

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: A957/2013

DATE: 29 OCTOBER 2014

In the matter between:

WISEMAN BHEKI MCAMBI

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

TLHAPI J:

[1] The appellant appeared before the Regional Court sitting at Oberholzer on two counts, of housebreaking with intent to rob and robbery and rape. He was sentenced on 9 November 2012 to imprisonment for periods of 15 and 10 years respectively. The sentences were to run concurrently. He now appeals his convictions and sentences.

[2] Mr I[...] M[...] ('M[...]') testified that his home had been broken into at about 2h00 on the morning of 16 February 2011. The assailants entered his shack and ransacked it. The shack was divided by a curtain into a kitchen and bedroom. One of the assailants who was not before court and accused 3 whom he identified in the dock entered the bedroom where he was sleeping with his wife. The others remained in the kitchen. Accused 3 was clad in a yellow T-shirt and both were in possession of knives. Both demanded money from them and they did not have any. Accused 3 pointed a knife at his wife, instructed her to undress and when they realized that he was looking on they covered him with a blanket.

[3] He was pushed towards the head of the bed and his wife towards the foot. He managed to peep and

could see accused 3 raping his wife, now and then pointing a knife at her while the other assailant pointed a knife at him. The third one ransacked the bedroom looking for money. The assailants fled after the rape. A Logic television set, Disci amplifier, Telefunken DVD player, LG sub-woofer speakers, duvet cover and 25kg of mealie meal were taken. The incident was reported to the police and after making statements at the police station he accompanied his wife to hospital where she was examined and treated.

[4] M[...] assisted in the arrest of the suspects. He was contacted by one Dan about an amplifier brought to him for repairs by someone who had purchased it. M[...] identified the amplifier as his. He summoned the police. Together with Dan and the police they proceeded to the purchaser's house. The purchaser called the appellant to his house to collect the amount that was due for the purchase of the amplifier. Two police officials hid themselves in the house while M[...] and other policemen moved to a different location. The appellant and accused 3 were arrested on their arrival.

[5] Even though it was dark in the bedroom M[...] alleged that he was able to identify accused 3 as the rapist because the two men who entered the bedroom lit their cell phones and accused 3 remained in the bedroom for approximately 30 minutes. He heard the police enquire from the appellant and accused 3 about the amplifier but they remained silent. It was only at the police station where he heard both of them admit that they had been present at the scene of crime and both implicated accused 4 who was later arrested.

During cross examination M[...] testified that at the scene of crime accused 3 wore a blue or green lumber jacket and cap and hand gloves and that he had a beard.

[6] Mr Lebepe ('Lebepe') was a member of the South African Police. He was on patrol duty when he met up with M[...]. He accompanied them to the purchaser's house and he called for police back up. The suspects were arrested on arrival at the purchaser's place. Lebepe testified that he had interviewed the suspects and that in his presence both M[...] and his wife identified the appellant and accused 3 as their assailants. The Appellant and accused 3 took him to accused 4.

[7] According to Lebepe the alleged stolen items were pointed out by the suspects but they denied that they had raped M[...]’s wife. The items which were recorded in the SAP 13 were an amplifier, TV, DVD player. He then took the suspects to the police station where they were charged and detained. Lebepe testified that he had not advised the suspects of their rights or of the consequences of making a statement or an admission or pointing out to the police because it was only when they were charged that such rights had to be explained.

[8] M[...]’s wife, Ms Segonyane testified that after the assailants had entered the bedroom they were instructed to remain on the bed. Accused 3 ordered her to come closer to him, to take off her night clothes and panty and to keep her legs wide apart. He covered her husband with a blanket and threatened to kill him

if he watched. Accused 3 then raped her. After the rape he ordered her to lie in bed with her husband and he covered her with a blanket. After their assailants had left she ran out of the house to her son's place and reported the incident. She was naked at the time. Her son gave her a blanket to cover herself and he summoned the police. She was taken to hospital where she was treated and DNA samples were taken. She was also given treatment to prevent HIV for six months until she was cleared.

[9] She was not present when the appellant and accused 3 were arrested. Her husband and the police fetched her afterwards. They were in the presence of five individuals in a police van. She identified accused 3 whom she said had raped her. She recognized accused 3 by his beard and a scar on his face under the left eye. She saw his face that night because his cell phone light shone into his face when he unzipped his trousers. At the police station the appellant and accused 3 admitted in her presence that they had robbed them. The appellant was known to her husband. Among the items collected by the police she identified her Logic TV and the Telefunken DVD player.

[10] The appellant testified that he had been approached by one Tshepo who wished to borrow money from him. He did not have any and Tshepo did not wish to approach a moneylender. Tshepo was in possession of certain items which he could barter. The appellant discussed the matter with accused 3 who knew somebody who might have an interest in the items. They were four in all who accompanied Tshepo to sell the items, himself, accused 3, 4 and 5. He denied that they were involved in the robbery and rape and alleged that the identification by the victims during his arrest was a mistake. He did not have an alibi for the day on which the incident occurred.

[11] He took the police to accused 4 so that he could show them where the items came from. The DVD player and TV were sold first. The amplifier was not in working order. It was agreed with the purchaser that it had to be repaired first before the purchase price was paid. The appellant corroborated M[...] on how his arrest took place. He further testified that they were assaulted by the police at the house of the purchaser and interrogated on the robbery and rape. The appellant testified that Ms S[...] knew them very well and admitted having given blood samples to the police but he could not explain why his DNA was found on her.

[12] Counsel for the appellant argued that the State had failed to prove its case beyond a reasonable doubt and made the following submissions:

1. that the court *a quo* failed to consider material contradictions in the evidence of the state witnesses, on whether it was a torch or cellphone which provided light in the bedroom.
2. that there was contradiction in the identity by the state witnesses of accused 3 as the rapist and the misdirection by the court *a quo* in relying on the DNA results pointing to the appellant who was

accused 2 at trial.

3. proper procedures were not engaged on identification of the accused and reliance by the court on an identification made in the presence of the police;

4. that the police violated the Constitutional rights of the appellant by failing to explain their rights upon arrest.

5. that there was a misdirection by the trial Court in accepting the DNA results without first enquiring from the defence whether there was objection thereto.

[13] In considering this appeal this court has to assess the findings of the trial court and by doing so, observe the salutary and trite principles stated in *Rex v Dlumayo and Another* 1948 (2) SA 677 (A) at 705 and 706.

Though very brief, the trial court's reasons for conviction appear in the following quote on pages 96 and 97 of the record:

"It is true that the identity of the culprits is at issue, the court is cautious with the evidence, especially if only a cell phone light was used. The fact that they pointed accused 3 as the rapist also indicates that the visibility was not very good, they were indeed correct as far as....or they might have been correct as far as identification is concerned, but certainly not the correct one pointed as the rapist, that makes the court even more cautious. On the other hand accused 2 and 3 admitted knowledge of the items, they even said that they took the items, that is of course not a confession because a confession must equal a plea of guilty, intention and all the other requirements must be admitted. In other words confession means that they must, without mincing matters admit every requirement of the offence.

They were also in possession of these items shortly after the offence, and they were actively involved in the selling, they even played a main role in selling of the items. They even went back to fetch the TV with Tshepo on their own version, and they also accompanied Tshepo on their own version, showing that they were indeed actively involved, they were not only accompanying Tshepo. Again when the buyer called back the sellers both accused 2 and 3 went to the buyer of the items"

[14] Having regard to the evidence as a whole there is no dispute that there was a rape and a housebreaking with intent to rob and robbery that occurred on 16 February 2011. M[...] enlisted the assistance of the police in apprehending the suspects. As I see it, it does not appear from his evidence that he was certain as to the content if any, of appellant's admissions. Constable Lebepe conceded that he was not aware that he had to warn the accused of their rights before engaging in an interview regarding their knowledge of the offence. According to him rights had to be explained at the police station when the accused was being formally

charged. The evidence regarding any admissions made to Lebepe should be disregarded because there was no inquiry by the court into their admissibility.

In his judgment the magistrate chose not to deal properly with the admissions made to Lebepe. In short he rejected that they amounted to a confession. I shall also not deal with this aspect because the conviction of the appellant does not rest upon the appellant's admission of participation in the crime to constable Lebepe.

[15] As I see it, and as testified by M[...] and on appellant's own version he responded to an invite from the purchaser to return to the purchaser's house to collect the amount due on the amplifier. He did so in the absence of Tshepo whom he alleged was the owner of the items. The probability is that the appellant responded to the purchaser's invite because he was one of the sellers of the amplifier, the DVD and TV. It was therefore not necessary to call Dan or the purchaser as witnesses and it was irrelevant to securing a conviction that the rest of the stolen items recovered be specifically identified by the complainants. In his judgment the magistrate took into account the appellant's possession of the amplifier, DVD and TV shortly after the offences were committed.

In my view, the conclusion of the learned magistrate regarding the appellant's conduct regarding the stolen items shortly after the offences were committed cannot be faulted.

[16] It was common cause that the offences were committed on the 16 February 2011 and that there was a positive identification of the appellant from the DNA samples. The question is, should be DNA results be excluded for reasons raised in argument by counsel for the appellant?

In its analysis of the evidence a court looks at the evidence as a whole in determining guilt or innocence. Before close of the state's case the DNA results and other related documents were handed in and it was recorded by the prosecutor that there was no objection by the legal representative of the appellant to the handing in of the forensic evidence including the DNA results. This is further demonstrated by the questions posed to the appellant during his evidence- in- chief, appearing on page 66 of the record:

“after you were arrested blood was drawn for DNA analysis, is that Correct — Yes

And also as I have already indicated and shown you that table, the samples that were taken from you matched the samples that were taken from the complainant or that lady who was raped on that particular night, which means your DNA matches”

There was no reasonable explanation from the appellant as to why his DNA was found on samples taken from Ms Segonyane on the date of the incident. The learned magistrate correctly found that because of

the inadequacy of illumination in the bedroom, M[...] and Ms Segonyane could not have made a positive identification of their assailants. The fact that they identified accused 3 and not the appellant as the rapist is of no consequence in the light of the DNA results. I am therefore satisfied that the conviction was in order.

[17] At commencement of the trial the state amended count 1 by placing on record that it had to be read with reference to the provisions of subsection 52(1) of the Criminal Law Amendment act 105 of 1997. In this instance the prescribed minimum sentence for count 1 is 15 years imprisonment. In the *locus classicus*, the *Malgas* matter, it was stated that the prescribed sentence should not be deviated from for flimsy reasons. It is clear from the record that the trial court did not go into the exercise of determining whether it could deviate or not from the prescribed sentences by establishing whether substantial and compelling circumstances were present or not. The Appellant was single and had a child who was 10 months old at sentencing. He was unemployed and lived with this girlfriend at his father's residence. He was a first offender. The charge sheet reflected that he was arrested on 23 February 2011 and he remained in custody till his conviction and sentence on 9 November 2011. These and other factors together with the triad must be cumulatively taken into account to determine whether substantial and compelling factors are present.

[18] The aggravating circumstances considered by the trial court were that the attack had taken place in the sanctity of the victims' home and that the said home had been broken into at night. The victims were attacked by a group and threatened with weapons.

Other factors to consider are that Ms S[...], who was in her mid- forties, was raped in the presence of her husband who was rendered defenceless because he was covered with a blanket and threatened with a knife. She was probably old enough to be the appellant's mother. After the incident she had to run naked at that time of the night to her son's home. It was argued by his counsel that his youth was not considered. In my view, a 26 year old and especially one who had a child and even co-habited with the mother of such child cannot be regarded as being youthful for the purpose sentencing. Taking all these factors into consideration I do not find substantial and compelling factors to be present.

[19] In the circumstances the following order is given:

The appeal is dismissed.

TLHAPI V.V

(JUDGE OF THE HIGH COURT)

I agree and it is so ordered.

PRELLER F.G

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON : 02 MAY 2014

JUDGMENT RESERVED ON : 02 MAY 2014

ATTORNEYS FOR THE APPELLANT: LEGAL AID SOUTH AFRICA

ATTORNEYS FOR THE RESPONDENT: DIRECTOR OF PUBLIC

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