IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

…… ……

Case number: A291/2015

In the matter between:

CEBEKHULU, NKOSINATHI N **Appellant**

And

THE STATE **Respondent**

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. Appellant was convicted in the Magistrate's Court at Germiston of rape and sentenced to a term of life imprisonment both of which he now appeals.

2. The complainant, [D……], was alone at home late at night on the 22nd March 2009 but not yet sleeping because her one month old baby was still awake. About midnight someone managed to open the locked front door and enter into her home. She recognised this man as the appellant, a friend of someone else, called [T…….].

3. The appellant pulled her and she pushed him, she tried to run and she fell down, there was a struggle. This man then bit her on her breast, threw her on the floor, beat her on her right eye and bit her around her face.

4. He then tore off her pants, opened his zip, removed his penis and raped her. He then attempted to use a piece of wire to throttle her and continued to rape her.

5. However, her friends – [M……..], [N……], [N…….] and [N……..] – arrived. The appellant ran away. They went to his house and then to the SAPS.

6. Three issues arise for determination. The identity of the perpetrator of the sexual attack and rape which undoubtedly occurred. The non-consensual nature of any sexual intercourse which took place. Whether or not the complainant was afflicted with grievous bodily harm.

Identity

7. Complainant testified that she knew the identity of appellant and recognised him that evening. She undoubtedly had sufficient opportunity to recognise her assailant first as they struggled and then as he raped her.

8. One of her friends, [N…….] [G……..], testified that she knew appellant because "we stay in the same area" and had "known him from 2008" and by the nickname "K". She said that, as she and the other friends approached complainant's house that evening, they all saw the door to the house opening and they commented that complainant had been waiting for them to arrive. Then "we saw a male person coming out and running". Because there was a light shining outside, she was able to recognise that the person running away was appellant.

9. Appellant gave evidence in his defence. His version was that he and the complainant had been in a relationship for some ten months and had had consensual sex. He did

not testify that they had sex on the particular evening of 22nd March but appeared to base his defence upon lack of force or the intention to rape and the consensual nature of all sexual intercourse which they had enjoyed. In short, it was not exactly clear that he disputed his presence in her home that evening. He was clear that they had sexual intercourse on 3rd April.

10. However, on the evidence of complainant and Ms [G……..], I am satisfied that the learned magistrate made no error in finding that the man in her house that evening was indeed the appellant.

Rape

11. There can be no doubt that the complainant was raped on the evening of 22nd March 2009.

12. Firstly, her version is clear and (save for identity of the perpetrator) is not disputed as to the attack upon her. Secondly, Ms [G……..] confirmed that she and the other friends arrived at the complainant's home and found her lying on the floor "groaning, somebody suffering". She did "not have clothes on her lower body". The complainant made an immediate report to Ms [G……..] and friends that appellant had raped her – "K" being the name by which appellant was known to Ms [G……..].

13. Exhibit A3 at page 64 onwards of the Record is the medical report, completed on the night of 22nd March at the Germiston Hospital. It records bite marks to the right chest, face and nipple of the left breast. It records nail marks on the neck. It records a swelling on the right side of the face. There is no recording of any injuries in the genital area but then complainant had one month prior given birth to a child and such would probably not be visible.

14. The evidence confirms that the complainant was attacked in her home. There can be no finding that any sexual intercourse which took place as a result of, or in the course thereof, was consensual.

15. Appellant presented a version that he and the complainant had been in a relationship for some ten months and had consensual sex on other occasions, but he did not explicitly state that they had intercourse that evening. However, his version as to their relationship must be rejected. First he does not know her surname; secondly, he knows nothing anything about her baby who was both conceived and birthed whilst he was supposedly in a relationship with her; and thirdly, he suggests that they had sexual intercourse on 3rd April which is a few days after the rape, the injuries and the complaint.

16. I find no misdirection in the magistrate's conviction of rape.

SENTENCE

Grievous Bodily Harm

17. The minimum sentence required to be imposed by Act 101 of 1997 for the offence of rape as contemplated in Part III of Schedule 2 is that of imprisonment of a period of not less than 10 years when the accused is a first offender.

18. However, where the rape involves "the infliction of grievous bodily harm" then the rape falls within Part I of Schedule 2 and a minimum sentence of life imprisonment must be imposed unless the court is satisfied that substantial and compelling circumstances justify the imposition of a lesser sentence of imprisonment.

19. The learned magistrate found in his judgment on conviction that the photographs of the complainant indicate "serious injuries, visible in her face, when she testified on 25 June the injuries was still visible. She will probably have those scars for the rest of her life" (page 33 of the Record) and in his judgment on sentence that the appellant "brutally assaulted her, by biting her in the face, at least three times, once on the breast, by throttling her and we have the photographs taken by the police officer that show the injures. It is shocking, she will have these scars for the rest of her life" (page 37 of the Record).

20. The only evidence before the court on the nature and extent of the injuries is the J88 medical form completed at the Germiston hospital. The bite and nail marks are noted as well as the swelling. The report gives no indication of any medical or surgical intervention. The complainant was not asked about any medical treatment.

21. I do not know (because no one thought to ask) whether or not any of the bite marks required stitching or whether any other treatment was offered. All this appeal court knows is that the magistrate could still see the marks several months later at the time of the trial.

22. I have considered whether or not these injuries and the events as described by complainant constitute "grievous bodily harm" as contemplated within the Act. There is no definition in the Act. But this concept is familiar in the distinction drawn in criminal law between 'common assault' and 'assault with intent to commit grievous bodily harm'. I note that in the legislation under consideration, Act 105 of 1997, it is not intention in relation to the harm but the infliction of the harm which is at issue.

23. In *S v Seatholo and another* 1978 (4) SA 369 TPD, the court referred with approval to that which was said in *S Mbelu* 1966 (1) PH H176 with regard to the meaning of 'grievous bodily harm':

"these are the factors which provide the index to the accused's state of mind. They are, first, the nature of the weapon or instrument used, secondly, the degree of force used by the accused in wielding that instrument or weapon, thirdly, the situation on the body where the assault was directed and, fourthly, the injuries actually sustained by the victim of the assault".

24. Whilst I bear in mind that both these courts were enquiring into intent as opposed to infliction, I note that Goldstone AJ in *Seatholo supra* had regard to the presence of the absence of open wounds, and the absence of medical evidence.

25. In *S v Melrose* 1985 (1) 720 SA ZSC, the court referred to a number of judgments at page 722 where the harm must be "such as seriously to interfere with comfort or health" or "such as seriously to interfere with health", where 'grievous' means no more and no less than "really serious". There was discussion in that judgment about the distinctions between 'comfort' and 'health'. There was discussion as to the distinction between "really serious" and "seriously interfere with health". The court made no finding thereon.

26. In this case, we also need make no finding. There was, as I have already indicated, no medical evidence as to any degree of 'seriousness' or 'harm' or 'health'. There was no evidence as to medical interventions. The comments in *Melrose supra* on the need for prosecutors to "regard it as the rule rather than the exception that the doctor's evidence is necessary" is equally apposite in a case such as this.

27. The injuries which constitute the harm are described as swelling, bite marks and nail marks. They are visible to both the photographer and were visible to the learned magistrate. But we know no more than that. I am loathe, in the absence of evidence to sentence a man to serve a period of life imprisonment where evidence has not been placed before the court to establish 'infliction of grievous bodily harm'.

28. In the result I cannot say that the learned magistrate had before him sufficient evidence, other than his own eyes, to decide that 'grievous bodily harm' had been inflicted. In the result, he could not have found this rape to constitute one which falls within the ambit of Part I of Schedule 2.

Rape in Part III of Schedule 2

29. The appellant is a first offender. A sentence of fifteen years imprisonment is the prescribed minimum sentence.

30. No substantial or compelling circumstances were found by the learned magistrate. Indeed, the record indicates none which would justify imposition of a sentence less than the prescribed minimum.

31. An aggravating factor is that the complainant did sustain injuries as already described. She fought appellant and in the process of forcing her and subduing her, appellant inflicted such injuries upon her. She is clearly a strong woman who was quick witted and took action against this intruder into her home and against her physical integrity. She cannot, in any way, be criticized for such opposition. It is the appellant who chose to inflict these injuries. A further aggravating factor is that appellant forced his way into her home where she, and her baby, should be safe from harm.

32. It is my view that an appropriate sentence which should be imposed on the appellant is one of 16 years imprisonment such sentence to be antedated to the 1st July 2010 which is the date when he was sentenced in the Germiston court.

ORDER

33. In the result an order is made as follows:
    a. The conviction of rape is upheld and the appeal against conviction is dismissed.
    b. The sentence of life imprisonment imposed by the court *a quo* is set aside and the following is substituted therefore:

        "A sentence of 16 (sixteen) years imprisonment is imposed which sentence is antedated to 1st July 2010".

    c. The order that the appellant is unfit to possess a firearm made in terms of section 103 of Act 60 of 2000 is confirmed.

DATED AT JOHANNESBURG 17th MARCH 2016

SATCHWELL J

I agree.

MOKOENA AJ

Counsel for Appellant: Adv Cosyn
Attorneys for Appellant Legal Aid of SA
Counsel for Respondent: Adv Makua
Attorneys for Respondent: Office of the DPP
Dates of hearing: 17th March 2016.
Date of judgment: 17th March 2016.