# HIGH COURT OF SOUTH AFRICA
# (GAUTENG DIVISION, PRETORIA)

**CASE NO: A94/2020**

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE 03 May 2021

SIGNATURE

In the matter between

**ROBERT PETROS MBELE** Applicant

and

**THE STATE** Respondent

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## J U D G M E N T

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*This appeal was decided in terms of the provisions of section 19 of the Superior Courts Act 10 of 2013 and otherwise disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.*

**DAVIS, J**

[1] Introduction

1.1 This is the appeal by the first of two accused who had been convicted of rape of a 51 year old woman. Although the offences had been committed in 2005, the record indicated the commencement of proceedings only in February 2011. Pleas were tendered on 6 November 2012 and the actual trial commenced on a March 2013. Conviction and sentencing took place on 6 November 2013.

1.2 This court, per Jordaan J and Pienaar AJ granted leave to appeal in respect of the petition of the first accused against conviction and sentence on 26 November 2016.

1.3 In granting leave to appeal as aforesaid, the court added the following:

> *"In particular it must be argued before the court of appeal if it was competent to convict each of the two accused on two counts of rape. If more than one accused take part in a crime like murder, robbery, theft etc it can certainly not be argued that each accused is guilty of the crime for what he did and is also guilty as an accomplice for what his co-perpetrators did and is then also guilty of the crime. For example if ten accused take part in a murder, robbery or theft they can certainly not be convicted of ten counts of murder, robbery or theft where only one victim was involved".*

1.4 For purposes of dealing with this appeal and the issue raised when leave to appeal was granted, accused number one shall be referred to as the appellant accused number two shall be referred to as in the court a quo.

1.5 In concluding this introduction, I point out that there are no explanations in the record of proceedings itself for the vast time lapses referred to in paragraphs 1.1 and 1.2 above. In the appellant's hand-written application for leave to appeal, filed timeously, he stated the following: "*the incident occurred in 2005 and I stayed in custody for a year and the case was dismissed in 2006. It was brought back again in 2008 only to be dismissed in 2009 ... . to my surprise, it was brought back in 2011 and I was found guilty and sentenced in 2013*". As the accused were legally represented and as no pleas of *autrefois acquit* were tendered, I assume that the "dismissals" referred to withdrawals. Even so, the delays and the slow pace with which the wheels of justice ground, are worrisome. There is also no explanation for the further lapse of time between the granting of leave to appeal and the date when the matter came before us on appeal on 21 April 2021.

[2] <u>The facts of the matter and the accepted evidence</u>

2.1 Counsel for the appellant summed the complainant's evidence correcting in heads of argument filed on behalf of the appellant. It is (equally briefly) this: on the day in question being 17 September 2005, the complainant was walking on her way home from a house of friends. It was approximately 20h30. She was walking with difficulty as she has "a problem" with her one leg. She was approached from the front by the two accused. She was grabbed by the two men and warned not to scream, but she did so in any event upon which one broke a bottle and the other produced a knife. She was taken against her will and despite her initial resistance and upon threat of death to a building site where there was a partially built house. She was pushed and then apparently restrained by the appellant while the second accused proceeded to rape her. After he left, the appellant proceeded to also rape her. She was also at one stage searched under her clothing for

money or a cellphone but only tissues were found on her. Shortly after the appellant "had finished" and stood up, a group of youngsters arrived at the site and apprehended the appellant. The complainant was taken with the appellant to a satellite police station, which was found to be closed. Both were then taken to a nearby clinic from where the police were also called.

2.2 The complainant had made a statement to the police the next day. Despite the appellant's criticism of the complainant's evidence (given some 8 years after the incident) and certain discrepancies between her written statement and her evidence, I find very little of material difference. In her statement, she alleged that she was searched inside the building after the first rape, while in her oral evidence the search took place before she was taken into the building. In her statement she alleged that at some stage when she was taken to or into the building, the accused had held their hands over her eyes while in her oral evidence, she did not mention this. Having regard to the time lapse, the traumatic nature of the events and the fact that the basis facts and major chronological sequence of events as well as the exact location and date and time of the incidents remained the same, I am of the view that the discrepancies are so minor as to be of no real consequence.

2.3 What is more important, is the independent corroboration of the events regarding the appellant, furnished by the second prosecution witness. He testified that, on the night in question, he was sitting in a watering hole called Tembi's Tavern. He observed the appellant coming into the tavern and looking around before leaving again. Some twenty minutes later, another male entered the tavern shouting for assistance as some lady was being raped in a nearby house. He and the tavern owner rushed to render assistance and he observed the appellant, still fastening his pants and pulling up his zipper, emerging from the incomplete house. The appellant

attempted to run away and jump over the fence but was apprehended by a group of men. The complainant was found inside the uncompleted house getting dressed. The only difference between the evidence of this witness and that of the complainant, was the estimation of time. She of course started her narrative at the commencement of events and he, near the conclusion thereof. This probably accounted for the estimated time difference.

2.4 The second accused was arrested some time later as the complainant had reported that the first rapist who had left the scene was known as "old Jan".

2.5 Both the appellant and the second accused testified in their defence. They both admitted intercourse with the complainant, but alleged that it was consensual. The second accused said she had consented inside Tembi's Tavern to have intercourse with him in the Tavern's toilets while the appellant said she had consented outside while he was walking with her, "to have sex" with him because he was "thirsty" for it as he had no girlfriend. According to him, her only fear was of being caught as she was married. According to the appellant they were both drunk.

2.6 What impressed me about the complainant's manner in which she conducted herself during cross-examination, was not only the clear and forthright manner in which she dealt with the questions put to her and her repeated reference to parts of her evidence in chief, but also her almost derisive reference to the accused as youngsters or "boys" when the suggestions consensual intercourse were put to her. Even her answers dovetailed with that of the independent witness which had been called to lead evidence after her to such an extent that there were no real discrepancies between them as to the immediate events after the second

rape. She also denied any use of alcohol. She does not frequent taverns or, in particular, Tembi's Tavern.

2.7 I find that the magistrate had correctly summed up the evidence, accepted the version of the complainant and rejected the versions of consensual intercourse tendered by the accused as false. As a court of appeal, I find no reason to interfere with the factual findings and credibility assessments of the learned magistrate.

[3] The conviction

3.1 From what I have stated above it must follow that the appellant had correctly been found guilty of having raped the complainant. He was also correctly found guilty of assault as a result of the manhandling of the complainant and the threatening with either the bottle or the knife and the treats to kill her if she did not keep quiet.

3.2 The question is whether the appellant could also be found guilty on any charge in relation to the rape committed by accused number two (chronologically, the first rape).

3.3 The record shows that three charges were put to each accused individually. The charges put to the appellant were similarly worded to the charges put to accused number two. Charges 1 and 2 in each case, were identically worded, namely "*... that on 17 September 2005 and at or near Balfour, in the Regional Division of Mpumalanga, the accused unlawfully and intentionally had sexual intercourse with a female person ...without her consent*".

3.4 Both the accused had pleaded not guilty, but had formally admitted intercourse.

3.5 The learned magistrate, having correctly found that both the accused had intercourse with the complainant without her consent and having correctly accepted the mutually corroborative evidence of the prosecution witnesses (insofar as their participation in the events overlapped), found as follows: "*The court is therefore satisfied that the guilt of both accused have been proven beyond a reasonable doubt ... just a moment, the two accused were charged with two counts of rape and one of assault with intent to do grievous bodily harm. On the two counts of rape each accused is found guilty on one count of rape and on one count of being an accomplice to rape. The third count of assault with the intent to do grievous bodily harm, both are found guilty as charged*"

3.6 At the time of the conviction of the two accused, the instrumentality approach to rape still prevailed. Fortunately and, for the many reasons mentioned in both the majority and minority judgements in S v Tshabalala 2020 (2) SACR 38 (CC), this approach has been jettisoned and is no longer part of our law. This decision was subsequently applied in S v Mthombeni 2020(2) SACR 384 (KZP).

3.7 Had the accused accordingly been found to have acted with common purpose, they could both have been found guilty of both instances of rape. As correctly pointed out in heads of argument delivered on behalf of the appellant, the doctrine of common purpose had not been relied on by the prosecution and it neither formed part of its case nor did it serve as a basis for the convictions.

3.8 It is clear from the evidence that the appellant had actively participated in the subduing of the complainant. He had grabbed her by the arms, threatened her with either a broken bottle or a knife and might have held

her eyes closed. He actively pulled or pushed her into the partially built house. There can be no doubt that his actions had been in furtherance or facilitation of the rape committed on her by accused number two.

3.9 At common law an accomplice is someone who is not a perpetrator of the offence that he aids and abets but is someone who in some way assists the perpetrator in the commission of the latter's offence or facilitates its commission. See Snyman, Criminal Law, 5 Ed at 268.

3.10 On the facts of this case, the appellant clearly rendered assistance of the commission of rape by accused number two and was correctly found guilty of being an accomplice to rape. This constituted the conviction on the second charge and answers the query raised when leave to appeal was granted.

3.11 On the accepted evidence, the conviction of rape in respect of the intercourse without consent perpetrated by the appellant, was also correct. This constituted the conviction on the first charge.

[4] Sentence

4.1 On behalf of the appellant, it was argued that from the record, it appeared that, when the charges were put to the appellant, no reference was made to the provision of Act 105 of 1997 and the implications of the minimum sentence regime implemented thereby. These submissions appear to be correct.

4.2 The further argument is that the minimum sentence regime was not in operation in the fashion it was when sentencing took place, at the time of the commission of the offence and, even if the learned magistrate had been

entitled to rely on the provisions of that act, he did not sufficiently deal with the issue of compelling or substantial factors in considering sentence.

4.3 The record however shows that the learned magistrate had taken all the appellants personal circumstances placed before the court a quo, into account. The magistrate also referred to the rights of "*every woman seated here in court today, every woman in our society outside ... to come and go as they please, when they please without having to fear that they will be molested*".

4.4 Even if one disregards any obligation regarding the minimum sentencing regime, the sentences imposed do not impose a sense of shock nor do I find them to be disproportionate or manifestly inappropriate. See: S v GK 2013 (2) SACR 505 (WCC) and the cases discussed there. In fact, the magistrate even apportioned the sentences by imposing a sentence of 10 years in respect of the charge of being an accomplice and 15 years for the rape actually perpetrated by the appellant. In my view, the magistrate had been at liberty to consider imposing the same sentence on the accomplice as that imposed on the actual perpetrator (which in the case of accused number two, was 15 years). The magistrate had therefore clearly considered the facts of the case relating to the two charges and exercised his discretion in a judicial fashion.

4.5 In my view the magistrate was also correct to find that the court "... *at the end of the day has to send a clear message to society that this type of conduct will not be tolerated*".

4.6 I find no reason to interfere with the sentences imposed which I find to be appropriate in the circumstances.

[5] Order

Accordingly, an order in the following terms should be issued:

The appeal against convictions and sentences are refused.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

I agree

T Raikane
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 21 April 2021

Judgment delivered: 03 May 2021

APPEARANCES:

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| For the Appellant: | Adv. L A VanWyk |
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| For the Respondents: | Adv. S Mahomed |
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