

[1] The appellant was convicted on one count of rape and one count of robbery with aggravating circumstances. He was sentenced to 20 years

JANSE VAN NIEUWENHUIZEN J

JUDGMENT

THE STATE

Respondent

and

THATO THABANG MOKOLONE

Appellant

In the matter between:

DATE	17.11.2016
SIGNATURE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
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(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

CASE NO: A 867/2015

17/11/16

- imprisonment on the rape charge and to 15 years imprisonment on the robbery charge.
- [2] This appeal is, with leave of the court *a quo*, only against conviction.
- [3] The complainant, a 36 year old female, was hiking from Daveyton to her boyfriend in Delmas on 3 November 2013. It was early evening and on her way she accosted the appellant and his co-accused, who suggested that they travel together. Along the way, the complainant was forced into a veldt and raped by both men. Her jewellery, cash, cards and cellphone were also stolen.
- [4] The appellant pleaded not guilty to the charges and relied on an alibi, to wit he was with his wife at their home on the evening in question.
- [5] It is common cause that the complainant was raped on the evening of the 3rd of November 2013. It is furthermore common cause that the DNA results confirm that the appellant's co-accused was one of the perpetrators.
- [6] The issue in dispute is the identity of the appellant. In this regard the State relied on the evidence of the complainant, an identity parade and DNA results.
- [7] The DNA results indicated that the appellant's DNA appears in the mixture of DNA in a 1 to 20 000 ratio. This is not conclusive but, indicates that the appellant is not excluded as a perpetrator.
- [8] The complainant's evidence in respect of the identity of the appellant established that she had enough time to identify the appellant and that the light, although not perfect, was sufficient to make a reliable identification. Mr van As, counsel for the appellant, pointed to several instances from which it appears that there was not enough light to facilitate a credible identification. The complainant's evidence should, however, not be seen in isolation and it should be borne in mind that she, in the same circumstances, was able to positively identify the appellant's co-accused.

[9] As alluded to *supra* the State also relied on an identification parade. It is common cause that the appellant's co-accused was positively identified at the identification parade. According to the evidence of the complainant she also identified the appellant at the identity parade. This is denied by the appellant.

[10] Warrant officer Mbata conducted the identification parade and testified that the complainant identified the appellant at the parade. I have no reason to reject his evidence in this regard and accept that he was pointed out as testified by the complainant.

[11] Mr van As, argued in the *alternative* and in the event that the court finds that the appellant was pointed out, which he still denies, that no reliance can be placed on the pointing out because several irregularities occurred during the parade, to wit:

- i. the appellant and his co-accused appeared in the same parade whereas their general appearance is not similar;
- ii. the appellant was the only person with a distinctly light complexion;
- iii. no photographs were taken at the parade;
- iv. the persons at the parade's numbers were not in sequence, leaving doubt as to which person was identified.

[12] The last "irregularity" is easily disposed of. When the complainant pointed at the appellant, warrant officer Mbata looked at the name of the person as reflected on the pro forma and confirmed that it was the appellant.

[13] The other three irregularities relied upon emanates from the South African Police Service's "National Instruction 1 of 2007 on Identification Parades." In each instance the procedure followed at the parade deviates from the prescribed rules.

[14] In view of the aforesaid irregularities, Mr van As, submitted that the irregularities that occurred at the identification parade is of such a nature and extent that it affects the fairness of the identification and greatly increases the opportunity for a wrong identification.

[15] Mr Jacobs, counsel for the State, submitted that the rules are not an absolute standard, but rather a guideline to ensure fairness and reliability in the identification process. I agree. A court should have regard to the totality of the evidence to determine whether the accused had a fair trial.

[16] Should the State only rely on the evidence at an identification parade, stricter compliance with the rules would naturally follow. In this instance, the State relies on other evidence as well, which evidence is merely corroborated by the identification parade evidence.

[17] It is common cause that the appellant and his co-accused knew each other well and were in each other's company until late afternoon on the day in question. As indicated earlier, the State proved beyond reasonable doubt that the appellant's co-accused was one of the perpetrators.

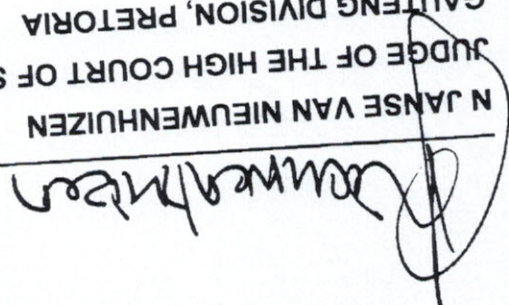
[18] In order to escape the inevitable conclusion that the appellant was the other perpetrator, the appellant relied on an alibi. According to his evidence his wife was not in the country at the time of the trial and could not testify to corroborate his version.

[19] It is trite law that there is no burden of proof on an accused in respect of an alibi defence. The reliability of the alibi defence will be determined by the evidence viewed in its totality and the State must at the end of the trial still prove the guilt of an accused beyond reasonable doubt.

[20] The court *a quo* carefully examined all the evidence and concluded that the State had proved the guilt of the appellant beyond reasonable doubt. I could not find any instance of misdirection in the judgment of the court *a quo* and am of the view that the appeal cannot succeed.

ORDER

In the premises, I propose the following order:
The appeal against conviction is dismissed.


N JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree.


N DAVIS
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

It is so ordered.

APPEARANCES

Counsel for the Appellant: Advocate F Van As

Instructed by: Legal Aid South Africa

Counsel for the State: Advocate Jacobs

Instructed by: The State