THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 161/2009

V Kebana Appellant

and

The State Respondent

Neutral citation: *Kebana v The State* (161/09) [2009] ZASCA 100 (18 September 2009)

Coram: HEHER, VAN HEERDEN and SNYDERS JJA

Heard: 14 September 2009

Delivered: 18 September 2009

Updated:

Summary: Criminal law – attempted murder – holistic assessment of probabilities.

ORDER

In an appeal from the High Court, Grahamstown (Miller and Chetty JJ sitting as court of appeal).

The following order is made:

The appeal is dismissed.

JUDGMENT

HEHER JA (VAN HEERDEN and SNYDERS JJA concurring):

[1] The appellant was 45 years old at the time of the events which gave rise to his arrest in June 2002. He had been divorced from the complainant for about a year and they occupied separate dwellings. The state alleged that on the twenty-third day of that month he raped her in a forest near Coega and attempted to murder her by stabbing her on the head and neck. After a trial in the regional court in which both gave evidence and the prosecution also relied on medical testimony, the appellant was convicted on both charges as well as a charge of possessing a dangerous weapon, *viz* a knife, in contravention of s 2 of Act 71 of 1968. He was sentenced to an effective period of imprisonment of 16 years.

[2] On appeal to the High Court in Port Elizabeth the convictions on the rape and dangerous weapon charges were set aside, but the appeal against conviction and sentence (ten years imprisonment) on the count of attempted murder was dismissed. The court *a quo* granted leave to appeal to this Court in respect of both.

[3] The magistrate rejected the version proferred by the appellant in evidence in all material respects. The court *a quo* found no reason to come to a different conclusion. Counsel, in arguing before us, reluctantly conceded that both courts were right in their

assessment of the credibility of his client. That reduces the scope of the factual disputes in this appeal to miniscule proportions.

[4] The complainant's tale of woe began early on the morning of 23 June. The appellant made an unexpected appearance at the door of her flat. He offered her a lift to her place of work. The weather was cold and wet and she readily accepted. But once in the car, the appellant, instead of making good his offer, pursued his own agenda, eventually stopping in a deserted forest area near Coega. As he had, shortly before this, threatened to kill the complainant, she scrambled out of the car and fled. The appellant chased her, striking her down with his fist. As she tried to defend herself he beat her with his fists. He removed her clothes below her waist and, according to the complainant's testimony, raped her. He then attempted to cut her throat and, when she protected her neck from him, he stabbed her several times on the side and back of her head with a sharp object. He also dragged her on the ground between the trees. Afterwards he left her bleeding profusely from her wounds while she was temporarily insensible. When she had recovered a measure of control and awareness the complainant made her way to a public road, where she lost consciousness, only regaining it a while later in St. George's Hospital. A good samaritan must have taken her to the hospital – she had no idea how she got there.

[5] Dr K.L. Punt, who was on duty, examined the complainant. He gave evidence for the prosecution at the trial that was unequivocal and unchallenged. In short, he identified three separate categories of injuries suffered by the complainant: clear abrasions to the head, one shoulder and on the feet, probably the result of a dragging movement; blunt force injuries to the face, particularly below the eyes and to the mouth; and four incised wounds on the skull, one on the chest and one on the neck below the jaw, inflicted with a sharp instrument. He excluded, as extremely unlikely, the probability that the last-mentioned injuries could have been inflicted in a fall from a moving vehicle. (Objectively viewed the photographs of those injuries drive one to the same conclusion.) That finding cut the ground out from under the main pillar of the defence. It was relied on by both lower courts in rejecting the appeal and rightly so.

[6] Because the appellant's evidence, once rejected, provided no explicit

explanation for the injuries suffered by the complainant, his counsel before us was reduced to sniping at what he saw as weaknesses in the complainant's evidence, in an effort to raise a reasonable doubt as to the source of those injuries and the appellant's role in causing them.

[7] Counsel began by submitting that when the court *a quo* upheld the appeal against the rape conviction it effectively disbelieved the complainant, or, at least raised a large question mark against her reliability.

[8] But the High Court went no further than finding that that charge had not been proved beyond a reasonable doubt. Its reasons were 'the complete lack of medical confirmation' (ie injuries or traces of semen) of recent forceful sexual intercourse and an initial denial by the complainant that she had been raped, both of which, so that court found, cast doubt on her veracity concerning the rape. I think the appellant was fortunate. I would not necessarily have felt the same hesitation. The court *a quo* could equally as well have pointed out that the complainant did not testify that the act of penetration was accompanied by any application of force or pain, that the complainant was a sexually experienced adult who had borne a child, and the initial examination took place about six hours after the event. Equally the court *a quo* could have emphasised that the complainant was subjected to a violent assault (even though it did not extend to sexual trauma) in order to subdue her. The magistrate did take account of all the factors for and against a finding that the complainant was raped. He not only heard her evidence but he observed her demeanour, favourably. The court *a quo* had none of these advantages. All in all I am unable to accord the reservations of the court *a quo* the (undue) weight that counsel would have us read into its judgment.

[9] Counsel also relied on apparent contradictions between the evidence of the complainant and a verbal statement made by her to Inspector Gental. These related to whether the appellant said that he was taking her to his *brother* in Motherwell (rather than to his *sister*, as the complainant testified), whether the appellant had kicked and choked her during the course of the assault, and why she had not mentioned the appellant's use of a sharp object to the inspector.

[10] The credibility of the police inspector was not in issue but his evidence needs to be put in perspective. First, the interview took place under circumstances unfavourable to the complainant in the hospital at about 12pm on the day of the incident. Inspector Gental readily conceded that:

'Sy kon nie mooi duidelik praat nie omdat volgens die dokter haar kake beseer was. Haar hele gesig was opgeswel en met my onderhoud met haar moes ek my oor so te sê teenaan haar mond sit om te hoor wat sy sê want sy kon nie reg praat nie. Ek moes dan haar woorde wat soos ek dit verstaan het, aan haar herlei sodat ons nie mekaar misverstaan nie.'

In these circumstances it would be unfair to expect perfect recollection from the complainant or accurate and full communication of the true facts of the assault. But against such criticism as may be justified the objective facts are more important: the complainant *was* stabbed and cut with a sharp instrument and blunt force *was* applied to her face.

[11] Once again, the magistrate fully considered the criticisms and he rejected them for good reason. I should add that in this respect as in others the magistrate correctly looked at and evaluated the evidence of both parties holistically and in a balanced manner rather than, as counsel did before us, by examining each in isolation, cf *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at 101a-e, referring with approval to *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449h-450b.

[12] It is unnecessary to allude to any of counsel's lesser sallies. In summary, the magistrate has not been shown to have misdirected himself on any aspect of fact. The presumption arises that his conclusion was correct; a court on appeal will only reverse it when it is convinced that the conclusion was wrong: *R v Dhlumayo* 1948 (2) SA 677 (A) at 706. Not only am I not so persuaded but I have no doubt that the magistrate was right. The appeal against the conviction must therefore fail.

[13] The sentence of imprisonment for 10 years was assailed only on the ground that it induced a sense of shock. Counsel drew attention to the appellant's age and his long and apparently unblemished work record with a single employer. His only previous convictions – for common assault and assault with intent to commit grievous bodily harm which drew a small fine, half suspended – were imposed fifteen years before the

events which gave rise to the conviction under appeal and can be disregarded. At the time of sentencing in the trial the appellant supported four minor children. The magistrate weighed these facts in the balance. But he also gave weight to what he regarded as aggravating circumstances, *viz* that the attack was planned, and was carried out in a cruel and cowardly manner. He regarded imprisonment for a long period as the proper punishment, fitting for the deed, appropriate to the circumstances of the appellant. The appellant did not then or subsequently admit his guilt or express his remorse and the role of mercy must to a large extent give way to just retribution. The sentence, while heavy, induces no disquiet in me.

[14] The appeal is dismissed.

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J A HEHER
JUDGE OF APPEAL

Appearances:

For appellant: T N Price

Instructed by: Nogcantsi & Associates, Port Elizabeth

Symington & De Kok, Bloemfontein

For respondent: N Henning

Instructed by: Director of Public Prosecutions, Grahamstown

Director of Public Prosecutions, Bloemfontein