REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: **A97/2015**

1/2/2016

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED

SOLOMONVUSI MPOTLE — **FIRST APPELLANT**

THULANE THOMAS NHLAPO — **SECOND APPELLANT**

AND

THE STATE — **RESPONDENT**

JUDGMENT'

THOBANE AJ,

[1] This appeal, which is brought against the conviction only, is with leave of the court below. The charges that the appellants faced in the Regional Magistrate held at Sebokeng, were as follows;

1.1. Kidnapping,

1.2. Rape, (read with the provisions of 51(1) of Act 105 of 1997), and,

1.3. Robbery with aggravating circumstances (read with the provisions of 51(2) of Act 105 of 1997).

[2] The appellants, who enjoyed legal representation during the trial proceedings, pleaded not guilty to all the charges. They admitted intercourse with the complainant but averred that it was consensual. Nevertheless, they were found guilty of kidnapping and rape and in respect of the robbery with aggravating circumstances charge, they were discharged in terms of section 174 of the Criminal Procedure Act. The two convictions attracted an effective term of imprisonment of 20 years.

[3] The salient facts that gave rise to the appellants' conviction are that in the early hours of the 14th September 2013 the complainant and the appellants were at a tavern known as Transkei, in Evaton. I pause to indicate that when the appeal was launched the appellants' legal representative had only been acting as counsel on behalf of the first appellant. At the hearing hereof leave was applied for and granted, that counsel move the appeal on behalf of both appellants.

[4] The complainant L. P. testified that as the tavern was closing and everyone leaving in the early hours of the 14th September 2013, he was grabbed by both appellants and led away. He was later pulled inside a dark shack. While inside he was undressed and made to lie on his stomach on the floor. The first appellant placed a condom on his penis while the second appellant held his hands and closed his mouth. He tried to alert them to the fact that they were causing him injury. Such an alert went unanswered. The first appellant then penetrated the complainant's anus with his penis. He thereafter penetrated the complainant's mouth. The complainant pleaded that he should not insert it, in his mouth, with a condom, whereupon first appellant removed the condom and penetrated the complainant in his mouth, without a condom. By this time the second

appellant had also penetrated the complainant in his anus with his penis. When he finished, the complainant indicated that he wanted to urinate. His thinking, so he testified, being that if allowed to go outside he would run away. He was however given a bucket and made to urinate in it. The second appellant indicated that he wanted to leave and proceeded to do so leaving the door slightly open. The complainant, was approached by the first appellant with his trouser around his knees demanding to have more sex with him. He ceased the opportunity and ran out into the yard and eventually onto the street.

[5] While walking on the street he heard footsteps and before he could establish where they were coming from, he was hit on the head and he fell to the ground. While on the ground he was assaulted and robbed of his cellphone as well as his wallet which had R640-00 inside. The robber who had covered his head and wore a hat, ran away. The complainant was unable to identify him. He lay on the road for a while because it was difficult to stand due to the injuries inflicted on him. Eventually he got up and left. On the way he met a person he believed had robbed him earlier and proceeded to ask him about the items robbed from him. This person disappeared. The complainant proceeded to the first appellant's home where on arrival he confronted him about those items. The first appellant chased him with a "knobkierie". He ran and knocked at the door of the main house where three people appeared, words were uttered in his direction and the door was shut in his face. He proceeded to a friend's place, L, to whom he reported the rape.

[6] He was later examined at the Vereeniging Kopanong Hospital. The photo album as well as the J88 Medical Report were admitted into evidence by consent without any objection from the defence. L M, the first report witness, was called to testify and she confirmed that the complainant reported to her that he had been raped, assaulted and robbed.

[7] Solomon Vusi Mpotle, first appellant, testified that from the tavern, the complainant is the one who offered to go with them. They were headed to a night vigil and the complainant indicated that he was going there as well. They together went to the night vigil and on arrival found that there were no people. They decided to go and sleep and the complainant again said he was leaving with them. On the way they were singing

songs. On reaching the first appellant's home, he opened the door and the three of them went in. All three of them then exited to go urinate behind the house. On returning into the room the complainant said to them they were young and that they could not do anything to him, he said so while moving towards the bed. The first appellant prepared a sponge for them to sleep on the floor and the complainant then proceeded to take off his pants. He called the first appellant to have sex with him. The first appellant took out a condom and inserted it on his penis and proceed to penetrate the complainant in his anus at which point the complainant called upon the second appellant to join in but instructed him to take off the condom. The complainant was penetrated anally as well as in his mouth at the same time. After ejaculating the first appellant withdrew his penis and lay next to the complainant who then told the second appellant that it was his turn. The second appellant inserted a condom on his penis and then penetrated the complainant in his anus. When he finished he left the complainant and the first appellant in the room. The complainant left the room momentarily to go and urinate behind the house but came back into the room again. He thereafter left as well.

[8] Thulani Thomas Nhlapho testified that when the tavern shut for the evening, the complainant offered to accompany them. They all went to the place where there was to be a night vigil but eventually ended inside the first appellant's room. The complainant alone went outside momentarily to go urinate leaving the appellants in the room. On his return he indicated that the appellants were young and that they can not do anything to him. He proceeded to undress and went to the sponge which had been prepared on the floor. He was joined by the first appellant who put on a condom and thereafter penetrated the complainant in his anus with his penis. The second appellant was instructed to join in so that the complainant can give him a "blow job". He had put on a condom but was told to take it off. The complainant then proceeded to perform oral sex on him at the same time as the first appellant had penetrated him in his anus. When the first appellant was done, he also put on a condom and penetrated the complainant in his anus and had sexual intercourse with him. When he was done he left.

[10] The magistrate found that the complainant was a good witness and that his evidence was honest and reliable. He rejected the defence of consent of the appellants as not being reasonably possibly true and in fact found that it was false beyond a reasonable doubt. He found that the complainant had been kidnapped and that he was

raped more than once by both appellants and convicted the appellants as aforesaid.

[11] Counsel for the appellants is taking issue with the following on appeal; firstly, that the magistrate misdirected himself when he made certain comments about what happens in places like New York and that as a result he allowed his personal views, about sex to cloud his judgment. Secondly, that the report witness did not corroborate the rape and further that the magistrate committed an irregularity in not allowing the report witness to give details of what she was told by the complainant. Thirdly, that the evidence of the complainant as a single witness was not approached with caution. Fourthly, that the magistrate failed have regard to certain improbabilities and inconsistencies in the complainant's testimony. Finally, that the magistrate erred in rejecting the contention that the complainant had a motive to falsely implicate the appellants. In this regard, it was submitted that complainant made the rape allegations against appellants because he had been robbed.

[12] It is trite that a criminal trial is not a game. The presiding officer's position is not merely that of an umpire to see that the rules of the game are observed by both sides. The presiding officer is the administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done. See ***R v Hepworth 1928 AD 265 at 277.*** When a presiding officer falters in this role, failure of justice may result.

[13] The role that the presiding officer plays in a criminal trial, *inter alia,* is to give meaning to the right to a fair trial as enshrined in the constitution. In ***S v Zuma and Others 1995 (1) SACR 568 (CC) at para 16,*** Kentridge AJ said:

> *"The right to a fair trial conferred by that provision (section 25(3) of the Interim Constitution) is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces* a *concept of substantive fairness which is not to be equated with what might have passed muster in our criminal Courts before the Constitution came into force* ..." *In* ***S v Rudman and Another*** **;** ***S v Mthwana 1992 (1) SA 343 (A)*** *the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of* a *Court of criminal appeal in South Africa was to enquire: "Whether there has been an irregularity*

or illegality, that is a *departure from the formalities, rules and principles of procedure according to which our law requires* a *criminal trial to be initiated or conducted." A Court of Appeal, it was said (at 377) "does not enquire whether the trial was fair in accordance with 'notions of basic fairness and justice', or with the 'ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration.'. That was an authoritative statement of the law before 27 April 1994. Since that date section 25(3) has required criminal trials to be conducted in accordance with those 'notions of basic fairness and justice'. It is now for all Courts hearing criminal trials or criminal appeals to give content to those notions."*

[14] The first ground of appeal, to the effect that there was a misdirection as to the nature of the alleged sexual activity, has four legs to it. Namely, the magistrate's conservative views which he expressed when he granted leave to appeal the conviction; his failure to consider evidence to the effect that the complainant requested the first appellant to remove the condom before oral sex; his view that it was improbable to have consensual sex as testified to by the appellants and finally his view about what happens in places like New York, in relation to the rape.

[15] The record reflects that the magistrate in his judgment granting leave to appeal said the following;

"There are a *lot of developments in our country, as* a *first year student I never thought that one day in this country there will be somebody,* a *man who is convicted for raping another man. As* a *student of law I never thought that one day* a *man will be convicted for raping another man.*

Even Justice M'dam in the Constitutional Court passed a judgment allowing this for the first time in this country, I thought she was being academic Justice M'dam of the Constitutional Court. I had a *similar case of anus to the mouth, which was set aside by the High Court.*

…..

So, I do not want to confine myself in this matter to my conservative views. That the applicants perhaps may have the benefit of some liberal views".

[16] The record further reflects that the magistrate when delivering judgment said the

following:

> *"it is improbable that he could have consented to mouth andanus sex at the same time. Even to prostitutes you will be insulting them to say,* a *prostitute one man is penetrating the man and the other one is penetrating the vagina at the same time.*
>
> *Even in centers where these things are practiced in New York where you have got* a *big building gays are there, prostitutes are in another building. You do not take two gays to one man. You do not take two men to one prostitute at the same time".*

[17] It was argued before us on behalf of the appellants, that the comments by the magistrate point to a misdirection on his part. Counsel for the respondent states that the record does not point to any misdirection when the statements are viewed in context. It must be mentioned from the onset that the comments by the magistrate were unnecessary. The context is however crucial. When the magistrate commented as aforesaid, during leave to appeal proceedings, he was highlighting the fact that it is current law that a man can be raped by another man. He also highlighted that he had one of his judgments set aside by the High Court. He did not give details of such judgment save to say it was a case of *"anus to the mouth".* Lastly, he indicated that he had conservative views and that perhaps a liberal approach, before another court may yield a different outcome.

[18] I am of the view that the comments alluded to were not proper. However, they did not impact on the fairness of the trial nor did they vitiate the trial. The testimony of the complainant is that the first appellant penetrated him anally while second appellant held his hands. When he was done penetrating him, he then proceeded to hold his hands and also inserted his penis, which he had withdrawn from the anus and which was still covered in a condom, into the mouth of the complainant, at which point the complainant asked him to remove the condom. This request by the complainant, it is argued on behalf of the appellants, is indicative of consent. I disagree. I do not find it to be unreasonable nor is it indicative of consent if the complainant requests that the condom that had just penetrated his anus and had been withdrawn therefrom, be removed before oral sex is performed.

[19] The second line of attack against the conviction is premised on the submission that there was no corroboration of the rape by the report witness. The argument before us is that in not allowing the report witness to testify in detail, the magistrate committed an irregularity. The record reflects this exchange, on which reliance is placed in making the aforementioned submission;

> …….
> *PROSECUTOR: Did he tell you in detail how he was raped?*
> *COURT: No, that will waste our time. The rape has been reported that is all that is required.*

The exchange, it is contended by appellants, evidences an irregularity in that had the report witness not been cut short, further discrepancies may have been uncovered. The latter contention is obviously speculative. The principle as enunciated in S *v* ***DE VILLIERS AND ANOTHER 1999 (1) SACR 297 (OPD)*** is that a complainant in a sexual case ought to make her complaint at the first opportunity that it could reasonably be expected of her to do so.

[20] */n casu,* the complainant testified that he did not, in reporting to the first report witness, disclose details of the rape, robbery and assault. He simply reported that he was raped and assaulted. The magistrate intervened when the prosecutor asked the report witness *"did he tell you in detail how he was raped".* I therefore do not share the same view that in not allowing details to be disclosed, which details the complainant testified were never disclosed, constitutes an irregularity. I am satisfied that the magistrate correctly disallowed the question. I agree with the submission by appellants' counsel that her testimony was of limited evidential value, however, it is sufficient for purposes of reporting at the first available opportunity, that the rape occurred. In this regard, I am of the view that there is such sufficient corroboration.

[21] The testimony of the complainant is to the effect that after the robbery on the street, he proceeded to the first appellant's home to confront him. He was however chased with a "knobkierie" and he went to knock on the door of the the main house. His evidence is further that three people emerged from the house after knocking on the door. They uttered some words and shut the door. The appellants contend that the rape

ought to have been reported then. The complainant, on his version, had just been raped in these premises from which he ran away. He had also just been robbed of his cellphone and wallet in the street. Finally, he had just been chased with a "knobkierrie" by the first appellant in the same premises. I do not find it odd that the complainant failed to report the incident to the first appellant's parents, in these circumstances, who seemed totally unperturbed and therefore unconcerned at what was taking place in their yard. I hold the view that it wasn't opportune to report the rape in these circumstances, and therefore that the complainant can not be faulted.

[22] The complainant was a single witness as to the kidnapping and the rape. For this reason his evidence ought to have been approached with a measure of caution. The purpose of the cautionary rule, as stated by ***DT Zeffert in The South African Law of Evidence 2nd ed at p961,*** is to assist the court in deciding whether or not guilt has been proved beyond reasonable doubt. Appellants contend that the trial court failed to approach the evidence of the complainant with the requisite caution.

[23] The court a *quo's* judgment and reasons therefor constitute the best tool to make a determination as to whether caution was indeed applied. In ***S v AVON BOTTLE STORE (PTY) LTD AND OTHERS 1963 (2) SA 389 (A)*** it was stated that the best indication that there was proper appreciation of the risks is naturally to be found in the reasons furnished by the trial court. The trial court must demonstrate that the warning was heeded and that the dangers of a wrongful conviction occupied its mind in the analysis of evidence. See also ***R v MANDA 1951 (3) SA 158 (AD).***

[24] From the record it is clear that in relation to the rape and the kidnapping, the evidence of the complainant in my view is clear and satisfactory in all material respects. The cautionary rule requires that the court having warned itself of the danger inherent in the acceptance of such evidence, it must look for some safeguards like corroboration in order to reduce the risk of a wrong conviction. *In casu* the magistrate examined the finding by the doctor who completed the J88 Medical Report to the effect that there were tears in the anal area, as well as the evidence of the complainant to the effect that owing to the nonconsensual anal penetration, his anus was not relaxed enough as to avert injuries. The contention that the injuries could have been caused by the robbery falls to be rejected. The complainant did not testify that he was assaulted during the

rape. His evidence was to the effect that he was held very tightly. The record does not reflect that this resulted in injury. The magistrate, in a further endeavour to be cautious, looked for corroboration in the testimony of the report witness. In this regard he made reference to **S *v NAUDE 2005 (2) SACR 218 (WLD) at page 221 J.*** I am satisfied that the magistrate was alive to the fact that caution was called for and in my view did in fact approach the evidence of the complainant with the requisite caution.

[25] The trial court also considered the probabilities of both the State's evidence and the defence's evidence. **S *v SINGH 1975 (1) SA 227 NPD at 228.*** It rejected as false the defence of consent which was raised by appellants and also rejected the evidence of the appellants as being not reasonably possibly true. Such an exercise would have entailed the examination of both versions. The complainant testified that on entering the first appellant's room he was made to lie on his stomach on the floor. He never went out of the room until after the rape when he escaped. Even when he wanted to urinate, he was made to do so in a bucket. The first appellant's version is that on entering the room all three went outside momentarily to urinate, before returning and engaging in consensual sexual intercourse. The second appellant's version is that the complainant went alone outside to urinate then came back. Further, the complainant testified that the first appellant penetrated him anally and thereafter he penetrated his mouth and that second appellant proceeded to penetrate him anally. The version of both appellants is to the effect that after first appellant had penetrated the complainant anally, the complainant called second appellant to perform oral intercourse. The trial court in the end rejected the versions of both appellants. It was, in my view, entitled to do so, on the basis of the strong evidence of the complainant that the prosecution had placed before court and also in considering the conspectus, the contradictory nature of the appellants' version.

[26] I am of the view that the trial court correctly convicted the appellants on both counts.

[27] I would therefore propose the following order;

27.1. The appeal is dismissed.

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SA THOBANE

ACTING JUDGE OF THE HIGH COURT

I agree and It Is so ordered

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M J TEFFO

JUDGE OF THE HIGH COURT

APPEARANCES

For Appellant: DJ.A. Botha
Instructed by: Pretoria Justice Center

For Respondent: L.A. More
Instructed by: Director of Public Prosecutions, Pretoria