

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: A559/14**

**DATE: 9 FEBRUARY 2015**

**NOT REPORTABLE**

**NOT OF INTEREST TO OTHER JUDGES**

In the matter between:

**MOEKETSI JACOB MOLOTO**

Appellant

and

**THE STATE**

Respondent

**JUDGMENT**

Tuchten J:

1. The appellant was convicted on one count of housebreaking with intent to rape and rape and sentenced to imprisonment for life. Under s 309B of the Criminal Procedure Act, 51 of 1977, as amended by s 11 of Act 42 of 2013, the appellant has an automatic right of appeal against both his conviction and sentence. The appeal is against both conviction and sentence.
2. The evidence of the plaintiff proved that on 21 February 2010, between 2h00 and 3h00 while she and her brother<sup>1</sup> were in their house in Sebokeng, two men broke into the complainant's house. The complainant was awake and watching television because she was suffering from toothache. The complainant was born on 27 January 1995 and was therefore 15 years old at the time. Her brother was about 21.
3. The complainant woke her brother and the two of them took refuge in the bathroom. The attackers broke

down the bathroom door. They did not find the complainant's brother because he had hidden himself behind a washing machine in the bathroom. The complainant was ordered to undress, which she did. She was raped twice by one of the men and once by the other man. One of the rapists had dreadlocks. He was the first to rape the complainant and took the precaution of covering his face with a piece of drapery he found in the house.. However, the complainant had seen this rapist's face after he entered the bathroom and before he covered his face. The uncontradicted evidence of the complainant was that she was a virgin at the time of the attack. No condoms were used by the attackers.

4. During the first of the rapes, the complainant was forced to hold a tap with one hand and balance herself on the washing machine with the other.

5. The complainant identified the appellant as one of her attackers. She said she knew him well by sight, although she did not know his name, and that she had last seen the appellant at a carwash, when the complainant was in company with a lady, later identified as Ms B[...]. On that occasion, the complainant said, the appellant had remarked that she was grown up and fit and that he would buy her a Coca Cola. After her ordeal, the complainant reported the attack upon her to Ms B[...] and told Ms B[...] that the appellant had been one of her attackers but could not identify the other.

6. The evidence of the complainant was that the scene was illuminated by means of a torch one of the attackers wore on his head. The scene was thus illuminated sufficiently to enable the identification to take place.

7. Despite the ordeal she had been through, the complainant was able to identify the vehicle in which the attackers left as a red Golf. The appellant admitted that he drove a red Golf.

8. Both the complainant's brother and Ms B[...] gave evidence. They corroborated the complainant in all material respects. The complainant's brother independently identified the appellant in court as one of the attackers. The appellant was well known to the complainant's brother. In the brother's statement to the police, he said that he would be able to identify the attacker who had dreadlocks. The statement, made on 29 February 2010, shows that although the brother was hiding behind the washing machine, he could see what was taking place in the bathroom.

9. The fingerprints of the appellant were found at the scene. The appellant formally admitted the contents of two statements by fingerprint experts. These show that the fingerprints of the appellant were found on the refrigerator in the kitchen and on the washing machine in the bathroom.

10. The appellant denied being one of the complainant's attackers. He explained the fingerprints by asserting that he had been in the complainant's house to perform electrical work to fix the refrigerator on 21 January

2010 and that he had been given the work by a person he called Buda. The complainant's mother testified that any electrical work which fell to be done in the house was the responsibility of her elder sister,<sup>2</sup> Jeminah Ramakao, who stayed in the house in question. The complainant's mother resided elsewhere.. Ms Ramakao testified that the appellant had not come to the house to do electrical work, that she had not requested that electrical work be done at the house and that she did not know the person called Buda. Both the complainant and her brother denied that the appellant had ever been in the house to do electrical work.

11. The appellant sought the assistance of the authorities to trace Buda and bring him to court. But after consultation, the appellant's legal representative elected not to call Buda, who was then called as a witness by the court. It emerged that Buda's full name was Simon Moroe and that he was a taxi driver. Moroe denied having instructed the appellant to do any work at the complainant's home.

12. The regional magistrate found that the appellant had indeed been one of the attackers. Implicit in this finding is that the regional magistrate believed the witnesses for the state and Mr Moroe and disbelieved the appellant. There were ample grounds for this finding. The evidence of the complainant and her brother implicating the appellant was convincing. There was strong corroboration for their identification in the fingerprint evidence and the evidence of Mr Moroe denying having sent the appellant to fix the refrigerator in the complainant's home.

13. I think it is decisive against the appellant that his fingerprints were found on the washing machine in the bathroom. The refrigerator was in the kitchen and the washing machine was in the bathroom. The appellant gave no acceptable reason how, on his version, his fingerprints came to be on the washing machine. He said that when he had visited the house to do electrical work, the washing machine was in the passage and that his fingerprints may have come onto the washing machine when he passed by it in the passage. This version was never put to any of the three state witnesses who lived in the house and there is no suggestion from their evidence that the washing machine had been in the passage at the time in question. The appellant's version in this regard was clearly an afterthought, made up in an effort to explain away the evidence against him.

14. Against the version of the appellant is the evidence of the complainant that during one of the acts of rape she was forced to hold onto the washing machine. This version places the appellant near the washing machine. It is probable that while the complainant was being violated as she held onto the washing machine, the attacker's hand would have touched the washing machine.

15. I find further corroboration for the complainant's identification in her evidence that when the appellant saw the complainant at the carwash, the appellant made a remark that implied that he considered her old and desirable enough to be the object of his sexual attentions, that one of the attackers had dreadlocks (as did the appellant) and that the attackers drove off in a red Golf (the kind of vehicle driven by the appellant).

16. The evidence of the appellant denying being one of the attackers could therefore not be reasonably possibly true and fell to be rejected. The purpose of the attackers in breaking into the complainant's house was proved to be to rape the complainant. Nothing was taken from the house and the attackers broke open the bathroom door to get to the complainant. After they had raped her, they left.

17. The appellant was one of two gang rapists who raped this young girl. It is dreadful that her first experience of sexual intercourse should have taken place in these circumstances. She was violated in her own home, by two men who broke open a door to get at her. The attack displayed utter contempt for the complainant as a human being.

18. The appellant was warned that he faced a life sentence under the minimum sentence regime. He showed no remorse. The appellant was HIV positive when he raped the complainant and took no precautions to prevent this life threatening virus from infecting the complainant.

19. At the time of the offence, the appellant was some 33 years old, in a relationship and supporting himself, his children and family by doing jobs as a mechanic and electrician.

20. On these facts the regional magistrate found no substantial and compelling circumstances to justify a sentence other than the minimum prescribed, ie life imprisonment. I fully agree with this finding. Indeed, I would go further. If, unconstrained by the minimum sentence regime, I had been required to sentence the appellant, I would have sent the appellant to prison for life. Although this was not one of the worst rapes, it is sufficiently abhorrent to justify the most severe sentence our law permits.

21. I make the following order: The appeal against conviction and sentence is dismissed and the conviction and sentence are confirmed.

NB Tuchten

Judge of the High Court

9 February 2015

I agree.

EM Kubushi

Judge of the High Court

9 February 2015

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<sup>1</sup> More correctly, her cousin.

<sup>2</sup> Referred to by the complainant as her grandmother.