

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**CASE NUMBER:**

A233/2010

5 **DATE:**

20 AUGUST 2010

In the matter between:

**PETER J OLIVIER**

Appellant

and

10 **THE STATE**

Respondent

---

**J U D G M E N T**

15 **ZONDI, J:**

The appellant, who was legally represented, appeared in the Mossel Bay Regional Court on 7 August 2008 facing various charges, including one count of rape and two counts of robbery with aggravating circumstances. As regards the charge of rape, it was alleged by the State that the appellant on or about 7 March 2008 and at Mayixhale Street, he raped a 17 year old girl complainant. With regard to the two counts of robbery with aggravating circumstances, the State alleged that at the same time and place, the appellant robbed the complainant of her

/bw

/...

cellphone and a pair of takkies by threatening her with a knife and further at the same time and place, the appellant robbed one Dawn McClear of her cell phone and earrings. All of the counts were subject to the provisions of Act 105 of 1997 (the  
5 minimum sentence).

The appellant pleaded not guilty to all the charges and in relation to the count of rape, he alleged that sexual intercourse was consensual. At the conclusion of the trial, the  
10 appellant was convicted on one count of rape and two counts of theft and was sentenced to ten years imprisonment on a count of rape and three years imprisonment on each count of theft, which were taken together for the purpose of sentence. He was effectively sentenced to 13 years imprisonment. With  
15 the leave of the court *a quo* he appeals to this Court against convictions and sentences.

Mr Bruinders appears on behalf of the appellant, while Ms Kortje for the State. The appellant's attack on conviction is  
20 based on the ground that the court *a quo* erred in convicting the appellant in circumstances where there were numerous contradictions, inconsistencies and improbabilities in the State's case. The evidence which formed the basis of the appellant's conviction was to the following effect. The  
25 complainant, who was 17 years old at the time of the  
/bw /...

- commission of the offences, testified that on the day in question at about six o'clock in the evening, she and her friend Dawn, met their friend one Arnold on their way home from attending biblical studies. Arnold asked them to accompany
- 5 him home to collect money, which they did. While Arnold went to collect money, they waited for him outside his house at the street corner. When he returned with the money, they all went to a tavern called Cosy Corner.
- 10 Arnold bought about four beers, which they all partook of. As they were busy drinking, the appellant, who was known to them, arrived. They had met him and had a chat with him at the same tavern some two weeks before this particular encounter. The appellant joined their table and Arnold bought
- 15 some beers. After a short while, Arnold went outside while she and Dawn were on the floor dancing. Shortly thereafter the appellant also went out and when he returned, he reported to them that Arnold had been stabbed. He told them to phone the ambulance. The appellant took them to his house and they all
- 20 sat in the sitting room. When they asked him why they were there, he told them not to get worried and when the complainant insisted that she wanted to go home, he smacked her with a knife.
- 25 The complainant took a cell phone from Dawn and phoned the



police, as she did not trust the appellant. The appellant approached her and grabbed the cell phone from her hand and smacked her with a 30 centimetre long knife on her cheek. Thereafter the appellant went out of the sitting room. During  
5 the appellant's absence, the complainant asked Dawn to phone the police from her cell phone, but as Dawn was busy phoning, the appellant returned and grabbed the cell phone from her hand. He used the gang language and told them to use it as well. When she told him that she did not understand it, he  
10 slapped her on the face with an open hand.

At this point in time, he dragged her by the hand to the bedroom, telling Dawn that she would see what he was going to do to her friend. She asked Dawn to follow her. Dawn sat  
15 on the bed. The appellant told her to lie on the bed, when she refused, he threatened to kill Dawn. He told her to pull her pants down, when she refused, he, himself, pulled out one of her pants' legs. At that stage he held a knife against Dawn's throat, but he put it down on the bed as he pulled her pants  
20 down. Dawn was sitting on the bed and looked on as the appellant did all of this. Thereafter the appellant pulled his pants down up to the knee level, took out is penis and put it into her vagina and raped her.

25 After raping her, the appellant told Dawn she was the next

one. Dawn said "Nee, ek het 'n grote pee" and the appellant left her. Thereafter the appellant told Dawn to go to the kitchen. While at the kitchen the appellant removed earrings from Dawn's ears and put them into his pocket. The appellant  
5 told the complainant to go back to the bedroom. She did. In the bedroom he told her to take off her takkies, which she did, because she was scared of him and he gave her his shoes to wear. The appellant was unarmed at that stage. The appellant told the complainant to keep quiet. He threatened her if she  
10 reported the matter to the police. He thereafter took her out and opened the front door to let her and Dawn out. He took them halfway and told them to come back later for their belongings.

15 On their way they saw a police van and Dawn signalled it to stop, which it did. Dawn related to the police what had just happened to them. The police took them to the nearest police station. Dawn gave a statement to the police. The complainant asked the police to fetch her mother, which they  
20 did. Her mother and Dawn accompanied her to hospital. As the doctors were not available to attend to her on that day, she was asked to return the following day, which she did.

During cross-examination she was taken through her statement  
25 she made to the police on 7 March 2008. She admitted to



signing it after the police officer had read it back to her. She was happy with what was read back to her, although she was at that stage confused and under the influence of alcohol. She denied that she had consensual intercourse with the appellant  
5 and that Dawn was sitting in the sitting room while she had intercourse with the appellant in the bedroom.

Maria Andrews is the complainant's mother. She confirmed that on the day in question at about half past ten in the  
10 evening, the police came to report to her that the complainant had been raped. The police took her to the police station. According to her observation, the complainant was not drunk when she saw her at the police station, though she was hysterical.

15  
Dawn McClear, who was 18 years old when she gave evidence, corroborated the complainant's version insofar as it related as to how she left the tavern and landed at the appellant's house. Though she differed with the complainant on the events which  
20 took place in the appellant's bedroom before the appellant raped the complainant, she, however, corroborated the complainant's evidence regarding the occurrence of rape. She also confirmed that the appellants took away their cell phones when they wanted to phone the police. She further testified  
25 that while in the appellant's kitchen, the appellant approached

her and removed her earrings from her ears. This removal was without her consent.

On their way home after the rape of the complainant, they saw  
5 a police van. She waved it to stop which it did. She informed  
the police (Sgt. Seconds) that the complainant had been raped  
by the appellant. Sergeant Seconds took them to the police  
station. Sergeant Seconds confirmed Dawn and the  
complainant's evidence insofar as it related to him.

10

The appellant's evidence is briefly as follows. He testified that  
he was 27 years old and that on 7 March he met Arnold, the  
complainant and Dawn at the tavern. As they had been  
expecting him, he joined them when he arrived at the tavern.  
15 There were about five beers on the table and he took out  
R100,00 from his pocket and bought a bottle of VO Bertram's  
Brandy, which they all partook of including the complainant. It  
was not the first time that he met the complainant and Dawn  
on the day at the tavern. He had met them the previous week  
20 at the same tavern, it was on that occasion that he told her  
that he was interested in her. She did not immediately  
indicate to him whether she was accepting his proposal. She  
told him that she would think about it and would inform him in  
due course.

25



When he met the complainant on 7 March 2008, he asked her if she had thought about his request, to which she replied in the affirmative. The appellant then asked her if she would go with him to his house. She agreed on condition that he would  
5 take her home. From the tavern all three of them went to his house. Arnold was no longer with them. He left them without a word while they were at the tavern. The appellant did not know where Arnold had gone to. He did not bother to look for Arnold. He remained with the complainant and Dawn. When  
10 they arrived at his house, they all sat in the sitting room. Dawn said she wanted to phone her uncle to enquire about the whereabouts of Arnold.

While Dawn made a call, he and the complainant went inside  
15 the bedroom. They sat on the bed and kissed each other. He asked the complainant if he could have sexual intercourse with her, she agreed, but said that they had to finish before Dawn finished phoning. They then had sex. Dawn arrived and said to the complainant she must make haste. The appellant and the  
20 complainant got up, put their clothes on and they left the bedroom. He took them halfway and asked them to make a turn at his house the following morning. The complainant and Dawn said it was in order. The appellant then went back to sleep.



The next day he met Arnold at the tavern. He and Arnold did not talk, but Arnold told him that the previous evening he decided to go home after smoking a pill. The appellant denied having robbed the complainant of her takkies, he said she left  
5 them at his house. She might have decided to leave them. She said she would come fetch them the following day. He said they were drunk on the night in question. He denied having robbed Dawn and the complainant of their cell phones or having robbed Dawn of her earrings.

10

Arnold Isaacs was called to testify on behalf of the appellant. When he gave his testimony he was serving a sentence. He knows the complainant and Dawn. Dawn was his girlfriend. On the day in question there was an arrangement that he would  
15 meet them after training. They wanted to go to the tavern, but did not have money for wine. They gave him their cell phones, a Nokia and a Motorola V360 to pawn. He took them to a certain Somalian, who agreed to pawn them for R400,00. He took it and gave it to Dawn and the complainant, which they  
20 split up. They then proceeded to the tavern and bought beers.

While they were busy drinking the appellant arrived. He greeted the appellant. The appellant asked him if he could join them. The witness said he could. The appellant joined  
25 them and he bought a bottle of brandy. The witness went out

/bw

/...

with his friend to smoke Mandrax. He did not return thereafter. He went home, leaving the appellant and the two ladies behind at the tavern. The following morning Dawn informed him that the appellant raped the complainant. She had come to give him his cell phone which he had given her the previous day at the tavern. He confirmed that the previous week they had also met at the tavern. The appellant and the complainant sat together and talked. During cross-examination he testified that he saw the appellant the following day in the street when he was on his way to buy Mandrax. At that stage Dawn had already informed him that the complainant had been raped by the appellant.

Inspector Rasant, the investigating officer, testified regarding the statements he took from the complainant on 9 March 2008, that is some two days after the incident. He denied that the complainant had mentioned to him that the appellant robbed Dawn of her earrings. He was also referred to Dawn's statement which he took on 9 March 2008. He denied that the earrings robbery was also mentioned to him by Dawn.

The main attack before us on the magistrate's judgment is that in light of numerous contradictions, inconsistencies and improbabilities in the State's case, he erred in finding that the State had proved its case beyond reasonable doubt and



convicting the appellant. In an attempt to persuade us to find that there were contradictions and inconsistencies in the State's case, Mr Bruinders, who appeared for the appellant, took us through the record to pinpoint deficiencies.

5

The principles governing the hearing of appeals against finding of fact are well established and that is, in the absence of demonstrable and material misdirection on the facts by the trial court, the presumption is that its conclusion is correct and  
10 the appeal court will only reverse it when it is convinced that it is wrong. See in this regard R v Dhlumayo & Another 1948(2) SA 677 (A) at 606 and S v Hadebe & Others 1998(1) SACR 422 at 426. At 426e-g the Court in S v Hadebe had this to say:

15

20

25

"That being the case, the credibility findings and findings of facts of the trial court cannot be disturbed unless the recorded evidence shows them to be clearly wrong. In assessing whether or not such is the case, the approach which commended itself in Moshephi & Others v R (1980-1984) LAC 57 at 59F-H, seems appropriate in the particular circumstances of the matter": 'The question for determination is whether, in the light of all the evidence adduced in the trial, the guilt of the appellants was established beyond a reasonable

doubt. The breaking down of the body of evidence into its component parts, is obviously a useful aid to a proper understanding and evaluation of it, but in doing so, one must guard against the tendency to focus too intently upon the separate and individual part of what is after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated against, together with all the other available evidence. That is not to say that a broader and indulgent approach is appropriate when evaluating evidence, far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But once that has been done, it is necessary to step back a pace and consider the mosaic as a whole."

I cannot find misdirection on the part of the trial court in this matter. The evidence given in the court *a quo* was fairly and accurately summarised in the judgment. Attention was given to the detailed criticism of the evidence of the witnesses who testified for the State. They were evaluated in the context of the entire body of the evidence that was led, and appropriate weight was attached to them in the light of all the evidence



and inherent probabilities and improbabilities of the case.

It is correct that there are contradictions between the complainant and her witness, Dawn, for instance regarding  
5 how Dawn landed in the room in which the complainant was raped.

Dawn testified that she and the complainant were told by the appellant to go into the bedroom. However, on the  
10 complainant's version, when the appellant told her to go to the bedroom, she asked Dawn to come along as she was afraid of the appellant. The contradictions, highlighted by the appellant, in my view, do not relate to the main issue which the court *a quo* had to determine. They relate to peripheral issues  
15 and matter of details. On the main issues before the court *a quo*, the evidence was overwhelming that sexual intercourse had been without the complainant's consent.

The complainant and Dawn were in agreement that the  
20 appellant took out a knife and used it to force the complainant to have sexual intercourse with him. The sexual intercourse took place in the presence of Dawn. The witnesses also corroborated each other on how their belongings were removed from them by the appellant before and after rape of the  
25 complainant. Finally, when they saw the police van in the

street, they stopped it and Dawn reported to the police that the complainant had been raped by the appellant.

The conduct of the appellant and that of the complainant was  
5 inconsistent with the appellant's version that sexual intercourse was consensual. The court *a quo* correctly found in favour of the State on the issues which were before it and the conclusion it reached was correct. In the circumstances I would dismiss the appeal against conviction.

10

Before I proceed to deal with the sentence, I just want to mention that there were also contradictions in the defence case. For instance Arnold testified that he had pawned the complainant and Dawn's cell phones before they went to the  
15 tavern. On his version, Dawn and the complainant did not have cell phones when they later went to the appellant's house. On the other hand, the appellant testified that while at his house Dawn went out to phone. So it is clear to me that there are also contradictions in the defence case.

20

I now turn to consider the appellant's attack on the sentence. The count of rape was subject to the provision of section 51(2) of Act 105 of 1997. This is the Act which prescribes a minimum sentence for certain offences. The minimum sentence  
25 prescribed for rape of the nature the appellant was convicted



of is 10 years imprisonment but that sentence could be deviated from if there are substantial and compelling circumstances. The court *a quo* investigated this aspect and found none. It accordingly imposed a prescribed minimum  
5 sentence of ten years imprisonment.

It was submitted on behalf of the appellant that the court *a quo* erred in imposing a prescribed minimum sentence on the ground that both the complainant and the appellant were under  
10 the influence of alcohol at the time of the incident and that the complainant did not suffer any serious injury or was not raped repeatedly. The question is whether there were sufficient facts placed before the court *a quo* which could justify the finding of substantial and compelling circumstances being made.

15

The appellant's personal circumstances were that he was a first offender in relation to the crime of rape, but had a number of previous convictions for theft and housebreaking. He was 28 years old, single and had no dependants and was  
20 unemployed. These are his personal circumstances.

As far as the offence is concerned, the evidence showed that the complainant was raped at a knife point in the presence of her friend and her belongings were taken by the appellant. In  
25 my view the appellant's personal circumstances did no

/bw

/...

constitute substantial and compelling circumstances, justifying the court *a quo* to deviate from imposing the prescribed sentence of ten years imprisonment. It should be remembered that the sentence prescribed by the Legislature should not be  
5 departed from for flimsy reasons which cannot withstand scrutiny. The complainant was treated with disdain by the appellant, he raped her in the presence of her friend. Not only did he violate her sexually, but also dispossessed her of her personal belongings. The appellant's conduct demonstrated a  
10 show of arrogance and power.

The suggestion that the court *a quo* erred in not ordering the sentence for theft to run concurrently with the sentence for rape is rejected. The appellant had a string of previous  
15 convictions relating to theft and housebreaking. He does not seem to have learnt from his previous mistakes. In the circumstances I would dismiss the appeal against sentence as well.

20 In the result the appeal against the convictions and sentences is dismissed and the convictions and sentences are confirmed.



ZONDI, J



STEYN, J: I agree.

5

---

STEYN, J