

**IN THE HIGH COURT, BLOEMFONTEIN**  
**FREE STATE DIVISION, BLOEMFONTEIN**

Appeal No.: A43/2014

In the appeal between:

**THUSO VICTOR POLORIE**

Appellant

and

**THE STATE**

Respondent

---

**CORAM:**

JORDAAN, J *et* MBHELE, AJ

---

**JUDGEMENT:**

MBHELE, AJ

---

**HEARD ON:**

4 MAY 2015

---

**DELIVERED ON:**

4 JUNE 2015

---

[1] On 27 January 2014 the Appellant, who was legally represented, appeared before the Regional Court Welkom, and was convicted of rape and assault with intent to do grievous bodily harm. He was, thereupon, sentenced to 10 years and 4 years direct imprisonment on the respective charges which sentences were ordered to run concurrently.

[2] He feels aggrieved by both the convictions and sentence and now approaches this court on appeal against the same after leave to appeal was granted by the trial court.

- [3] On convicting the Appellant, the trial court effectively rejected the Appellant's version as not reasonably and possibly true. The court below, further accepted the identification evidence of the complainant with the circumstances surrounding the events of that night. The trial court, furthermore, accepted the medical evidence that confirmed that the complainant was assaulted and that sexual intercourse did take place on the complainant.
- [4] Upon imposing the sentences, the court below found that there are substantial and compelling circumstances to justify a departure from the life sentence prescribed by Act 105 of 1997 (the minimum sentences Act 105 of 1997) for rape of a minor and ten years minimum sentence for assault with intent to do grievous bodily harm.
- [5] In the notice of appeal and the heads of argument as well as submissions before us the Appellant assails the convictions on the grounds that the complainant was a single witness and the court *a quo* erred by not approaching her evidence with caution. Ms Kruger, appearing for the Appellant, further, submits that the trial court erred by not rejecting the evidence of the complainant and her cousin which was marred with serious contradictions. It is, furthermore, contended on behalf of the Appellant that the fact that the complainant waited a considerable time to report the matter, affected her credibility and reliability.

- [6] The State supports both the convictions and the sentences according to Mr Mohlala, who contends that the complainant's evidence was satisfactory in all material respects and that she did not contradict herself in any manner. It is, further, submitted for the State that the reason the complainant did not immediately inform her mother about the rape, was because she was still young and afraid to tell her mother that she was at a tavern when she was assaulted and raped, a place not suitable for children her age.
- [7] The factual dispute between the parties which had to be determined by the trial court was effectively whether or not the Appellant was the one who assaulted the complainant and had sexual intercourse with her on the night in question. The State's version, as presented by the complainant, was that the latter who was 14 years old at the time of the incident was at the tavern in company of her cousin, drinking alcohol. The Appellant was also a patron at the tavern on the night of the incident. At some stage, on the said night, she went outside to answer a phone call from her father. On her way outside she met with the appellant who later called her and told her to come and see something. The Appellant pulled her by her hand to the back of the tavern where he instructed her to undress and when she enquired as to why she must undress, he pulled her belt from the pants she was wearing.

She fought back and scratched the Appellant on the chest, he then hit her with a fist on the eye and she fell to the ground. While on the ground the Appellant put his feet on her head and pressed her down on the same eye that he hit. The Appellant then undressed her and penetrated her vagina with his penis. After he had finished

raping her he left leaving her weak and unable to walk. As she was crawling, three unknown girls came to her assistance and took her home. When she got home her mother noticed an injury on her eye and asked her who did that to her and she said it was the Appellant. Her mother examined her genitals and called the police. She went to the Police Station in the morning and reported that she was assaulted and raped by the Appellant.

- [8] K. E. M., who is the complainant's cousin, testified to the effect that she saw the Appellant pulling the complainant while they were at the tavern. She mentioned that the complainant was crying and tried to pull her away from the Appellant and the latter kicked her. She left both the Appellant and the complainant at the tavern and went home. She confirms that they consumed alcohol. She denies that the reason the complainant went outside was because she had to answer a phone call but that the security officer at the tavern noticed that they were minors and chased them away.
- [9] M. M. T., the complainant's mother confirms that the complainant's eye was swollen. She further testified that she was bleeding from her mouth and that she noticed sperms on her thighs when examining her. The complainant only told her in the morning that she was raped by the Appellant.
- [10] The Appellant denies ever having had sexual intercourse with the complainant. He confirms that on the date in question he was at the tavern and saw the complainant. He told the complainant he liked her to which she responded in the affirmative. They thereafter

kissed. He had plans to leave with the complainant later, so they could spend the night at his place.

[11] Mrs Kruger contends that the contradictions between the evidence of the complainant and that of her cousin are so material that the complainant's evidence must be rejected.

[12] It is however clear from the evidence that the complainant and her cousin corroborated each other on material aspects. She observed the Appellant assaulting the complainant.

[13] It is also not disputed that the complainant sustained injuries on her left eye, mouth and her buttocks. It is, further, not disputed that sexual intercourse occurred on the complainant that night.

[14] It is trite that the Appeal Court will not interfere with the factual findings of the trial court unless they are shown to be wrong. The trial court's acceptance of oral evidence of witnesses and its findings thereon are presumed to be correct in the absence of misdirections on its part. (See **S v Hadebe and Others** 1997 (2) SACR 641 (SCA) and **S v Francis** 1991 (1) SACR (A at 204 (-R)).

[15] There is nothing before us to show that the trial court misdirected herself in her factual findings, evaluation of oral evidence and acceptance thereof.

[16] Although the complainant did not at the first available opportunity tell her mother that she was raped, she did tell her that the

appellant is the one who inflicted the visible injuries she sustained, immediately when she got home. The Appellant just denied the allegations. The trial court was correct in rejecting the Appellant's version as false.

- [17] The Appellant feels that there was unlawful splitting of charges or duplication of convictions. It was argued on behalf of the Appellant that assault is a means to the end result in a rape offence. It is my view that assault with intent to cause grievous bodily harm is a distinct offence with its own elements, different from the elements of rape. Evidence necessary to prove the charge of assault with intent to do grievous bodily harm does not necessarily prove the elements of rape.
- [18] It was not necessary for the Appellant to assault the complainant in order for him to subject her to rape. I am of the view that the convictions on the two charges are not unjust. (See **S v Whitehead and Others** 2008 (1) SACR 431 (SCA).
- [19] Sentencing is pre-eminently in the discretion of the trial court. The sentences can only be interfered with if the sentencing court exercised its discretion unreasonably or in circumstances where sentences are adversely disproportionate. (See **S v Pieters** 1987 (3) SA 717 (A) at 727.)

[20] The trial court, when sentencing the appellant found that there were compelling and substantial circumstances to justify a deviation from the sentences as prescribed by the law. When weighing up the mitigating factors against the aggravating circumstances in this matter, as well as the interests of the community, I am not persuaded that the sentences imposed in this matter are unjust.

### **ORDER**

[21] Wherefore I make the following order:

1. The appeal fails on both count 1 and 2 and the convictions and sentences are confirmed.

---

**N. M. MBHELE, AJ**

I concur

---

**A. F. JORDAAN, J**

On behalf of the appellant: Ms. S. Kruger  
Instructed by:  
Legal Aid South Africa  
BLOEMFONTEIN Justice Centre

On behalf of the respondent: Adv. M. A. Mohlala  
Instructed by:  
Director: Public Prosecutions  
BLOEMFONTEIN