IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A317/2010
DATE: 27 AUGUST 2010

In the matter between:

KHAYALETHU HENDRICKS Appellant

and

THE STATE Respondent

JUDGMENT

BLIGNAULT. J:

Appellant was convicted on 30 October 2009 in the regional court at Parow on three charges. The first charge is that he raped M B per anum on 1 March 2009 to 2 March 2009. The second charge reads identical to the first charge. The third charge is that he assaulted the same person, M B by hitting him with a knife. He was convicted of common assault on this charge.

Appellant was sentenced to 17 years imprisonment on the first two charges taken together. On the third charge he was sentenced to six months imprisonment to run concurrently with the 17 years imposed in respect of the first two charges.

Appellant pleaded not guilty to all the charges. He was not legal represented.

At the outset, the State applied to allow the complainant, that is M B (Mzumo), to testify in a separate room through an intermediary. This application was allowed. Mtestified that he was 17 years old when he gave evidence and was born 21 September 1992. He was staying with his uncle and his family in Langa. On 1 March 2009, he was walking towards Zone 2 to look for a friend. It was about eight to nine in the evening. Then he saw a man, which he said was called Jerry. He later confirmed that this man was the appellant. He had seen appellant previously walking in the street.

He, Mzumo, wore a jacket, T-shirt, pants and underwear. Appellant was alone. Appellant then asked him to buy loose cigarettes for him. He returned with the cigarettes to appellant's house. He knew where he lived, because his niece was a friend of appellant's cousin. Appellant opened the door and asked him to come in. Then he closed the doors and
locked them. Appellant told him, and these were his words,that he had a sentence, did he want a banana or blood. It appears that at first Mdid not understand what he was referring to. But then appellant took out handcuffs and put them on his one hand. Later he took the handcuffs off and took a knife. He hit Mwith a knife on top of his head five times. Appellant then asked him to undress himself. Mtook all his clothes off. Appellant was also undressing himself. Appellant told him not to look at him.

Appellant then switched off the light, climbed into the bed and told Mto lie on his stomach. Then he put his penis in him, that is Mzumo's anus, and made

movements. Appellant asked him why was he "holding himself". Appellant then put the lights on and took the knife. At this stage it would appear that he was no longer penetrating him. He said that if Mheld himself again, he would stab him. Then he switched the lights off again and proceeded to put his penis in his anus again. He took a long time, then stood up, switched on the light and opened the door.

He, Mzumo, tried to get out, but appellant held his hand and said that he must stay inside so that he can get dressed. He dressed himself and appellant said that if he told anyone, he would kill him. Then he, Mzumo, left and went home. He was dressed, except for his underpants, which were in his hands.

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At home he told his uncle, Salomzi, what had happened. This was about one o'clock in the morning. Then his aunt, Pamela, woke up and they went to the police station. They took him to a doctor, who examined him. Later that night he took the police to appellant's house. Appellant was not there, but the police found the handcuffs in his house.

Dr Paul Alexander Theron, a district surgeon, testified that he examined the complainant after the incident. He saw him at a quarter past ten in the morning of 2 March 2009. He found that the back area of his scalp was painful, but there were no lesions. In the perianal and anal area, he found two lesions externally, which had been caused by blunt trauma. They were tears of the perianal skin. Then he examined his rectum and found that it was very painful. He concluded that rape per anum was probable.

Mr Salomzi Bacela testified that the complainant, Mzumo, is his sister's child. Mstays with him in Langa. On the day in question Mcame to his house. Mwas shocked. He had his underpants in his hand. Masked him whether he knew the man called Jerry. He did not. Mthen told him what had happened between him and the man called Jerry. Mgave him a detailed account of the incident. That account, I may say, tallied with Mzumo's version of the

incident in his own evidence about it. Salomzi said that he did not know appellant, but that Mtold him that his other son was a friend of one of appellant's family members. Salomzi said that the went to the police station with Mzumo. Mlater took the police to appellant's house, but he was not at home.

Appellant testified that he was at Monwabisi's house on Sunday 1 March 2009 at about seven o'clock in the evening. They played dominos, watched DVD's and played music. Before eight o'clock in the evening, Monwabisi said that he had seen Mady going into his shack. After a while he, that is appellant, went to see Mady. Mady was with his girlfriend named Maasi. Appellant sat down next to him and they chatted. At some stage they went to Bonteheuwel and back. They sat at Mady's place all night long. Monwabisi joined them at some stage. On Sunday 1 March 2009 he said he was not at home at all. Or, the Friday thereafter he was at Monwabisi's place where he was told there was a rumour that he had assaulted Mzumo. He went to Mzumo's house and explained to a woman, whom he took to be Mzumo's mother, that he did not assault Mzumo, as he had not been at his home on that Sunday. The police then arrived and arrested him.

Appellant called Monwabisi Williams to give evidence. He

stayed in Langa and he knew appellant. Appellant was at his place when he was arrested on Friday 6 March. He was asked whether he knew where appellant was on Sunday 1 March. He said that appellant came to his place, then went home and came to his place again. Then appellant when to their friend, David's place.

The magistrate gave a full judgment. He summarised the evidence and then evaluated the witnesses. M, he said, made a good impression as a witness. He came across as honest and credible. His evidence was confirmed by the fact that he reported the incident to Salomzi immediately after it happened and that he took the police to appellant's house. Appellant on the other hand was found not to be a good witness. Monwabisi, he found, contradicted appellant's evidence that he, appellant, had never been at his own house on the day in question. In the light of all the evidence, the magistrate said, he found that the State had proved that appellant raped Mtwice and that he assaulted him. The magistrate accordingly convicted appellant on all three charges, but on the third charge he convicted him of common assault.

Appellant has a number of previous convictions for theft and robbery. The last of these was a charge or robbery on which

he was sentenced on 23 March 2001 to 12 months imprisonment. Appellant testified for purposes of sentence. He said that his father had passed away

and that his mother was an elderly person. He was born on 23 June 1968. He lived with a female partner and he had three children aged 12 years, nine years and 18 months. His mother was looking after them. He had already spent eight months in custody. The Court obtained a victim impact report prepared by Ms Caron Majevsk. Her principal findings are:

> "From the above it is clear that the victim, M B was negatively affected by the crime. The victim has suffered several physical and psychological effects. Mappears to suffer from a flashback when required to think and recall detail of the incident. These flashbacks can induce feelings of intense anxiety and fear. It seems to appear as if Mis suppressing his feelings in an effort to protect himself from the full impact of the trauma. This is of grave concern, since these feelings, if not dealt with, can be manifested in acting out and rebellious behaviour which appear to be happening now both at home

The Court also obtained a probation officer's report in respect of the appellant. The probation officer dealt fully with the personal circumstances of the appellant. The evidence placed before the presiding officer for sentence was summarised in appellant's counsel's heads of argument. In addition to what I have already mentioned, she pointed out that appellant resided in a shack on his mother's property, who is a pensioner and she is 80 years old. It also appeared, I may mention, from the probation officer's report that appellant was in fact not the father of the three children as he had suggested. It also appeared that he had a scholastic achievement of Standard 5 and that he had been in custody for approximately eight months before sentenced.

The magistrate approached the sentencing of appellant on the basis that the prescribed minimum sentence for the first two charges was life imprisonment as he had been convicted on two counts of rape. He found, however, that there were material and compelling circumstances justifying a lesser sentence and he sentenced him to 17 years imprisonment on both counts taken together. On the third charge he convicted him to six months imprisonment to run concurrently with the 17 years imprisonment on counts 1 and 2. The magistrate granted appellant leave to appeal against his conviction and sentence.

It is trite law that a court of appeal will not likely interfere with a lower court's credibility and factual findings. See S v Francis 1991(1) SACR 198 (A) at 204E-F:

> "Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial court's evaluation of oral testimony."

I have considered the magistrate's judgment and appellant's arguments carefully, but I am not persuaded that he erred in the credibility and factual findings made by him. I do think, however, that the magistrate erred in convicting appellant on two counts of rape. Although there was, according to the evidence, two separate acts of penetration, they appear to me to have been committed in the course of one single rape. It appears that the only

reason for appellant's temporary withdrawal was to threaten Mwith a knife so that he would adopt a more relaxed posture. Appellant proceeded immediately thereafter with the second act of penetration. In this regard I refer to the reported case of S v Blaauw 1999(2) SACR 295 (W) at 300a-d.

Appellant should, therefore, have been convicted on one count of rape only. This means effectively that his conviction on the second count must be set aside. Being convicted only on one count of rape, means that the sentence of 17 years imprisonment requires to be adjusted. The prescribed minimum sentence for rape is ten years imprisonment. I have considered the circumstances carefully, but I am not persuaded that a lesser or more severe sentence should be imposed. There is in my view no need to interfere with the sentence of six months imprisonment on the third charge, save to make it clear that this sentence will now run concurrently with the sentence of ten years imprisonment imposed on the first charge.

The appeal against appellant's convictions is accordingly upheld in part. Appellant's conviction on the second count of rape is set aside, but his conviction on the first count of rape and the third count of assault are confirmed. The appeal against sentence is also upheld in part. A sentence of ten years imprisonment is imposed in respect of the first count of rape. The sentence of six months imprisonment on the count of assault is confirmed, but it is ordered that such sentence will run concurrently with the sentence of ten years imprisonment on the first count. Both sentences are antedated to 23 December 2009, being the date on which appellant was sentenced in the magistrate's court.

BLIGNAUT, J

BOTHA, AJ: I agree

BOTHA, AJ