IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED.

CASE NUMBER: A752/2016

20/10/2017

In the matter between:

NKULULEKO NOMANDLA **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

TLHAPI J

INTRODUCTION

[1] The appellant appeared before the Regional Magistrate at Oberholzer. He was found guilty and sentenced in the following manner:

1. Robbery with aggravating circumstances read with section 51(2) of

Act 105 of 1997 . He was sentenced to 20 years imprisonment ;

2. Kidnapping ; he was sentenced to 3 years imprisonment ;
3. Rape read with section 51(1) of Act 105 and further read with the relevant sections in the Sexual Offences Act 23 of 2007 as mentioned in the charge. He was sentenced to life imprisonment.

[2] The appellant was represented during the trial. He has automatic right of appeal in terms of Act 43 of 2013, and the amended sections 309(i) and 309B(i) of the Criminal Procedure Act 51 of 1977.

BACKGROUND

[3] The facts are common cause and a brief account is given. On 25 January 2014 , the complainants Ms M and Mr Mangai "Mojalefa" were in the company of their running group and, had intended to participate in a race in Pretoria the following day 26 January 2014. The group had to board their transport near the Khutsong Police Station at about 24h00 . When their transport failed to arrive , at 4h00 the complainants decided to return to their homes on foot. They were attacked by two men near a stadium . One of their attackers was in possession of a firearm which was first pointed at Mojalefa. He was robbed of his cell phone. Mojalefa fled the scene leaving Ms M in the company of the two men. She too was later searched and nothing was found. She was taken to some houses nearby. Both men held her by her arms while one was pointing a firearm at her. She testified that the two men took turns in raping her. When she was later attended to by the police; she informed them that she could described her attackers . The police advised her that she would later have to come and identify them. The version of the second accused was put to her that he was coerced by appellant throughout the incident and she disputed such version .

[4] Mr Mlhongo was a police officer who was given information by an informer, which then led to the arrest of the appellant. He testified that he found the appellant in possession of a firearm on arrest on 11 February 2014. The appellant informed him that one Gift Molefe (second accused) was involved. He arrested the appellant and a few days later, he arrested the second accused. The appellant was not present during such arrest. Mr Mhlongo caused photographs to

be taken of both men and he presented them to a clinic to have swabs taken for DNA profiling. He testified that he knew the appellant from previous encounters, and he pointed him out in court as accused 1, who was wearing a white shirt. He also had knowledge that the appellant used to wear a dreadlock hairstyle, but that on his arrest the dreadlocks were removed. He did not arrange for an identification parade because both complainants had informed him thatthey could not identify their assailants.

[5] The appellant denied participating in the attack on the complainants. He explained that he was at his home and that he had knowledge of the incident which he gained from the second accused. He testified that he was in the company of the second accused and others, at a tavern sitting around and drinking beer. They normally had discussions in these groups about what they had done over the weekend. It was during these discussions where the second accused related the incident to them, that he had raped a girl. The second accused did not divulge who was in his company when the incident took place.

[6] The appellant testified further, that he was arrested on 01February 2014 at Masara tavern and after being placed in the police bakkie, a search of the tavern was conducted and he was informed that a firearm was found in a toilet. He denied being in possession thereof. He was taken to a holding cell and was made to sign some documents without his rights being explained. He further denied having informed his attorney during a court appearance that DNA was not necessary because his defence was that of consensual sexual intercourse. This was apparently recorded before plea. He also denied the version of the second accused that was put to him during cross examination.

[7] The second accused testified that he was not friends with the appellant. On the day of the incident they were both at the same tavern drinking liquor and in the company of others. They also smoked dagga. When he left the tavern the appellant joined him. They met the complainants on the way and the appellant, who was in possession of a firearm, coerced him to take part in the robbery and the rape.

[8] The grounds of appeal are the following:

1. The learned magistrate erred in failing to apply the cautionary rule to identification;
2. He neglected to approach the evidence of the appellant's co-accused with the required caution;
3. The learned magistrate ignored various irregularities in the presentation of the State's case;
4. He rejected the version of the appellant;

THE LAW

[9] It was trite that the State bears the onus to prove the accused's guilt beyond a reasonable doubt. An accused person on the other hand bears no onus to prove his innocence. If his version is reasonably possibly true, he is entitled to an acquittal. When a trial court considers the versions of both the state and the defence , it looks to the strengths, the weakness , the probabilities and the improbabilities and the court must satisfy itself that the balance weighs heavily in favour of the state, so as to exclude any reasonable doubt of an accused person's guilt: S *v Chabalala* 2003 (1) SACR 134(SCA) at 139J -140A.

[10] It is further trite that a court of appeal has limited powers to interfere with the findings of fact of a trial court and in S *v Francis* 1991 (1) SACR 198j - 199a the following was stated

> *" an appeal court would only interfere where it was convinced that on adequate grounds, that the trial court was wrong in accepting the evidence ...* a *reasonable doubt will not suffice to justify interference with its finding. Bearing in mind the advantage which the trial court has of seeing, hearing and appraising* a *witness, it* is *only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony "*

[11] It is my view, that in this matter it must be determined that the state proved beyond a reasonable doubt firstly, the identification of the appellant and secondly, that his defence of an *alibi* and his version could not be reasonably possibly true. The guidelines which are not in themselves exhaustive were stated in *S v Mthetwa* 1972 (3) SA 766 (A) at 768 A-C :

> *"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors , such as lighting, visibility and eyesight; the proximity of the witness; his opportunity for observation; both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of identification parades if any; and of course, the evidence by or on behalf of the accused. The list is not exhaustive . The factors or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence; and the probabilities."*

[12] Both complainants did not know the accused on the date of the incident. Ms M testified that she had moved to Khutsong from Ysterfontein three months before the incident. The area where the incident took place had a street light and was about 60 metres from the tarred road. During the trial the appellant was referred to as accused 1. She described her assailants in the following manner

> Examination in chief: Ms M
>
> Page 10 and 11
>
> *" one was slender and chub and dark in complexion and had dreadlocks .....the tall one with dreadlocks was wearing blue jeans and black jacket* "

"the other one was dark, not tall, not short....was wearing blue jeans with a *blue T-shirt and a white cap"*

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Now I just want to be clear when you say accused 1 who are you speaking about - the real accused number 1 in the white shirt Accused 2?
- Accused 2

Who of the two was pointing Mojalefa with a firearm- Accused 1

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Now outside the toilet when this thing was happening to you how was the lighting- it was bright;
What was making it bright - there is a street light

So *tell* me *what could you actually see, when you look at a person,.. .let us start with accused 1 when you looked at him what could you* see *- I do not understand your question*
Could you see his facial features, for example could you tell he had blue eyes, could you see *his clothes"" - I* saw *his face and the clothes he was wearing... Accused 1 was wearing blue pair of jeans, black jacket and white All Stars*

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What else - he was not wearing anything on the head

Yes his hair? What type of hairstyle did he have - I do not remember

You slipped, she said something - she did and then she *retreated again and said I do not remember*
Court: was he the one with dreads or not - well if I remember well accused

1 did not have the dreadlocks, but Moja/efa, I know that he had dreadlocks.

I want you to tell us what you saw, do not tell us what Mojalefa told you. The description that you gave earlier is it something that you saw, or is it what you were told by Mojalefa - it is what I heard from Mojalefa
When did he tell you what the guys looked like - The day we gave our statements to the police
Court: Just to put it a little different, are you, from your own experience, are you able to properly, or w re you able to properly see them and observe them, see how they look like, the men - yes your worship, but the description that the court knew that of accused 2
Why accused 2 what made you observe him, because when I was lying down at the place where they have raped me, he was *standing at the light.*
If someone can come and say *that you are making* a *mistake, these two accused are not the people who kidnapped you, and raped you on the day in question - I would say it was them because the firearm they had on that day, they were arrested with the firearm;*
Now if they are not arrested with a *firearm, how are you sure it was them -*

Accused number 2 I am *sure of,*

Accused number 1 - Also him, it is him

[13] It is also evident from the evidence of Mojalefa that he did not have sufficient opportunity to see his assailant although there was light provided by the Appello lights. He conceded this fact because after he was robbed he fled the scene. Contrary to the evidence of Ms M he testified that their assailants approached from behind. Furthermore, that the appellant pointed him with a firearm, that he had dreadlocks and was wearing a black lumbar jacket and accused a brown lumbar jacket. In cross examination he contradicted himself and testified that the second accused was wearing a black lumbar jacket.

[14] Mr Mhlongo arrested the appellant about 15 days after the incident and he testified that the appellant did not have a dreadlock hairstyle. The second

accused was adamant that the appellant did not have dreadlocks on the day of the incident. It is my view that since there was confusion regarding this distinguishing feature of the appellant, it would have been appropriate to hold an identification parade. It should also be borne in mind that the dreadlocks was just a hairstyle which could be removed. If if indeed the appellant was one of the assailants then it was incumbent upon the State to prove the appellant's presence at the scene beyond a reasonable doubt.

[15] The investigating officer testified that he did not hold an identification parade because the witnesses told him that they could not identify their assailants. It appears that he took over the investigation after statements had been obtained from the complainants which gave the descriptions of the perpetrators. It was argued for the respondent that the investigating officer should not be faulted for failing to hold one. I do not agree, because an identification parade is an important investigative tool in establishing with certainty the identity of the perpetrators. Even though the appellant was excluded by DNA profiling, which only linked the second accused, the reliability of the appellant's identity was an important factor, in that, it would have assisted the court to reject his *alibi* defence. Ms M was certain about her identification of accused 2, even though this constituted a dock identification, at that stage. S *v Tandwa* 2008
(1) SACR 613 (SCA) at 617 b-d stated:

> *"Generally* a *dock identification carries little weight, unless it is shown to be sourced in an independent identification preceeding."*

A dock identification in certain instances cannot be discounted altogether i.e. unless it does not stand alone: *Mlungisi Mdlongwa v State* (SCA) unreported judgment case 99/10. In this instance the dock identification of the second accused does not stand alone.

[16] In S *v Charzen and Another* 2006 (2) SACR 143 (SCA) the description of dreadlocks as an identification feature also arose and the following is stated;

Para [11]

"... as *our courts have emphasized again and again, in matters of identification, honesty and sincerity and subjective assurance are simply not enough. There must in addition be certainty beyond a reasonable doubt that the identification* is *reliable, and it* is *generally recognized in this regard that evidence of identification based upon a witness's recollection of a person 's appearance can be dangerously unreliable and must be approached with caution."*

Para [13]

"... *.for dreadlocks (a Rastafarian hairstyle..) are eminently removable ; and indeed* a *criminal may deliberately remove them to try to mask his identity"*

Para [14]

"... *.facial characteristics are a more reliable and enduring source of identification than variable features such* as *hairstyle or clothing.*

[17] What now remains is to consider the evidence of the appellant and that of his co- accused . The argument between them regarding the second accused 's girlfriend is one that was engaged in the prison cells after arrest. It was not part of the conversation between the "boys" at the tavern, from which the appellant testified that he gained knowledge from the second accused of his participation in the attack on the complainants. The question is, is it possible that the appellant would have gained information of the crime from the second accused at the tavern? I am of the view that it is. Having regard to the evidence as a whole, it is my view that the State failed to prove the guilt of the appellant beyond

reasonable doubt. I recommend that the appeal must succeed.

[18] In the result the following order is given:

1. The appeal on conviction and sentence is upheld.

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TLHAPI VV

(JUDGE OF THE HIGH COURT)

I agree ,

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CRUTCHFIELD A

(ACTING JUDGE OF THE HIGH COURT)

MATTER HEARD ON	**:**	**16 OCTOBER 2017**
JUDGMENT RESERVED ON	**:**	**16 OCTOBER 2017**
ATTORNEYS FOR THE APPELLANT	**:**	**PRETORIA JUSTICE CENTRE**
ATTORNEYSFORTHERESPONDENT	**:**	**THE DIRECTOR OF PUBLIC PROSECUTIONS**