IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – GRAHAMSTOWN)

Case No.: CA&R 131/2010
Date heard: 13 October 2010
Date delivered: 17 December 2010

In the matter between:

SONWABO MTATSI Appellant

and

THE STATE Respondent

Summary
– appeal against conviction of rape and assault with intent to grievous bodily harm – whether discrepancies in the complainant's version necessarily warrant rejection of his/her evidence.
– Appeal against sentence – whether sentence induces a sense of shock – whether the provisions of the Criminal Law Amendment Act 105 of 1997 were applicable.
– The test is whether the evidence proved the guilt of the appellant despite the discrepancies.
– No basis for interference with the sentences imposed.

J U D G M E N T

DAMBUZA, J:

1]The appellant was convicted in the Regional Court, Port Elizabeth of rape and assault with intent to do grievous bodily harm. He was then sentenced to 18 years imprisonment in respect of the rape and 2 years imprisonment in respect of the assault with intent to do grievous bodily harm. He now appeals, with leave of the court *a quo,* against both the conviction and the sentence.

2]It was common cause before the court *a quo* that on the night of the incident, immediately prior to the incident unfolding, the appellant and complainant, then 15 years old, had been at a shebeen together with her friends. The appellant was at the same shebeen, in the company of one Vusumzi Sikhosana who was accused no. 2 before the court *a quo* on the same charges as the appellant but was discharged at the end of the state case.

3]The complainant's version in the court *a quo* was that, whilst at the shebeen, she was called by the appellant who offered her a drink. She refused the offer. Shortly thereafter, she went to an outside toilet located about 10 metres from the shebeen main house. As she came out of the toilet, the appellant and accused no. 2 were standing next to the toilet. The appellant grabbed the complainant and, with the assistance of accused no. 2, gagged and dragged her to a shack at the home of accused no. 2, threatening to stab her with a knife should she dare raise alarm. At some stage accused no. 2 tried, in vain, to discourage the appellant from dragging the complainant away from the shebeen.

4]At the home of accused no. 2 the appellant then raped the complainant. Thereafter he instructed accused no. 2 to do the same. Accused no. 2 obliged, albeit reluctantly. The appellant raped the complainant once more. Thereafter the appellant left the shack. Accused no. 2, who had remained behind, offered to accompany the complainant home, but, as they were leaving, the appellant reappeared. The complainant ran to a nearby house but

the appellant chased her into the house and told the occupant that the complainant was his girlfriend. The complainant however, eventually managed to break away from the appellant after pretending that she had to relieve herself. It is at this stage that the appellant stabbed her on the head. The complainant however managed to run to a house in the vicinity where her aunt lived. This is the version that was accepted by the magistrate and on which the appellant was convicted of the rape and assault with intent to do grievous bodily harm.

5]The appellant on the other hand maintained that there was a secret love relationship between the complainant and himself and that the complainant was falsely accusing him of the rape because her “real boyfriend” had unexpectedly met them on their way from the home of accused no. 2 where they had just had consensual sex. His version was that it was, in fact the complainant’s boyfriend who had stabbed the complainant.

6]In rejecting the appellant’s version the magistrate referred to contradictions between the evidence of the appellant and that of accused no. 2 who, having been discharged from prosecution at the end of the state case, testified on behalf of the appellant. Accused no. 2 testified that the appellant indeed had a knife on him on the night in question whilst the appellant denied that he was in possession of a knife. Part of the appellant’s version was that prior to him and the complainant leaving the tavern the complainant had become unruly and threw a tantrum on observing the appellant giving money to another lady at the shebeen. Accused no. 2 testified that he had not seen the complainant

conducting herself as described by the appellant even though he had been in the appellant's company when the incident was alleged to have happened. I agree that these contradictions are material and that in this regard the evidence of accused no. 2 supports the complainant's version rather than that of the appellant. Further the temper tantrum and overt display of jealousy described by the appellant is, in my view, irreconcilable with the clandestine nature of the love relationship between the two.

7]Contrary to the submission on appeal by *Ms McCallum* I agree with the finding by the magistrate that the following aspects of the evidence are supportive of the complainant's version that she was forced into submitting to sexual intercourse with the appellant: the state of distress in which the complainant was when she arrived at her aunt's house; the fact that despite the appellant's version that the complainant was hopelessly drunk that he had had to support or carry her, the medical report revealed no clinical evidence of intake of drugs or alcohol on the complainant and the fact that the complaint, having been that drunk, suddenly found the strength to break away from the appellant on two occasions and eventually ran to her aunt's house. Additional to this is the fact that the condom which the appellant had used when having sexual intercourse with the complainant was found in the complainant's private parts when the complainant was later examined by the doctor at the hospital. The evidence was the appellant was examined by the doctor within five hours of the incident.

8]According to the appellant, the complainant was so drunk that at the home

of accused no. 2 she passed out and slept on the ground, outside the shack, with her underwear half way down. It is improbable in my view that, immediately thereafter she would have consensual sex with she appellant and be the one to alert the appellant who had fallen asleep after having sex, that accused no. 2 was knocking at the door as the appellant testified.

9]It was further submitted on behalf of the appellant that the magistrate erred in finding that the contradictions in the evidence of the complainant were immaterial. In this regard the complainant had testified that the appellant raped her twice. It appears from the record that during cross-examination she testified that the appellant had raped her twice at first and then two times later and that accused no. 2 had raped her a further four times. The difficulty with this issue is that, apart from the fact that the complainant was, as evident from the record, very emotional during the trial, the record of the cross-examination of the complainant appears to be the magistrate's own notes rather than a transcript of the mechanical recording.[1] The following appears on the record in this regard:

> "You were raped by accused No. 1 only? --- Both.
> Why No.2 if he did not like that? --- Was forced by accused no.1.
> How many times were you raped? --- I did not commit. 2 also, although initially did not want, also raped me a total of 8 rounds (i.e.) 4/4).
> Did No. 1 use condom? --- Yes, also No.2.
> No.1 was also having is knife? --- Yes – with one hand – open.
> On all 4 occasions accused No.2 was forced (by No.1) to have sex with you? --- Yes.
> You told (in chief) that accused had sex once, No.1 once? --- (No reply

1 Correspondence between the magistrate and the appellant's legal representatives reveals that the record or a portion thereof was reconstructed.

entered).

No. 1 was forcing accused No.2 all the times? --- Yes – drew a knife and said if accused No.2 talks nonsense, will kill both of us."

10]The magistrate accepted that the evidence proved two instances of rape by the appellant. As a court of appeal, we are entitled to interfere with this finding only if we are satisfied that the magistrate was wrong or misdirected himself in reaching the conclusion that he did.[2] I can find no basis warranting interference with the magistrate's factual findings.

11]The magistrate also considered the apparent discrepancy in the complainant's evidence as to whether it was both the appellant and accused no. 2 that dragged her as she exited the toilet or only the appellant who did so. The complainant had at first testified that both the appellant and accused no. 2 grabbed her as she exited the toilet; but during cross-examination, she testified that only the appellant did so and that they only met accused no. 2 on the way to his home. The magistrate acknowledged the discrepancy but found it to be immaterial and be no proper basis for rejection of the complainant's version of the incident. In any event, the evidence by the both the complainant and the appellant was that accused no. 2 was present when the complainant was dragged from the shebeen premises to his home.

12]The magistrate also considered the fact that the complainant exaggerated her injuries. In this regard the complainant's evidence was that the appellant

2 In the absence of demonstrable and material misdirection, there is a general presumption that the trial court's finding of fact are correct and will only be disregarded if the recorded evidence shows that them to be clearly wrong. See ***Hadebe and Others*** **1997 (2) SACR 641 (SCA)**

had stabbed her above the eye, on the head and on the hip. The medico legal report revealed an open wound only to the complainant's head. Again the magistrate found, and I agree, that this inconsistency did not justify rejection of the complainant's evidence as false. He referred, amongst others, to ***S v Msiwa*** 2001 (1) SACR 413 and ***S v M*** 2006 (1) SACR 135 (SCA) in which it was held that the totality of the evidence must be measured by assessing whether, in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides, the balance weighs so heavily in favour of the state that any reasonable doubt about the guilt of the accused is excluded. I cannot find that the magistrate erred in finding that no reasonable doubt existed as to the guilt of the appellant existed in this case.

13]Regarding sentence, the magistrate applied the provisions of the so called minimum sentencing legislation and found that substantial and compelling circumstances in the case rendered the imposition of the prescribed minimum sentence in respect of the rape conviction, unjustified. It was submitted, on behalf of the appellant, that the sentences imposed still induces a sense of shock, particularly in view of the four years spent by the appellant in custody whilst awaiting sentence and the fact that the complainant did not suffer injuries that could be regarded as serious. As I have stated the only injuries recorded in the medico-legal report was a 2cm laceration on the head which was treated with sutures and tenderness and restricted movement of the left hip which resulted in the complainant walking with a limp.

14]The appellant had four previous convictions; three for theft during 1997,

1998 and 1999 respectively in respect of which sentences ranging from a postponed sentence, 12 months imprisonment and a fine of R450,00 and one for abuse of a dependence producing substance (dagga) in 2000 for which he was fined R50,00 or 5 days imprisonment. He was 25 years old when he committed the offences in question, was single and had no dependants.

15]During argument *Ms McCallum* submitted that at the time of the commission of the offences the jurisdiction of the magistrate was limited to 10 years imprisonment. I do not agree. Section 53 A of the Criminal Law Amendment Act 105 of 1997 provides that :

> "If a regional court has, prior to the date of the commencement of the Criminal Law (Sentencing) Amendment Act, 2007—
>
> *a)* committed an accused for sentence by a High Court under this Act, the High Court must dispose of the matter as if the Criminal Law (Sentencing) Amendment Act, 2007, had not been passed; or
>
> *b)* not committed an accused for sentence by a High Court under this Act, then the regional court must dispose of the matter in terms of this Act, as amended by the Criminal Law (Sentencing) Amendment Act, 2007."

16]The Act commenced on 31 December 2007. The appellant, as it appears from the record, was sentenced on 13 December 1007 (the offences having been committed on 8 June 2002). The magistrate therefore did not misdirect himself in applying, as he did, the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997.

17]I am satisfied that the magistrate properly weighed the aggravating and mitigating factors in the case; it appears from the record that the time spent by

the appellant in custody whilst awaiting trial weighed heavily with the magistrate as a mitigating factor, but he also considered as serious aggravating factors the brazen conduct of the appellant. Regarding the assault, the magistrate considered this an aggravating factor, the fact that the appellant stabbed the complainant, subsequent to the rape, to prevent her from escaping. On the established principles regarding the approach to be used by courts on appeal against sentence, I do not agree that the sentences imposed induce a sense of shock or that they are so excessive as to justify interference by this court on appeal.

18]I would therefore order that:

> The appeal be dismissed and the conviction and sentences be confirmed.

_____
N. DAMBUZA
JUDGE OF THE HIGH COURT

CHETTY, J:

I agree. It is so ordered.

_____

D. CHETTY
JUDGE OF THE HIGH COURT

Appearances:

For the appellant: Adv H McCullum of Grahamstown Justice Centre

For the respondent: Adv M September of Director of Public Prosecutions, Grahamstown