first appellant and whether the complainant consented to sexual intercourse with the second, third and fourth appellants, all the elements of the crimes were formally admitted.

[6] All four the appellants were found guilty as charged.

[7] They were sentenced as follows:

- A sentence of life imprisonment was imposed in respect of the housebreaking with intent to rape and rape count; and
- A sentence of 3-years imprisonment in respect of the kidnapping.

The sentences were ordered to run concurrently.

[8] The appellants were legally represented throughout the proceedings.

[9] Leave to appeal against the conviction was refused, but leave to appeal against sentence was given by the Magistrate.

[10] In terms of the provisions of Section 10 of the Judicial Matters Amendment Act, Act No. 42 of 2013, the appellants have an automatic right to appeal. They appealed against conviction and sentence.

Contentions:

[11] The State's case against the first appellant rested upon his identification by the complainant, a certain L M.

[12] On appeal it was contended by the first appellant that the Court did not treat the evidence of the complainant with the necessary caution.

[13] It was further contended by the first appellant that there were no basis for the Court to reject his alibi.

[14] It was contended by the second, third and fourth appellants that the Court erred in accepting as truthful the complainant's evidence and rejecting their evidence as being false beyond a reasonable doubt.

Legal Principles:

[15] In ***S v Artman and Another 1968*** *(3)* ***SA 339 A at 341*** it was held:

> *"In this Court the main contention of counsel for each appellant was that the trial Court was wrong in its appraisal of Noreen's evidence. It was further contended that, in the light of the evidence as to the alibis there was a reasonable possibility*

that they might be true, and accordingly the verdicts were not justified.

Before dealing with the various points submitted in this Court, I wish to say something about the approach of Courts of appeal in cases of fact. The reluctance of an appellate tribunal to interfere with findings of fact and credibility made by the trial Court is all the greater where the latter consisted of a Judge and assessors, for in that event three triers of fact, instead of one, had the real advantage of seeing and hearing the witnesses. This applies particularly where the points raised on appeal were considered by the trial Court, in relation to the persons whom it was observing.

In the present case the learned acting Judge President was assisted by two assessors who are counsel of experience. The three members of the Court observed the witnesses under thorough cross-examination. In particular, the Judge's report says of the principal State witness, N K, 'she went through a harassing cross- examination by two very experienced counsel'.

(The appellants were separately represented in both Courts.) In the result, it seems to me that, unless an analysis of the record reveals material errors in the reasoning or findings of the trial Court, this Court would not be justified in interfering. It would only be entitled to do so if persuaded that the trial Court was wrong."

[16] In ***S v Francis 1991 (1) SACR 198 A at 198 J-199A*** and ***S V Hadebe and Others 1997 (2) SACR 641 SCA at 645 E-F*** it was held:

"The fundamental rule to be applied by a Court of Appeal is that while the appellant is entitled to a rehearing, because otherwise the right of appeal become illusory a Court of appeal is not at liberty to depart from the trial Court's findings of fact and credibility, unless they are vitiated by irregularity, or unless, an examination of the record of evidence reveals that those findings are patently wrong. The trial Court's findings of fact and credibility are presumed to be correct, because the trial Court, and not the Court of Appeal has had the advantage of seeing and hearing the

witnesses and is in the best position to determine where the truth lies."

[17] In ***R v Hlongwane 1959 (3) SA 337 A at 340*** the Court held that:

"The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted.

In ***R v Biya 1952 (4) SA 514 (AD)*** *the Court held that:*

But it is important to point out that in applying this test, the alibi does not have to be considered in isolation…

The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impression of the witnesses."

[18] In ***S v Mthetwa 1972*** *(3)* ***SA 766 A at 768*** the Court held as follows:

> *"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest; the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused, the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other. In the light of the totality of the evidence, and the probabilities. See cases such as* ***R v Masemang, 1950 (2) SA 488 (AD); R v Dladla and Others, 1962 (1) SA 307 (AD) at p. 310C; S v Meh/ape, 1963 (2) SA 29 (AD).”***

[19] In ***S v Jackson 1998 (1) SACR 470 (SCA) (1998 (2) SA 984; 1998 (4) BCLR 424; [1998] 2 All SA 267) at 476 E-F*** it was held:

> *"The cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly woman) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence in* a *particular case may call for* a *cautionary approach but that is* a *far cry from the application of* a *general cautionary rule."*

[20] In ***S v Sauls and Others 1981 (3) SA 172 A at 180 E-G*** the Court held that:

> *"There is no rule of thumb test or formula to apply when it comes to* a *consideration of the credibility of the single witness. The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether it is trustworthy and whether despite* ,

the fact that there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule may be a *guide to* a *right decision but it does not mean that the appeal must succeed if any criticism, however slender, of the witnesses' evidence was well founded. It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."*

Evidence:

State's

Case:

[21] The complainant testified that on 19 July 2009 at about 03:00 she was asleep in her bed. The four appellants forced the door open and entered her shack. In the light from outside she recognised the third and fourth appellants. She screamed for help. The second appellant produced a knife and while he held it to her throat told her that if she did not do as she was told he would kill her. Her grandmother heard her screams and came out and stood at the door. She told her grandmother under duress to go back. At that stage she also recognised the first appellant. She was then ordered to undress. They discussed amongst themselves to rather rape her elsewhere. They then took her outside. .She was forced to walk naked to. a nearby railway line. At the railway line she was told to bend

down on her

hands and knees and gang raped by the appellants. Thereafter they took her back to her shack where they raped her again. The second and third appellants also forced her to have oral sex with them. They then left.

[22] After they left she cried for a long time. She wanted to go out but it was still dark. At first light she went to report what had happened to her to her aunt. She was at the time still crying. Her aunt then accompanied her to her mother to whom she also reported same. She was also still crying. From there they first went to her uncle and then to her grandmother to informed them about what had happened to her. Thereafter they went to the police station to report the matter. She informed the police that two of her assailants were known to her and gave them the names of the third and fourth appellants.

[23] She later identified the first and second appellants at an identification parade.

[24] She further testified that earlier the night in question she was in the company of her female friend, a certain H M. At about 19:00 while they were standing at the door of the "Pakistani Shop" the fourth appellant approached her and made advances to her to which she did not respond.

[25] They later went to H place. They however did not stay long. The complainant then went home.

[26] H corroborated her evidence and testified in this regard as follows:

"Accused four came and stood next to Land he said that he has an interest in her. He touched her. L moved backwards. He then left."

[27] She further testified that the complainant sent her a "please call me". When she called the complainant the complainant told her that she reached home safely.

[28] The third State witness, a certain D N, testified that the complainant was his girlfriend. They had been dating for more than 3- years. He also knew the first, third and fourth appellants. On the day in question he had not seen the complainant. In response to a question whether he didn't think that the complainant was hiding something, he replied that he trusted her.

[29] The fourth State witness, a certain Constable K, testified that the complainant reported that she had been raped by four men. She named the third and fourth appellants as two of her assailants. The complainansaid that she did not know the names of the other two assailants. As a result of information obtained from informers the first and second appellants were arrested. They were subsequently pointed out by the complainant at an identification parade. After his arrest the third appellant implicated a certain B in the commission of the crimes. The complainant however maintained that the said B was not involved in the commission of the crimes.

Defence case:

[30] All four appellants testified in their own defence.

The first appellant's alibi

[30] The first appellant called as a witness his girlfriend one L M. L supported the first appellant's alibi.

[31] She testified that after she knocked off from work she joined the first and second appellants at the R Tavern. After the first appellant complained of not feeling well the three of them left.

[32] The first appellant however testified in this regard that he and the second appellant met Lena outside the tavern when she alighted from a taxi[33] The second appellant on the other hand testified that L was accompanied by a certain Z when she met them at the tavern. He and the first appellant were at the time sitting at a table together with the third and fourth appellants. After L and Z arrival he and the first appellant went to sit with them at a table. When the first appellant complained that he was feeling sick, the four of them left together.

[34] In his judgment the Magistrate remarked with regard to L's evidence as follows:

> *"A remarkable feature of the witness evidence in chief at first is that she, without being led, appeared to be reciting a well-known (or we/1-rehearsed) story which she knew she had to come and relate to the Court. Furthermore, from the very outset she was giggling and laughing while testifying, which at more than one occasion Jed to me reprimanding her as the trial was no joke but a serious matter."*

[35] The Magistrate further remarked as follows:

> *"Accused No. 1's evidence was at first a little more confusing than that of his witness. At first he*

> *lacked detail, but as he progressed, he recited detail that is astounding . . . Towards the end of the Prosecutor's cross-examination, I observed certain behaviour by the previous defence witness sitting in the gallery, and remarked as follows:*
>
> *... the previous witness is sitting behind in Court and she is constantly making remarks and shaking her head. She must refrain from doing so."*

[36] The second, third and fourth appellants testified in support of the first appellant's alibi he was not with them when they had consensual sexual intercourse with the complainant.

[37] It transpired from the evidence that the first and second appellants were friends with each other and that the third and fourth appellants were friends with each other. The first and fourth appellants knew each other and the first appellant referred to the fourth appellant as his brother-in-law because the latter had a child with the first appellant's sister. The second and third appellants knew each other from jail.

The second, third and fourth appellants' versions:

[38] The second, third and fourth appellants' versions of events were inconsistent and vague e.g. in respect of the circumstances under which

they left the tavern, had sex at the railway line and in the complainant's shack and how they left the complainant's shack.

[39] In broad terms their version can be summarised as following:

After the first appellant, second appellants and L left the tavern the third and fourth appellants went to the third appellant's house to have something to eat. Sometime later the second appellant and L returned to the tavern. L however shortly thereafter left again. The second appellant, whilst sitting alone at a table saw the complainant and a girlfriend sitting at a table drinking. He then called the complainant's girlfriend who told him that their boyfriends had just left. He then asked whether he could join them. He then bought liquor for them. Later on the third and fourth appellant joined them. Complainant and the fourth appellant who knew each other hugged one another. While the second appellant was chatting complaint's friend up, complainant and the fourth appellant were "getting it on". They all eventually left and ended up having sex with each other at the railway line near the complainant's shack. From there they all went to the complainant's shack where they once again had sex with each other. Their

boyfriends then arrived at the shack, broke the door open and the appellants fled.

[40] The second appellant in cross-examination testified with regard to the identity of the complainant's girlfriend as follows:

> *"When she said she knows* me *from Nelspruit and in Nelspruit I* am *using public phones and that area where I* am *working in, most of these prostitutes they are roaming around there. That means that other lady was* a *prostitute."*

[41] As to the circumstances under which they had left the tavern the evidence varied from: The second appellant wanted to go to sleep; The complainant invited them to a "sex party" to thank them for the liquor which they have bought for them; The complainant and the fourth appellant were making out and the complainant then suggested to him that it was time for them to leave. The third appellant was invited along by the complainant because she did not want him to tell tale on them.

The Magistrate's Judgment:

[42] The Regional Magistrate delivered a lengthy, well-reasoned and balanced judgment.

[43] He found that the complainant's evidence was clear and satisfactory in all material respects. He remarked that the complainant had made a good impression as a witness. He was satisfied that the complainant was telling the truth and that her evidence was reliable.

[44] He further found that the evidence of the other State witnesses was also reliable and acceptable. H M corroborated the complainant's evidence in all material aspects in respect of the time they were in each other's company.

[45] He severely criticised the evidence of the appellants.

[46] The Magistrate concluded that they were unreliable witnesses.

[47] The Magistrate also criticised the evidence of the defence witness.

[48] The Magistrate held that the appellants' versions were so improbable that it could simply not be accepted as reasonably possibly true. He came to the conclusion that the four appellants and the defence witness had lied.

Evaluation:

[49] The complainant is a single eye-witness and her evidence must be looked at closely.

[50] With regard to identification the complainant's evidence relating to factors such as lighting, visibility, proximity, opportunity for observation, the extent of her prior knowledge of the first appellant were as follows:

> *"Court: Yes, just a moment, I think there might be a misunderstanding here. You said when they entered, in the light of outside you recognised two people who were known to you from before and that is accused three and four. Now we know that you said that accused two was not known to you from before but could you at that stage already see his face well enough to identify him as one of the persons who entered? ... Yes, I saw his face well that if I see him again I will identify him.*
>
> *And the fourth person, could you see him well enough at any stage of the insident, well enough to later identify him? ... Yes, the fourth one I saw and I even hear his voice.* ,

Did you see his face well enough to later identify him and when did you see him well enough to later identify him? ... Whilst accused two had pressed the knife on my neck I was facing on the side. Then I could see accused one at that stage.

I put it to you that at three am of the 19th of July 2009 the accused was sleeping and he was not at your homestead . . . The S whom I was staying with for a long time I used to play with him. I know his voice very well. I will never confuse him with another person.

The appolo light that lit on your homestead was there a reflection at the railway line at that particular time from this particular appolo light or any other light? ... Yes. You see when it is dark in the house, when you open the door forty percent of that light illuminates inside the house. That forty percent is the forty percent which I am talking about from outside."

The second appellant testified in this regard as follows:

"When we were standing there at the railway line I could see there is an RDP and there is a shack next to the RDP.

I saw M having sex with the complainant while S was seated a distance from them but not far away, just a distance away.

How far was the complainant and M in relation to where you were busy making sex? ... From here to that door.

And where was S? ... At the corner there.

You could see him? ... Yes.

He could also see you? ... Yes, he could see although it was dark but if he can look properly he could just see. There at the railway line it is better because we could see what was happening and it happened at the same time there and I can see them, but in the shack, there inside the house it was dark. I was using my cell phone, my 1100 cell phone to see, even the condom I was searching that with the light of the cell phone.

Was there light at the railway station. I mean the railway line?

... There is light there, not that much but there is light there. The Apollo is a bit far but you can see."

Conclusion:

[51] There is no ground to justify interference by this Court with the credibility findings by the Magistrate.

[52] The Magistrate, in my view, in any event correctly held that the complainant's evidence was reliable and compelling and that her identification of the first appellant was beyond doubt.

[53] It was further correct of the trial Court to reject the evidence of the appellants and L as false.

Sentencing:

[54] Now I turn now to the appeal against the sentence of life imprisonment imposed in respect of the housebreaking with intent to rape and rape count and the 3-years imprisonment in respect of the kidnapping.

[55] It is trite law that the determination of a sentence is pre-eminently a matter for the discretion of the trial court and the Court hearing the appeal should only alter the sentence if the discretion has not been judicially and properly exercised (See: **S *v Rabie 1975 (4) SA 855 A at p. 857*** **D)**

[56] In **S *v Ncheche 2005 (2) SACR 386 (W)*** it was reiterated that a Court of Appeal even if it is of the opinion that it would have imposed a lighter sentence, is not free to interfere if it is not convinced that the trial Court could not reasonably have passed the sentence that it did.

[57] ***Section 51 (1) of Act No. 105 of 1997*** provides that a High Court must sentence a person convicted of rape to imprisonment for life where the victim was raped more than once by the perpetrator or by any co-perpetrator or accomplice and where the victim was raped by more than one person and such persons acted with a common purpose. The Court is obliged to impose the prescribed minimum sentences unless there are substantial and compelling circumstances justifying the imposition of a lesser sentence as provided for in Section 51 (1) (3) (a) of Act No. 105 of 1997.

[58] In **S *v Ma/gas 2001 (2) SACR 469 SCA*** it was held that:

> *"If the sentencing Court on consideration of the circumstances of the particular case is satisfied that*

they render the prescribed sentences unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a *lesser sentence ...*

… The specified sentences should not be departed lightly, based on flimsy reasons and that the prescribed sentences should ordinarily be imposed, however in the event of circumstances of a *case calls for* a *departure the court should not hesitate to do so. In determining whether departure is called for the Court should weigh all the considerations that would traditionally be relevant to sentencing."*

[59] In ***Director* of *Public Prosecutions v Magoma 2010 (1) SACR 427 (SCA) at para 14,*** the following was held:

"A failure by our Courts to impose appropriate sentences, in particular for violent crimes by men against women, would lead to society losing its confidence in the criminal judicial system."

[60] With regard to the seriousness of the offence it was held in the case of ***Chapman 1997*** *(2)* ***SACR*** *(3)* ***(SCA) at p5 A-D*** that:

> *"Rape is a serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The right to dignity, to privacy and the integrity of every person are basic to the echoes of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work and to enjoy the peace and tranquillity of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. The Courts are under a duty to send out a clear message to the accused, to other potential rapists and to the community we are determined to protect the quality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights."*

- A first offender
- Under the influence of alcohol;
- He has a 7-year old child;
- His parents are deceased and he was staying with his brothers.

The fourth appellant:

[64] He was, at the time when these crimes were committed by them:

- 27-years old;
- Under the influence of alcohol;
- He had two minor children aged 7-years and 8-years old respectively.

Aggravating circumstances:

[65] The second and fourth appellants had previous convictions.

[66] The manner in which these crimes were committed by the appellants.

[67] The appellants displayed no remorse. On the contrary they degraded the complainant further by *inter alia* averring that she was drunk and invited them to a "sex party".

Discussion:

[68] In the assessment whether substantial and compelling circumstances were present, I find in respect of the first and third appellants that the fact that they were first offenders combined with the fact that they were under the influence of alcohol when they committed these offences constitute substantial and compelling circumstances and leaves open the possibility of rehabilitation.

[69] I am of the view that a sentence of 18-years imprisonment in respect of the housebreaking with intention to rape and rape would be just in their cases.

[70] I however find no substantial and compelling circumstances in respect of the second and fourth appellants.

In the result it is ordered that:

1. The appeal against the convictions of all four the appellants is dismissed.

2. The appeal against sentence in respect of the Second and Fourth Appellants is dismissed.

3. The appeal against the sentence of life imprisonment in respect of the First and Third Appellants is upheld.

4. The sentence of life imprisonment in respect of the First and Third Appellants is set aside and a sentence of 18-years imprisonment is imposed.

5. The sentences are antedated in terms of the provisions of Section 282 of the Criminal Prosedure Act, Act No. 51 of 1977, to 1 February 2012.

6. The sentence of 3-years imprisonment in respect of the kidnapping is confirmed.

7. The two sentences are ordered to run concurrently.

DE KLERK
Judge of the High Court

I agree and it is so ordered.

MULLER
Judge of the High Court

For the Appellant

Advocate

Instructing attorney

For the Respondent

Advocate

Instructing attorney