Republic of South Africa

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

Case Number: [High Court]: **A504/16**

Case Number [Lower Court]: **SH/109/09**

In the matter between:

MALIPHATHWE BABA 1st Appellant

MASIXOLE MAQANA 2nd Appellant

MONWABISI MOSES 3rd Appellant

and

THE STATE Respondent

Coram: Cloete J *et* De Waal AJ
Hearing: 15 March 2019
Judgment: 27 March 2019

JUDGMENT

De Waal AJ:

[1] The three Appellants in this matter were convicted of gang-raping the 17-year old complainant on 27 October 2007. The Appellants were sentenced to 10 years imprisonment by the Regional Court (per Ms A Van Leeve), the Court *a quo* having found that there are substantial and compelling circumstances to deviate from the minimum sentence of life imprisonment prescribed by s 51 of the Criminal Law Amendment Act 105 of 1997. In the present instance the sentence of life imprisonment was prescribed because the victim was raped by more than one person, and the rapists acted in the execution or furtherance of a common purpose.

[2] The Appellants were granted leave to appeal to this Court against the convictions and sentences in terms of s 309B(1)(a) of the Criminal Procedure Act 51 of 1977 ("**the CPA**").

[3] Before dealing with the grounds of appeal, I briefly sketch the factual background and the reasoning of the Court *a quo*, both in respect of the convictions and the sentences imposed.

[4] The case originally started with five accused. First Appellant, Mr Maliphathwe Baba, was the first accused. Second Appellant, Mr Masixole Maqana, was the fourth accused and Third Appellant, Mr Monwabisi Moses, the fifth. The second accused was A B and the third accused was Xolisa Nxusani. I shall refer to the Appellants as they were referred to during the course of the trial, i.e. Accused 1, 4 and 5 but to Accused 2 as "*A*" and to Accused 3 as "*Xolisa*".

[5] Before the commencement of the trial, charges were withdrawn against A on the instruction of the Director of Public Prosecutions, Western Cape. The trial also did not proceed against Xolisa because he had by then passed away.

[6] As was stated above, the convictions relate to the events of 27 October 2007, a Saturday night. On that night, the complainant and some of her friends were at Tshepo's Tavern drinking ciders and wine. They spent approximately three hours at the tavern and left at about 22h00 that night, accompanied by A and the others (except Accused 4).

[7] The complainant and A walked slightly ahead of her friends. A then told the complainant that her boyfriend, S M ("**S**"), sent him a text message asking A to take her to his house and to wait for him there. The complainant did not see a problem with this because her boyfriend and A were friends. They (A and S) lived opposite each other.

[8] The complainant testified further that she went to A's place, which she described as a side flat close to the main house on the property. A then told her that he was going to call her boyfriend and left. The complainant testified that she started to panic at this time because it was getting late and she wanted to go home. She tried to open the door but the door was locked from the outside with a latch and a piece of wire.

[9] A returned, not with the complainant's boyfriend, but with the other accused, who then proceeded to pin her down to the bed, took her clothes off and raped her in turn. The complainant testified that she bit at least one of the accused and they were laughing about it. She further testified that at one

point she pretended to faint in order to make the accused stop raping her but that A then threw water on her.

[10] Eventually all the accused but A left. The latter begged the complainant not to go to the police. She told him that she would not do so and persuaded A to call her boyfriend. When S came over, the complainant immediately told him that she had been raped, except that, because she was in the presence of A, she did not say that he also participated in the gang rape.

[11] S then accompanied the complainant to the police station where she laid charges against four of the accused (she later added Xolisa). A medical examination and subsequent report found the DNA of Accused 5 inside the complainant's vagina, and that the SDR profiles of the DNA obtained reflected that of more than one person.

[12] Apart from the complainant herself, the State also called as witnesses S and the medical doctor who performed the gynaecological examination of the complainant on the morning of 28 October 2007. For purposes of the appeal, it is not necessary to discuss the evidence of the latter two State witnesses.

[13] Each of the Appellants testified in their own defence.

[14] Accused 1 testified that he was drinking at Tshepo's Tavern on the evening of 27 October 2007. He left the tavern with the group and walked with one of the complainant's girlfriends, one M. The group scattered when they bumped into M's older sister, who reprimanded them about drinking and being out late. In the process Accused 1 was separated from M. He then went looking for M at

A's place. Accused 1 claimed that he saw the complainant in the side flat but he then left.

[15] Accused 4 testified that he was drinking at a different tavern, namely the White House. He too went to A's flatlet thereafter and he also saw the complainant there. Accused 4 claimed that she was lying in A's bed, covered with a duvet. Accused 4 then left to buy cigarettes and when he returned, A told him not to come in. He then left. Accused 4 claims that the reason why the complainant claims that he raped her is because his sister had an altercation with her sister over a cell phone.

[16] After testifying in his own defence, Accused 4 also called and led evidence of A. A testified that on the evening of 27 October 2007 he was at Tshepo's Tavern and that he saw the complainant when he left. He started walking with her and flirting with her. He asked her if she wanted to go home with him and she agreed. At his flat she got onto the bed and they started kissing. The complainant then consented to having sexual intercourse with him. Whilst in the process of having intercourse with the complainant, A felt someone "*removing*" him from the complainant. He tried to push the person off but there were also other intruders. During his evidence-in-chief, A testified that it was dark and that he could not identify any of the intruders. However during cross-examination, he accepted that a statement drafted by his advocate at the time was correct in that he could in fact identify the three Appellants and Xolisa as the men who barged into his room; pulled him off the complainant; and then gang-raped her.

[17] Accused 5, whose DNA was found inside the complainant, testified that on 27 October 2007 he was at Tshepo's Tavern drinking with his friends, including A, Xolisa and Accused 1. He left with his friends and wanted to go to another township but needed to fetch a jacket at his home. On his way he met Xolisa, who told him that some friends were at A's house. He then also went there. At the flat, he met with A and the complainant. A then left to buy cigarettes. At this stage the complainant got up, came to sit on him and started kissing him. They undressed and had sex. When A returned he wanted to sleep and Accused 5 then left.

[18] I now turn to the reasoning of the Court *a quo*.

[19] The Court *a quo* commenced its analysis by referring to some *dicta* in the Supreme Court of Appeal judgments dealing with the principles relating to convictions based on the evidence of a single witness. It is well-established that such evidence must be approached with caution. The merits of the evidence must be weighed against factors which militate against the credibility of the single witness. Even if there are shortcomings, or defects or contradictions in the testimony, the Court may convict the accused if satisfied that the truth has been told.

[20] In applying the principles, the Court *a quo* held that the complainant gave a coherent version of the events which took place on 27 October 2007 and that her evidence was clear and satisfactory in all material respects. In this regard, the Court *a quo* reasoned that certain contradictions in the evidence of the complainant were not material. For instance, it was not clear why she

agreed to go to A's house when she was in a hurry to get home after drinking at the tavern. It also seems that she was untruthful when she claimed that it was the first time that she consumed alcohol at the tavern because her boyfriend testified that she previously drank there.

[21] According to the Court *a quo*, the complainant gave a satisfactory explanation for why she did not implicate A immediately when her boyfriend first arrived at the latter's flat.

[22] The Court *a quo* further referred to authority for the proposition that less caution is required where the evidence of a single witness is corroborated in some or other way so that it is firmly established that the whole story is not concocted. On this aspect, it was found that the evidence of S lends credibility to the complainant's story.

[23] The Court *a quo* considered the evidence of the Appellants and found their versions to be riddled with contradictions. What was however clear is that the three Appellants and Xolisa were at A's house on the night in question. Besides the evidence of the complainant and that of A, the Appellants *themselves* placed them on the scene of the crime on that night.

[24] As to the rest of their evidence, the Court *a quo* concluded that the Appellants' versions made no sense and had to be rejected as lies. The Court *a quo* held that there must have been a plan to meet at A's house as Accused 5 testified that he went home to fetch a jacket and then went back to A's house because the latter had beers and whiskey.

[25] The Court *a quo* further relied on A's evidence, which implicated each of the three Appellants.

[26] After the above analysis, the Court *a quo* concluded that the State had proved its case beyond a reasonable doubt against each Appellant.

[27] As to sentencing, the Court *a quo* found, in mitigation, that alcohol played a major role on the night of the commission of the offence. The Court further took into account that the matter had been running since 2007 and that the Appellants only pleaded in 2015. In this regard, account was taken of the fact that the Appellants were unable over this very long period to move on with their lives; to get careers; or to enter any kind of institution to finish their education. All three Appellants were first offenders and Accused 1 was only 17 years old at the time of the commission of the offence. Accused 4 and 5 were barely over 18 years old.

[28] As to aggravating factors, the Court *a quo* recorded that the complainant, according to a victim impact report, became unmotivated; lost energy and attempted to commit suicide as a result of the horrific ordeal.

[29] The Court *a quo* concluded that all three Appellants had potential to rehabilitate but that such rehabilitation could take place inside the walls of the prison. Taking all circumstances into consideration, the Court held that there were compelling and substantial circumstances why life imprisonment was not appropriate. Sentences of 10 years of imprisonment were imposed on each of the three Appellants.

[30] I now turn to deal with the contentions made on behalf of the Appellants in this appeal.

Accused 1

[31] Mr Simon, who appeared for Accused 1, contended that his client could not have been properly identified as the complainant was not sober and the attack on her happened suddenly and in the dark. A, it was argued, could not see the attackers but claimed to identify them by "*feeling*" them.

[32] The above leaves out of account that:

31.1 It was common cause that the complainant knew her attackers.

31.2 The attackers made no attempt to mask their identities.

31.3 Although she admitted that she was under the influence of alcohol, the complainant was not inebriated to the extent that it impaired her ability to identify someone she knew.

31.4 The complainant was further raped multiple times over a period of time in a small room. The attack was intense, brutal and invasive. She bit at least one of accused on the upper arm, showing how close she was to the face of this attacker (a few centimetres).

31.5 At the first opportunity she identified the accused by name. This evidence was independently verified by S.

31.6 There was no satisfactory explanation as to why she would have implicated the accused if they were innocent. It is in my view far-fetched to suggest, as Accused 1 and 4 did, that she accused them of rape just because they saw her in A's bed. It is in any event highly unlikely that the complainant had consensual sex with A that night, for reasons that I shall explain below. That is another reason why the motive alleged by Accused 1 and 4 cannot be correct. Accused 4's claim that the reason why the complainant claims that he raped her is because his sister had an altercation with her sister over a cell phone merely has to be stated in order to reject it.

31.7 Then there was the evidence of A. Although the charges against him were initially withdrawn on the basis that he will testify against the other accused in terms of s 204 of the CPA, the State did not call him. Accused 4 however decided to call him. I deal below with the manner in which his testimony should be approached. For present purposes it suffices to say that although A may not have been truthful about his own involvement in the gang-rape, he corroborated the complainant's version of the events as far as the conduct of the Appellants is concerned. He did so in a carefully prepared statement, the veracity of which he confirmed under cross-examination. There was no reason given for why A would falsely implicate the Appellants.

[33] It was further contended on behalf of Accused 1 that if the complainant knew him then it is strange that she did not ask him by name why he was raping her or why she did not cry out his name during the attack. The short answer to

this is that she was not asked about this during the trial. It is no use to speculate about this issue on appeal. For all we know, the complainant may have called out the names of her attackers. She indeed testified that she begged her attackers to stop doing to her what they were doing.

[34] To the above one must add that the accused placed himself on the scene, first at Tshepo's Tavern and thereafter at A's flat. His explanation as to how he got there and why he left is difficult to understand, to put it mildly. It is inconceivable that a group of young men and women would, after a drinking session at a tavern, scatter about at a reprimand from M's sister, to the extent that they lost contact with each other and Accused 1 then had to go looking for M at A's flat. Even harder to believe is the testimony of Accused 1 to the effect that he went all the way to A's place but when he saw the complainant sitting there on a bed, he simply left.

[35] For these reasons, the appeal in respect of the conviction of Accused 1 is dismissed.

[36] Turning to the sentence, it was argued that Accused 1 was a first offender and furthermore that he was only 17 years at the time when he committed the offence. In this regard, reference was made to s 77 of the Child Justice Act 75 of 2008, which provides in subsection 1(b) that when sentencing a child who is 14 years or older at the time of being sentenced for the offence, the Court must only impose a sentence of imprisonment as a measure of last resort and then for the shortest appropriate period of time. It was further

contended that Accused 1 was a junior under the influence of seniors when the offence was committed.

[37] The problem with the first of the above arguments is that Accused 1 was no longer a child when he was sentenced. He was sentenced some 9 years after the offence was committed and when he was already about 26 years old. There was also no evidence led at the trial which suggested that Accused 1 was under the influence of the other accused when he committed the offence. This is not surprising given that he was only a few months younger than them.

[38] While it is ordinarily so that a different approach to sentencing is adopted in respect of children, it would be artificial in the extreme to distinguish between the offenders in this matter. Accused 4 (the Second Appellant) was for instance only 11 days older than 18 when he committed the offence. The conduct of Accused 1, who was a few months younger than 18, was as reprehensible and indeed sickening as that of Accused 4. There would be no logic in differentiating between the two.

[39] As to the sentence of 10 years, I see no reason to interfere.

[40] One can never leave out of account, as the SCA recently emphasised again in *S v Hewitt* 2017 (1) SACR 309 (SCA) at para 9, that rape is "*a horrifying crime*" and "*a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of [the] victim"*, and as "*a very serious offence*" which is "*a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim*".

[41] In the present instance one is dealing with gang rape, which is one of the most horrific crimes imaginable and one for which the legislature has dictated that a sentence of life imprisonment must be imposed unless there is substantial and compelling reasons to do otherwise. In light of that guide, I do not believe that the sentence of 10 years of imprisonment is disproportionate. It was just even though Accused 1 was only 17 years old at the time of the offence and a first offender.

[42] The appeal against the sentence is accordingly also dismissed.

Accused 4

[43] At the outset it is worth pointing out that Accused 4's version of the events of the evening are strange, even more so than that of the other Appellants.

[44] Accused 4 claimed to have started the evening at a different place to the others. He testified that he was not at Tshepo's Tavern but at another location, named the White House. Thereafter he took a 15 minute walk to A's place and met the latter there with Xolisa and Accused 5. When he arrived, the complainant was lying on the bed sleeping. He then went to go buy cigarettes and met with up one Jarvis, who had died by the time of the trial. When he went back, five minutes later, the complainant was standing at the door. A asked him not to come into the room even though Xolisa and Accused 5 were also still in the room. Accused 4 then went back to Jarvis and he then received a phone call from his brother asking him to "*fetch stuff in Cape Town*". This was at 01h00 on the Sunday morning.

[45] Mr Mtini of Legal Aid South Africa, who appeared for Accused 4, raised much of the same argument already discussed above regarding the identification of his client. I do not find this argument persuasive. Accused 4, on his own version, ended up at A's flat; he too was known to the complainant. She indeed identified him as the person who raped her the most times on the night in question. She immediately named him as a perpetrator at the first opportunity. He was also implicated by A.

[46] It was contended that the failure by the State to have called A justifies an adverse interference to be drawn. Such an inference can be drawn in certain circumstances,[1] but it would in my view be unfair to do so in the present instance. Firstly, there is a reason why the State did not call A. A deposed to a very detailed affidavit regarding his version of events, which was that he had consensual sex with the complainant but then got pulled off her by the Appellants and Xolisa who then proceeded to gang-rape her. The problem with this version is that even though the complainant thought that she had bit Accused 4 no bite marks were found on him. However, the report of the medical practitioner contained photos of bite marks on A's arm. It is inconceivable why, in these circumstances, it was decided to drop the charges against A. But this probably explains why the State did not make use of him as a s 204 witness. His credibility could have been destroyed in cross-examination. The prosecutor indeed confronted A during the trial and put it to him that he was trying to save himself whereas he in fact was also involved in the gang-rape.

[1] See *S v Texeira* 1980 (3) SA 755 (A) at 763G-H.

[47] Accused 4 decided to call A. This was a blunder because A then, under cross-examination, implicated all three Appellants. A was never declared a hostile witness and Accused 4 was precluded from impeaching his credibility. Whilst A may have lied about his own actions on the night in question, I fail to see on what legal or logical basis his evidence against the three Appellants should be disregarded. His evidence corroborated the complainant's version in respect of the three Appellants. And none of them had a satisfactory explanation as to why A would falsely implicate him.

[48] In the circumstances the appeal against the conviction of Accused 4 is dismissed.

[49] As far as sentencing is concerned, I fail to see on what basis one can differentiate between Accused 4 and Accused 1. The former was over 18 years old at the time of the commission of the offence. He can accordingly hardly contend for a lighter sentence than the latter. There was no other peculiar factor raised about the personal circumstances of Accused 4 which justifies a lesser sentence. The sentence of 10 years is accordingly confirmed.

Accused 5

[50] The difficulty for Accused 5 was that the DNA evidence indicated that he must have had sexual intercourse with the complainant. In order to explain this aspect, he came up with the, frankly preposterous, version that the complainant suddenly jumped on him when A stepped outside to go and buy a cigarette. This simply makes no sense and must be rejected as a lie. It will

further be recalled that Accused 5 himself testified that he went to A's house because the latter had beers and whiskey. In a sense he described the plan that the accused had but then leaves out the gruesome actions which followed.

[51] According to the complainant, Accused 5 even apologised to her for what he had done. He admitted that he apologised but claimed that he did so because *he* was being falsely implicated. This makes no sense whatsoever.

[52] There can be no doubt about his guilt and the conviction is confirmed.

[53] As with Accused 1 and 4, I do not believe that the sentence of 10 years imprisonment is disproportionate in respect of Accused 5. Again, no personal circumstances was raised which differentiate his position from the others. It was mentioned that he had a problem with drugs but overcame this by the time that he committed the offence. I cannot see how one can reduce his sentence for this reason alone. In the circumstances the appeal against the sentence imposed on Accused 5 is dismissed.

[54] In the result, the appeals against all three convictions and the resulting sentences are dismissed.

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H J DE WAAL AJ

Acting Judge of the High Court

Cape Town

27 March 2019

I concur.

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Cloete J

Judge of the High Court

Cape Town

27 March 2019

APPEARANCES

First Appellant's counsel:	**C Simon**
First Appellant's attorneys:	**Legal-Aid South Africa**
Second and Third Appellants' counsel:	**O Mtini**
Second and Third Appellants' attorneys:	**Legal-Aid South Africa**
Respondent's counsel:	**M Marshall**
Respondent's attorneys:	**Office of the Director of Public Prosecution: Western Cape**