IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Date: 2008-10-13

Case Number: A91/08

In the matter between:

GEORGE LIBIOS HADEBE Appellant

and

THE STATE Respondent

JUDGMENT

SOUTHWOOD J

[1] On 7 August 2006 the appellant was found guilty in the Piet Retief regional court on two counts of housebreaking (counts 1 and 4); two counts of robbery with aggravating circumstances (counts 2 and 5) and one count of rape (count 3) and he was sentenced to an effective term of 30 years imprisonment made up as follows:

(1) 15 years imprisonment for the housebreaking (count 1) and robbery with aggravating circumstances (count 2), the counts being taken together for purposes of sentence;

(2) 15 years imprisonment for the rape (count 3);

(3) 15 years imprisonment for the housebreaking (count 4) and robbery with aggravating circumstances (count 5), the counts being taken together for purposes of sentence; and

(4) In terms of section 280 of Act 51 of 1977 the court ordered that the sentences for counts 1 and 2 run concurrently with the sentences for counts 4 and 5, an effective sentence, therefore, of 30 years imprisonment.

With the leave of this court the appellant appeals against the convictions and sentences.

[2] On appeal, the appellant's counsel contends that the regional court erred in finding that the state had proved that the appellant committed the crimes. She contends that none of the witnesses were reliable and credible particularly with regard to the identity of the person who committed the crimes and that it is questionable whether S.L.N. (the complainant in respect of the rape charge) can be believed when she says she was raped. She also contends that

the appellant's version is reasonably true: i.e. that he had no knowledge of the allegations against him because he did not commit the crimes as he was at home sleeping. She further contends that the regional magistrate's reasons for the conviction are unsatisfactory because they do not explain why the state witnesses' evidence was accepted and the appellant's evidence rejected. The respondent supports the conviction. With regard to sentence the parties are agreed that it was established that S.N. was 15 at the time of the rape and accordingly that the regional magistrate had no jurisdiction to sentence the appellant and that the sentence must be set aside as a nullity. See ***Direkteur van Openbare Vervolgings, Transvaal v Makwetsja*** **2004 (2) SACR 1 (T)** paras 23, 20 and 30; ***S v Liau*** **2005 (1) SACR (T)** at 501g-i and 503f-h.

[3] The crimes were committed during the night of 8 August 2004 in a small settlement where there were no electric lights and the residents used candles for illumination. It is common cause that although the appellant lived and worked in Johannesburg he was present that night; that he grew up in the settlement and knew and was well-known to all the state witnesses; that he was known as a troublemaker who did as he pleased when he visited the settlement and that he had fathered a child by the daughter of one of the state witnesses, Emelina Nomvula Ngwenya. According to Emelina Ngwenya the appellant had raped her daughter and made her pregnant. It is clear that none of the state

witnesses were well-disposed towards the appellant.

[4] The appellant denied that he committed the crimes and relied on an alibi. The issue in the case is therefore whether the identification of the appellant as the perpetrator of the crimes is reliable, particularly bearing in mind that the appellant relies on an alibi: i.e. that he was at home asleep with his brother Sipho Radebe. In this respect it must be borne in mind that it is wrong to reason that because the evidence of the state witnesses, considered in isolation, is credible, the alibi must be rejected. The correct approach is to consider the alibi in the light of all the evidence in the case and the court's impressions of the witnesses and on all the evidence to decide whether the alibi might reasonably be true – see ***R v Hlongwane*** **1959 (3) SA 337 (A)** at 341A and ***S v Hlapezula and Others*** **1965 (4) SA 439 (A)** at 442E-F.

[5] In view of his defence the appellant could not dispute the crimes. On the night of 8 August 2004, at about 22h30, a man, identified by the witnesses as the appellant, broke into the house of Emilina Ngwenya and threatened to kill her with a firearm (count 1 – housebreaking with the intention of committing a crime unknown to the state). The man then forced Emilina Ngwenya, at gunpoint, to go to a room where her two daughters, Sonto Khumalo and S.N., were sleeping with Sonto Khumalo's children. The man asked S.N. to go with him to Emilina Ngwenya's bedroom to fetch her identity document. S.N. accompanied the appellant to her mother's bedroom where he ordered her to

undress and then had sexual intercourse with her. She submitted from fear (count 3 – rape). Before he left the home of Emilina Ngwenya the man demanded that she give him money. When she refused he threatened to kill her and she gave him R370 (count 3 – robbery with aggravating circumstances). At about 23h00 on 8 August 2004 the man went to the home of Julia Siphiwe Kunene where he entered and demanded that she take him to her husband's bedroom (count 4 – housebreaking with the intention of committing a crime unknown to the state). When they arrived there her husband's second wife, Sortwa Nimya, opened the door and the man demanded that her husband give him his firearm. When her husband said he did not have a firearm the man demanded money which her husband also did not have. The man then demanded that Julia Kunene take him to Christina Msibi's home. When they arrived there the man demanded that Christina Msibi give him money otherwise he would kill Julia Kunene's husband. Christina Msibi complied with this demand and gave the man R800 (count 5 – robbery with aggravating circumstances). After saying that he would consult with people outside the man left the house and did not return.

[6] Most of the witnesses testified that although it was dark they were able to identify the appellant as the perpetrator because he was carrying a torch which gave off light in which they saw him and because they recognised his voice. It is clear from the evidence that all the witnesses know the appellant and that they had ample

opportunity to hear him speaking. Their evidence that they were able to see him in the light given off by the torch could not be and was not challenged. If there was no conspiracy it is astonishing that all the state witnesses were able to identify the appellant as the perpetrator of the crimes. Virtually all the witnesses gave a coherent and logical account of what happened. It is striking that S.N. gave a coherent account of how the man had taken her to her mother's bedroom and raped her. It is also striking that she had no doubt who the rapist was. It was the appellant and she saw him in the torch light and recognised his voice. He is a neighbour and she knew him well. It is clear from the evidence that when S.N. came back from the bedroom she told her mother, Emilina Ngwenya, and her sister, Sonto Khumalo, that she had been raped. By then Emilina Ngwenya knew that the appellant was the man in question.

[7] The appellant's evidence was simply that he was at home the whole day and the whole night and that he had been sleeping in the same room as his brother, Sipho Hadebe. He testified that Emilina Ngwenya had made a false charge against him because he had made her daughter pregnant. He suggested that there was a conspiracy to bring false charges against him. This was not suggested to any of the witnesses nor was it demonstrated. The appellant testified that he got on well with the other witnesses and could not explain why they would conspire to falsely implicate him in very serious crimes.

[8] Sipho Hadebe was an extremely poor witness and was rightly disbelieved by the court *a quo*. At first he denied that he knew the appellant then he said the appellant was his brother. He testified that on the night in question he had been sleeping with the appellant in the same room on one bed. When questioned by the court he testified that at night he locks the door of the room and keeps the key.

[9] The regional magistrate did not believe the appellant. In the context of this case his version amounts to a bald denial that he was present and committed the crimes. Where a number of witnesses who know him well put him on the scene because they recognised him in the torch light and because they knew his voice the evidence against the appellant appears to be overwhelming. It also seems unlikely that there was a conspiracy to falsely implicate him. Despite the fact that it was dark some of them said that they could see him in the torch light but, Sonto Khumalo, freely conceded that although she saw a man she was unable to identify him. That is not what would be expected if she was part of a conspiracy.

[10] The regional magistrate clearly decided to accept the state's evidence and reject the appellant's evidence. The problem which arises in this case is that he does not explain why. The reasons for the decision are unsatisfactory. The appellant's version was logical and coherent and not marred by any contradictions or inherent improbabilities. In its essence (i.e. that he was at home when the crimes were committed) it

was supported by his brother's evidence. In ***S v Guess* 1976 (4) SA 715 (A)** at 718D-719A the court said the following about the necessity for reasons:

> 'The magistrate obviously misdirected himself in accepting Makapan's evidence without stating his reasons for believing him and without stating his reasons for disbelieving the appellant and Miss Brown. The correct approach which the magistrate should have adopted in weighing up the evidence of the state and that of the defence appears from the *dicta* of the following two reported cases:
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> (1) Per De Villiers, JP, in ***Schoonwinkel v Swart's Trustee,* 1911 TPD 397** at p401:
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> > "This Court, as a Court of appeal, expects the court below not only to give its findings on the facts, but also its reasons for those findings. It is not sufficient for a magistrate to say, 'I believe *this* witness, and I did not believe *that* witness'. The Court of appeal expects the magistrate, when he finds that he cannot believe a witness, to state his reasons why he does not believe him. If the reasons are, because of inherent improbabilities, or because of contradictions in the evidence of the witness, or because of his being contradicted by more trustworthy witnesses, the Court expects the magistrate to say so. If the reason is the demeanour of the witness, the court expects the magistrate to say that; and particularly in the latter case the Court will not likely upset the magistrate's finding on such a point."
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> This *dictum* was intended for a civil case but it is equally applicable to a criminal case.
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> (2) Per Leon, J, in ***S v Singh,* 1975 (1) SA 227 (N)** at p228:

> "Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how the court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and demerits of the State and defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond reasonable doubt. The best indication that a court has applied its mind in the proper manner in the above-mentioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses."'

[11] It is trite that a trial court's conclusion must account for all the evidence. In ***S v Van Aswegen*** **2001 (2) SACR 97 (SCA)** the court quoted with approval the following passage from ***S v Van der Meyden*** **1999 (1) SACR 447 (W)** at 450a –

> 'It is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is "completely acceptable and unshaken". The passage seems to suggest that the evidence is to be separated into compartments, and the "defence case" examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it

> is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives it must account for all the evidence …
>
> I am not sure that elaboration upon a well-established test is necessarily helpful. On the contrary, it might at times contribute to confusion by diverting the focus of the test. The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored'

[12] The regional court failed to take account of the following matters:

(1) the contradictions between the evidence of S.N. and her statements to the doctor recorded in the J88 medical report;

(2) the fact that the doctor made no finding as to whether S. Nkosi had been raped;

(3) the fact that S.N. told the doctor that she had been raped 'by

an unknown person';

(4) the fact that the appellant was not arrested by the police before he could return to Johannesburg on 10 August 2004; and

(5) the fact that the appellant was arrested only on 7 September 2004.

[13] The contradictions between the evidence of S.N. and her statement to the doctor show that she is an unreliable witness. According to her evidence (given in late 2005) she was certain at the time of the rape that it was the appellant who raped her. In her statement to the doctor on 9 August 2004 she said she was raped by an unknown person. In her evidence (given in late 2005) she testified that she had had intercourse with her boyfriend, Happy, before the night of the rape. In her statement to the doctor on 9 August 2004 she said that she was a virgin and had not previously had sexual intercourse. The fact that the doctor simply recorded her statements under conclusion and did not find that she had had intercourse the night before suggests that he was not able to support her complaint. He simply referred to the fact that the rest of her hymen was present and that there were no fresh tears or bleeding. In view of the purpose of the examination the absence of any finding is startling and clearly significant.

[14] The fact that S.N. told the doctor that she had been raped by an 'unknown person' must be considered in its wider context. According

to the witnesses they identified the appellant as the perpetrator while the crimes were being committed. There was no doubt. Clearly if S.N. had had any doubt this would have been speedily resolved by her mother when she reported to her mother that she had been raped. Accordingly, when S.N. was taken to the police and then by the police to the doctor, if the evidence is correct, she must have known who raped her. The fact that she did not taints all the state's evidence that it was the appellant. This is a small community where the residents talk to each other.

[15] The appellant arrived at the settlement on 7 August 2004 and left for Johannesburg on 10 August 2004. The incident occurred on 8 August 2004 and the crimes were reported on 9 August 2004. If the witnesses identified the appellant as the perpetrator there was ample time to arrest the appellant. Yet the police did not do so. This indicates that the police also were not informed that the appellant was the person who committed the crimes.

[16] The appellant returned to Johannesburg and on 4 September 2004 he was telephoned by a family member who told him that the police were looking for him in connection with his lost firearm. He went to the police station and the policeman asked him to wait for the Piet Retief police who wanted to interview him. He waited and when the Piet Retief police arrived they arrested him for the crimes allegedly committed on 8 August 2004. The failure to arrest the appellant on 9

August 2004 and the delay of almost one month before arresting him indicates that the police were only told later that the appellant committed the crimes. The evidence that the witnesses knew on 8 August 2004 therefore cannot be true.

[17] In my view these facts and the probabilities referred to create at the very least a reasonable doubt that the appellant was guilty of the crimes alleged. He therefore should not have been found guilty.

Order

[18] The appeal is upheld and the convictions and sentences are set aside.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

S. POTTRILL
ACTING JUDGE OF THE HIGH COURT

CASE NO: A91/08

HEARD ON: 9 October 2008

FOR THE APPELLANT: ADV. L. AUGUSTYN

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. L. SWART

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 13 October 2008