IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A227/10

In the matter between:

H. JAMES

Appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED ON 22 OCTOBER 2010

HENNEY, AJ:

[1] The Appellant was arraigned in the Regional Court sitting at Mossel Bay on 12 August 2008 on the following charges:

1) Housebreaking with the intent to rob and robbery;
2) Rape;
3) Kidnapping;
4) Robbery with aggravating circumstances;
5) Attempted murder.

On 14 August 2009 he was convicted on the 1st, 2nd and 5th charges and acquitted on charges 3 and 4.

On the housebreaking with the intent to rob and robbery and attempted to murder charges, he was sentenced to 4 years imprisonment after the two charges were taken together for the purpose of sentence.

The Appellant was sentenced to 20 years imprisonment on the rape charge. It was ordered that the sentence of 4 years in respect of the housebreaking with intent to rob and robbery and attempted murder run concurrently with the sentence of 20 years imposed on the rape charge.

[2] The Appellant now appeals against his convictions and sentences after successfully petitioning this Court.

[3] The Appellant's main ground of appeal on the convictions is that the court *a quo* had misdirected itself in accepting the evidence of the complainant, a single witness without reservation. In amplification of that, the appellant avers that,

i) the evidence of the complainant was unreliable;

ii) she did not have a good recollection of the events on the night in question and;

iii) there was a material discrepancy between her viva voce evidence in court and the statement she made to the police shortly after the incident.

[4] A further ground of appeal was that the DNA evidence does not implicate the accused in the commission of the rape.

[5] In respect of the attempted murder charge, the appellant submits that the Court *a quo* misdirected itself in finding the appellant guilty of attempted murder based on the doctrine of common purpose.

On sentence, the Appellant submits that the effective sentence of 20 years imprisonment induces a sense of shock and the trial magistrate failed to exercise his discretion properly.

[6] The State's principal witness in this matter is the complainant, (an adult female), 7 other witnesses also testified in the State's case. Among these relevant to the appeal are the investigation officer, Inspector Rhode, Dr Cenge, the medical doctor who examined the complainant and Captain William Koenze, the senior forensic analyst. The Appellant testified in his own defence and called no further witnesses.

[7] The following seems to be common cause:

(a) during the night of 1 February 2006, a group of people, including accused no.2 Jonas Jantjies and one known as Ricardo Muller, alias "handlanger", broke into the house of the complainant while sleeping, with the intention to rob her. They indeed robbed her of R2 060,00, 1 x kodak camera, one pair of binoculars, jewellery and a jacket.

(b) the complainant was raped by more than one person. Accused no.2, and Ricardo Muller pleaded guilty to these charges in a different Court.

[8] It is not in dispute that the appellant was present whilst the complainant was raped.

[9] The evidence of the complainant relating to the appellant's involvement, briefly stated, is the following: she woke up when becoming aware that someone was in her room. She immediately got up. She was pushed back onto her bed. Someone started to talk to her and she recognised the voice of the appellant. Thereafter Ricardo Muller came to sit on top of her and she was threatened with a knife and her panties was pulled down. She was then hit in the face about 4 times by the appellant who also threatened to kill her with a knife. She did not resist or fight back at that stage.

Ricardo Muller then attempted to rape her, but could not penetrate her, because of the position in which she was laying. During this time, the appellant was still in the bedroom. Ricardo Muller became frustrated and requested the appellant to take over. Appellant then approached her, and with a knife, opened his trousers he proceeded to rape her. During this time, accused no.2 came into the room and made a gesture as if he was going to stab the appellant. According to her evidence, the appellant raped her for about 20 minutes. She also gave a detailed explanation what she meant in her police statement that the appellant attempted to rape her. Her explanation was that the appellant did not penetrate her fully, due to the fact that she was lying flat on her back. She resisted. This made it difficult for

him to penetrate her fully. The size of his sexual organ was also unknown to her. As far as she recalls, the appellant did not have an ejaculation. He then stopped out of frustration. Thereafter Ricardo Muller came back, who then proceeded to rape her. It was during this time that accused no.2 came into the room and put a belt around her neck and choked her. At that stage she was not aware of the whereabouts of the appellant. After she was raped by Ricardo Muller, she cannot remember whether she was raped by accused no.2. She also had difficulty in remembering everything that happened. She had sustained several injuries in the neck and face area as a result of the assault by the appellant and Ricardo Muller. She sustained further injuries to her chest and breast area and to her lower jaw and had several bruises on her thighs as a result of the rape.

She further testified that Ricardo Muller raped her and she was assaulted by accused no.2. The appellant did nothing to persuade them to leave her.

She was later forced into her bakkie by Ricardo Muller and accused no.2, who drove off with her. The appellant however stayed behind. She thereafter managed to escape when she was left alone with accused no.2, whilst Ricardo Muller drove off to a garage, and managed to get help at a house nearby. The police was called. She was then taken to a hospital and was medically examined by Dr Cenge.

[10] The investigating officer Rhode testified the complainant mentioned to him that that she was raped and there was also an attempt to rape her. He was also responsible for the collection of all the forensic evidence from the medical doctor

and those of the various accuseds'. He took a statement from the complainant. In cross-examination, he testified that the complainant explained to him that the appellant had attempted to have sexual intercourse with her, but could not fully penetrate her. He questioned her and wanted to know what she understood by this. According to him, the appellant could not fully penetrate her.

[11] Dr Cenge, examined the complainant after the incident. The examination revealed extensive bruises on both sides of the neck which is consistent with strangulation. There were also bruises in the chest area. The complainant's right eye was swollen. She had a bruised lower lip and was unable to close her jaw. She had many small bruises in her inner thighs and injuries in her vaginal area. The injuries to the vaginal area are consistent with the allegation that she was raped.

[12] Captain Koenze, the senior forensic analyst, testimony is relevant to issues raised by the appellant. He received 6 samples for the examination of DNA. These are:

(a) a victim swab vestibule;

(b) a sample of the panties of complainant;

(c) a control sample from the victim – complainant in this matter;

(d) a control sample of blood drawn from the appellant;

(e) a control sample of blood drawn from Thomas Jantjies (accused no.2);

(f) a control sample of blood drawn from Ricardo Muller ("handlanger")

The DNA of Ricardo Muller could be read in the sample taken from the vestibule of the complainant. There was a mixture of DNA of various persons found on the complainant's panty. The DNA of accused no.2 could also be read into the genetic material deposited onto the panties. No DNA of the appellant could conclusively be read in any of the samples connected to the complainant.

[13] The appellant's version initially, was that although he accompanied Ricardo Muller to the house of the complainant, he was never involved in the commission of any crime at the place of the complainant. He later conceded that he participated in breaking into the house of the complainant and he wanted to take something from the house. He, however, denies that he had assaulted or raped the complainant.

[14] On a conspectus of the evidence in this matter, I am in agreement with the findings of the trial magistrate that the complainant was a reliable and credible witness.

She was absolutely clear in her mind as to the role the appellant played during the ordeal. She could clearly distinguish what his actions were and that of his other assailants, due to the fact that she knew him better than the other assailants. She also had a discussion with him and requested him to help her. The contention that

she could not clearly recollect what role the appellant played is without substance. The fact that she could not clearly remember whether accused no. 2 had raped her does not mean that she cannot recollect the role the appellant played. The DNA evidence that accused no.2 and Ricardo Muller deposited genetic material on her panties and vestibule serves to strengthen her version, despite her evidence that she cannot recall whether accused no. 2 raped her.

The complainant also gave a satisfactory explanation what she meant in her police statement that the appellant attempted to rape her. It is clear from her explanation that she never meant to say that there was an attempt by the accused in strict legal sense. I am therefore satisfied that there was no intent discrepancy in the version of the complainant.

[15] The fact that no DNA evidence of the appellant was found does not assist the appellant. The complainant clearly stated that the appellant did not deposit any semen and became frustrated and stopped raping her. This fact in any event does not detract from the veracity of the evidence in the light of her version.

[16] The trial magistrate, in my view correctly rejected the evidence of the appellant as false and not reasonably possibly true. A further difficulty with appellant's case is that he lodged an appeal on the first charge of housebreaking with the intent to rob and robbery. He conceded in his evidence in the court *a quo* after initially denying, that he actively participated in the housebreaking. This evidence clearly demonstrates that he was aware of the intention of the other

perpetrators. The evidence of the complainant is also overwhelming that he assaulted and raped her whilst items were stolen from her house.

[17] For these reasons stated, it follows that the appeal against the conviction on count 1 and count 2 cannot succeed.

[18] Insofar as the fifth count is concerned, I am inclined to agree with the contention of the appellant's counsel that his conviction on the count of attempted murder based on the principle of common purpose cannot be sustained.

The only evidence of any violence committed by the appellant was during the rape of the complainant.

The trial magistrate overreached and stretched the facts too far by finding the appellant had actively associated himself with the other perpetrators especially accused no.2, to form a common purpose. There is also no evidence to find or infer that there was intention to murder the complainant.

[19] The imposition on appropriate sentence is a matter falling solely within the discretion of the trial court. The court of appeal will only interfere where such discretion was not properly or judiciously exercised. This point was once again clearly stated in State v Malgas 2001(1) SACR 469 HHA at 478 D - E.

"A court exercising appellate jurisdiction cannot, in the absence of material

misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court ..... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling', or 'disturbingly inappropriate'."

[20] The appellant at the time of committing these offences was 32 years of age. He lived together with his partner for 7 years. He is the father of two children. He worked as a contractor who does paint work and earn a wage, the amount of which is unknown.

[21] After the rape and robbery inside the house, the appellant actively disassociated himself from the further actions of the other two persons.

He did not want to participate further when the complainant was forced into the bakkie when the other two assailants drove off with her. At that stage it seems he really became concerned that the complainant might be further harmed and feared the worst, that she might even be killed. He was so concerned that he immediately with the help of a telephone of a friend contacted the police, he thereafter went to look for the complainant and the other two assailants with the

police. This is a factor that should have been given more weight and attention, by the court *a quo*.

[22] There was also no distinction between the sentence imposed for the rape charge between the appellant and accused no.2. Both were sentenced to 20 years imprisonment. This notwithstanding the fact that accused no.2 had two previous convictions for rape.

[23] In my view, the sentence imposed on the appellant is disproportionate to the crime, the seriousness of the offence and the appellant's personal circumstances.

[24] The trial court, quite correctly deviated from the prescribed minimum sentence of life imprisonment, but should have deviated to the extent that was fair and just to the appellant. Having regard to his particular circumstances.

[25] In the result, I am of the view, that the sentence of 4 years with regards to count 1 having regard to his previous convictions, is a proper one.

[26] On count 2, having regard to what was said, earlier on, I am of the view that a sentence of fifteen (15) years imprisonment is a more just and equitable sentence.

[27] In the result, I would propose the following order:

(1) The appeal against the conviction on count 1 and 2 is dismissed.

The appeal against the conviction and sentence on count 5 succeeds.

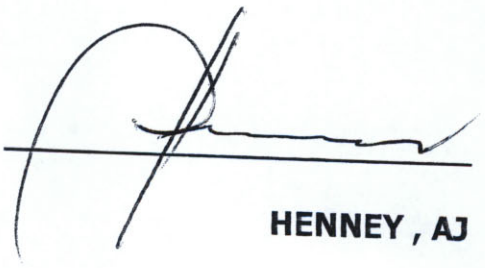
(2) The appeal against sentence succeeds. The imposed sentence is set aside and substituted with the following:

Count 1: 4 years imprisonment

Count 2: 15 years imprisonment

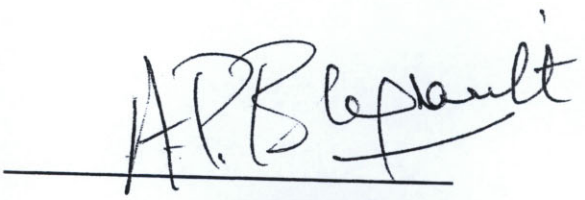
It is ordered that the sentence on count 1 run concurrently with count 2.

(3) It is ordered that in terms of Section 282 of Act 51 of 1977 (Criminal Procedure Act) that these sentences be antedated to the date of sentence in the Regional Court, being 3 September 2009.



HENNEY , AJ

I agree. It is so ordered.



BLIGNAULT, J