THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

In the matter:

Case No:633/09

No precedential significance

PETRUS THEMBA DAMGAZELA **First Appellant**
ISAAC LINGELILE MKHEHLANE **Second Appellant**

and

THE STATE **Respondent**

Neutral citation: ***Damgazela v The State*** **(633/09) [2010] ZASCA 69 (26 May 2010).**

Coram: Nugent, Heher, Shongwe JJA, Majiedt et Seriti AJJA

Heard: **18 May 2010**

Delivered: **26 May 2010**

Summary: Conviction on rape – identification evidence credible and reliable – approach to be adopted where oral evidence is at variance with statement restated – cautionary approach to single witness – sentence – 18 years' imprisonment not excessive.

ORDER

On appeal from: Free State High Court, Bloemfontein (Rampai, Kruger JJ and van Rooyen AJ sitting as court of appeal).

1. The first appellant's appeal against conviction and sentence is dismissed. The second appellant's appeal against conviction, so far as it might be properly before this court, and his appeal against sentence, are dismissed.

JUDGMENT

MAJIEDT AJA (Nugent, Heher, Shongwe JJA and Seriti AJA concurring)

[1] The appellants were convicted of rape after a trial in the Regional Court. The matter was referred for sentencing to the Free State High Court, Bloemfontein in terms of s 51(1)(b)(i) of the Criminal Procedure Amendment Act 105 of 1997. The regional magistrate was requested by Van der Merwe J to furnished additional reasons for convicting the first appellant. When those additional reasons had been furnished the matter was placed before Milton AJ who was satisfied that both appellants had been correctly convicted and they were each sentenced to imprisonment for 18 years.

[2] The first appellant applied to the learned judge for leave to appeal against both his conviction and sentence. The second appellant applied for leave to appeal only against sentence. Milton AJ granted both applications, with leave being granted to the Full Court.

[3] The appeals came before Kruger and Rampai JJ and Van Rooyen AJ. A majority (Kruger and Rampai JJ) dismissed 'the appeal of both appellants in respect of conviction and sentence'. (Van Rooyen AJ was of the view that the

first appellant was wrongly convicted but concurred with the majority so far as the sentences were concerned.) So far as the order of the majority purported to dismiss an appeal by the second appellant against conviction clearly that was an inadvertent error because no such appeal was before it.

[4] Both appellants then applied to this court for special leave to appeal, in each case against both conviction and sentence. In truth the application by the second respondent for leave to appeal against conviction was irregular because no such appeal had been before the Full Court. Both applications were nonetheless granted. Although leave to appeal against conviction ought not to have been granted to the second appellant by this court, I have nonetheless considered whether the second appellant was correctly convicted. For the reasons that follow the convictions of both appellants are unassailable.

[5] The State adduced the evidence of the complainant and her boyfriend, Mr Chrisjan Khuduga (Khuduga). Their version in broad terms was that at approximately 20h30 on the evening in question, they were making their way from a shop towards their home. Khuduga was then struck by a stone behind his head. The stone had been thrown from behind by the first appellant. Khuduga left the complainant's company and moved off in a direction back towards the shop from where they had come, ostensibly to seek help from his friends at the shop. In venturing back, Khuduga had to walk past the first appellant. According to the complainant while Khuduga was away the first appellant and another man, whom she later identified as the second appellant, forcibly dragged her off to a nearby informal settlement where they took turns to have sexual intercourse with her without her consent, behind a shack. Upon Khuduga's return later, the two appellants fled the scene. Khuduga was unable to recognise the fleeing attackers, due to the poor visibility. The appellants' identification as the alleged rapists rests solely on the testimony adduced by the complainant.

[6] Both appellants testified and advanced a diametrically opposite version to that of Khuduga and the complainant. According to this version the second appellant had met the complainant (whom he did not know previously) in a tavern on the evening in question. The second appellant bought her some drinks and he

'proposed love' to her, which she immediately accepted. They were joined later by the first appellant who, at the second appellant's invitation, also joined them in drinking at the tavern. Khuduga arrived and took exception with the first appellant entertaining his girlfriend (the complainant) there. It was pointed out to Khuduga that the complainant was in fact in the second appellant's company, but Khuduga persisted with his confrontation with first appellant, and the altercation became violent. Khuduga left the tavern, unhappy with the state of affairs there.
The first appellant also left and at the complainant's suggestion, the second appellant and the complainant left for the second appellant's parental home where they slept for the rest of the night. They had consensual sexual intercourse once during the course of the night. Both appellants were arrested the following day by the police who were accompanied by Khuduga.

[7] The common cause facts are as follows:
(a) The two appellants were at some stage in each other's presence that evening where an altercation occurred between first appellant and Khuduga.
(b) It was dark outside with poor visibility and the only source of illumination was a light at the shop, some distance away from the informal settlement.
(c) Second appellant had sexual intercourse with the complainant that evening.
(d) Second appellant has a nickname, 'Madice'.
(e) The first appellant lives in the same area as Khuduga and the complainant.
(f) The appellants were arrested by the police the following day after Khuduga had pointed them out. At that time the complainant was being examined in Welkom by a doctor.

[8] The appellants' primary attack against their conviction was directed at the first appellant's identification by the complainant, the differences between the complainant's oral evidence and her witness statement as well as the differences between the versions of Khuduga and the complainant. The regional magistrate was alive to all these pitfalls and found that the complainant, as a single witness to the actual alleged rape, was sufficiently credible and reliable. The regional magistrate found Khuduga to be a very good witness and rejected the appellants'

version as false beyond reasonable doubt, mainly because of the improbabilities contained therein.

[9] Counsel for the appellants was driven to concede in the course of his argument that the first appellant was known to the complainant and Khuduga. The fact that an identification witness knows an accused provides a significant safeguard against a mistaken identification.[1] As far as the second appellant is concerned, identification is not in issue, because his defence amounts to consensual sexual intercourse. While the illumination was admittedly quite poor at this scene and while events must have happened quite fast, I am satisfied beyond reasonable doubt that the complainant's identification is reliable.[2] A further safeguard against mistaken identification is provided by the fact that it became common cause that the appellants were in each other's company at some stage during the course of that evening (although of course, the place where and the circumstances under which they were together are in issue). There is no plausible explanation as to why Khuduga should the very next day point out the first appellant who coincidentally happened to have been in the company of the second appellant at some stage the previous evening – the very same person who on the common cause facts had sexual intercourse with the complainant that previous evening (the consent to such intercourse is of course in issue).

[10] The discrepancies between the complainant's oral evidence and her witness statement were subjected to fierce criticism by the appellants' counsel. But those inconsistencies relate mostly to her description of the clothing which the appellants wore. This issue becomes moot where the first appellant was known to the complainant (and to Khuduga) and where the second appellant admits intercourse with the complainant, as discussed in the previous paragraph. In any event this case is a classic illustration of the rationale underlying the caution expressed by Olivier JA in *S v Mafaladiso & others*[3] against the summary

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[1] *R v Dladla and others* 1962 (1) SA 307 (A) at 310B-E; *S v Zitha* 1993 (1) SACR 718(A) at 721d-e.
[2] Cf *S v Charzen* 2006 (2) SACR 143 (SCA) para 11; *S v Mavinini* 2009 (1) SACR 523 (SCA) para 21 and 22.
[3] 2003 (1) SACR 583 (SCA) at 594 a-c ([2002] 4 All SA 74 (SCA) at 83).

rejection of a witness' contradictory evidence vis-a-vis the witness' police statement, without a careful evaluation of underlying factors, such as language and culture differences between the witness and the author of the statement and the fact that a witness is seldom required to explain his or her statement. In this instance the complainant made her statement in English, although according to her, she spoke to the police officer in Afrikaans and Sesotho. The statement was read back to her by the police officer in Sesotho, a language which she testified she did not know very well. The police officer in turn, informed the complainant that he does not understand Afrikaans, which the complainant testified is her home language. When reading her evidence on the record, it is plain that she is an unsophisticated person of a modest educational level. In these circumstances the contradictions between her oral evidence and her statement are mitigated by the obvious language difficulties outlined above.

[11] The isolated incidences of contradictions within the complainant's own evidence and between her and Khuduga are not material, concerning matters such as the first appellant's clothing, what was said on the scene and whether the police were contacted that same evening or the next morning. The proper approach to such contradictions is well-established.[4] The contradictions, of which there are but a few, are of the type which suggest absence of fabrication rather than unreliability.

[12] The trial court was faced with two mutually destructive versions of the events on the night in question. One of them must be false. In such circumstances, apart from considering the credibility and reliability of the witnesses, it was justified in assessing the probabilities of the two versions and to reach a finding as to which one is true and which one is not.[5] It could, of course, only dismiss the defence version as false in the event that it reached that conclusion beyond reasonable doubt. And it had to do so after giving consideration to the evidence before it as a whole.[6]

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[4] *S v Mkohle* 1990 (1) SACR 95(A) at 98f-g; *S v Mafaladiso & others* at 83.
[5] *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie and others* 2003 (1) SA 11 (SCA) at para 5; *S v Saban* 1992 (1) SACR 199(A) at 203i-204b.
[6] *S v Trainor* 2003 (1) SACR 35 (SCA) para 9; *S v Mbuli* 2003 (1) SACR 97 (SCA) para 57.

[13] The regional magistrate correctly found the complainant to be satisfactory in all material respects as a single witness in respect of the rape. She is corroborated in some respects by Khuduga, whom the regional magistrate found to be a very good witness, a finding which was not attacked with any modicum of vigour before us. He testified that, upon his arrival at the scene of the alleged rape, he found the complainant in a frightened and tearful state, with her skirt full of dust and drawn down as far as her knees and with her panties missing. And it became common cause, as I have said, that at least the second appellant had sexual intercourse with her that night (whether it had been consensual or not was in issue).

[14] The regional magistrate correctly, in my view, rejected the defence version as false beyond reasonable doubt by reason, inter alia, of the following glaring improbabilities:

(a) That the complainant, who was some 8 years older than the second appellant, would at their very first encounter immediately agree to have intimate relations with him.

(b) That Khuduga, having been informed that the complainant was with the second appellant at the tavern, would nonetheless continue with his altercation with the first appellant.

(c) That Khuduga would meekly depart the scene without confronting the second appellant and leave his girlfriend, the complainant, there particularly after his violent confrontation with the first appellant concerning the very complainant.

[15] On a proper conspectus of all the evidence, the regional magistrate cannot be faulted in her finding and the majority below was correct in upholding both appellants' convictions.

[16] No misdirections on sentence were relied upon on appeal by the appellants. Their appeal is restricted to a contention that it is shockingly excessive. Pre-sentence reports concerning the appellants' personal circumstances were handed in at the trial. Both appellants were first offenders, had left school prematurely and they were aged 18 and 19 years respectively at the time of the incident. They had both spent 20 months in custody awaiting trial.

Aggravating features are the gravity of the offence and the prevalence thereof, the appellants' lack of remorse and the fact that there appears to be a degree of premeditation involved in the commission of the offence.
Appellate interference in respect of sentence on the striking disparity criterion is only competent in instances where the appellate court has formed a definite view as to the sentence it would have imposed and where the degree of disparity between that sentence and the one imposed by the sentencing court is so striking that interference on appeal is warranted.[7] The sentence in the present matter does not meet that criterion. I do not find it shockingly excessive at all.

[17] In the result, the first appellant's appeal against conviction and sentence is dismissed. The second appellant's appeal against conviction, so far as it might properly be before this court, and his appeal against sentence, are dismissed.

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S A MAJIEDT
ACTING JUDGE OF APPEAL

[7] *S v Pieters* 1987 (3) SA 717(A) at 734F-I; *S v Matlala* 2003 (1) SACR 80 (SCA) at para 10.

APPEARANCES:

For appellant:	N L SKIBI
	Instructed by: Legal Aid South Africa, Bloemfontein.
For respondent:	S GIORGI
	Instructed by: Director Public Prosecutions, Bloemfontein.