

SOUTH AFRICA / JUDGMENT

Lebopa v S (A492/2014) [2015] ZAGPPHC 231 (29 April 2015)

[2015] ZAGPPHC 231**COURT**

North Gauteng High Court, Pretoria

BEFORE

Kubushi, Strijdom

CASE / FILE NUMBER

A492/2014

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Policy**REPUBLIC****OF SOUTH AFRICA****IN THE HIGH COURT****OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****CASE****NO: A492/2014****NOT****REPORTABLE****NOT****OF INTEREST TO OTHER JUDGES****In the matter****between:**

RONNY

LEBOPA.....APPELLA

NT

and

THE

STATE.....RESPON

DENT

JUDGMENT

HEARD ON: 13 APRIL 2015

JUDGMENT ON: 29 APRIL 2015

KUBUSHI, J

- [1] The appellant was convicted in the regional court held in Giyani on charges of contravening s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 1997, read with the provisions of s 51
- (1) of the Criminal Law Amendment Act 105 of 2007, assault with intent to do grievous bodily harm and robbery. He was sentenced to life imprisonment in respect of rape, ten years imprisonment for assault with intent to do grievous bodily harm and robbery (the two latter charges were taken together for purposes of sentence).
- [2] The appellant was legally represented throughout the trial.
- [3] Having been sentenced to life imprisonment by the regional court, and in terms of s 309 (1) (a) of the Criminal Procedure Act No 51 of 1977 (the Criminal Procedure Act), the appellant had an automatic right to appeal without leave to appeal being granted. The appellant is before us on appeal against both conviction and sentence.
- [4] Due to the nature of the offence in count 1, that of rape, the proceedings were held in camera when the complainant in that charge testified. The trial court in its judgment did not refer to the complainant in count 1 by her names, but referred to her as IM. I shall also in this judgment refer to her as such.
- [5] As already stated, the complainant in count 1 was IM and the complainant in count 2 and 3 was R[...] M[...] (R[...]). The respondent adduced the evidence of both complainants and two other witnesses in support of its version. A DNA report was handed in in terms of s 212 (4) (a) and 8 (a) of the Criminal Procedure Act, by the respondent. The contents thereof were admitted by the defence.
- [6] IM, a 22 year old woman, was on 26 June 2009 walking with her boyfriend, R[...]. It was around 20: 00. They were accosted by four men. The four men approached them and wanted to know where IM and R[...] were coming from. They searched R[...] and took three cell phones from him - two C115 Motorola phones and a Vodaphone. The cell phones were never recovered. IM and R[...] were forcibly taken to the nearby bushes. One of the four men removed R[...]’s waist belt and shoe laces. The four men divided themselves into two groups. One group remained with R[...] and the other group went deeper into the bush with IM. The two men who were with R[...] tied his hands with the shoe laces and tied his feet with the belt He was assaulted with the back of a tomahawk.

- [7] IM was made to lie down on her clothes. One of the two men who were with her took her panties off and the two men took turns to put their penises into her vagina and raped her. They threatened to kill R[...] and IM had to plead with them not to do so. The two groups alternated and those who were initially with R[...] also took turns to put their penises in IM's vagina. This was done without IM's consent.
- [8] IM and R[...] were admitted in hospital on the same evening of the occurrence. R[...] sustained serious injuries as a result of the assault. He sustained injuries to his waist, right hand by fending off the blows; a swollen left knee and a three centimetre long open wound on his left buttock which was clinically stitched. Paginal swabs were taken from IM and referred to the forensic science laboratory for comparison with the appellant's blood.
- [9] Three other men were arrested together with the appellant, one in particular being Kenny Motsiri Monareng (Monareng). The charges were withdrawn against the three men. Only the appellant stood trial. A DNA mixture had been taken from the vaginal vault, cervical OS and body fluids of IM and compared with the blood samples of the appellant and Monareng. The conclusion made from the DNA analyses was that the likelihood that the DNA belonged to someone else other than the appellant was one in eleven thousand thus including the appellant as a possible donor to the mixture. Monareng was excluded as a possible donor.
- [10] The state called Monareng to give evidence. In his testimony, Monareng conceded to having been, together with the appellant, part of the gang of men who raped IM and robbed R[...] of his cell phones and assaulted R[...] with a tomahawk. He testified that he knew the appellant very well, they used to be friends and according to the appellant they are distant relatives.
- [11] Both complainants were unable to identify their assailants. They could not even identify the appellant in court. As thus the identity of the appellant was the main issue at the trial.
- [12] The appellant was tied to the commission of the offences by a DNA sample taken from the vagina of IM. The DNA results were not in dispute. In fact the appellant admitted that his DNA was found in the vagina of IM. He explained this finding by alleging consensual sexual intercourse with IM. His evidence is that he was in a sexual relationship with IM which was vehemently denied by IM.
- [13] The appellant's grounds of appeal are that the trial court erred in convicting him because -
- 13.1 neither IM nor R[...] were able to identify him;
- 13.2 Monareng was not warned in terms of s 204 of the Criminal Procedure Act and as such his evidence should be rejected; and
- 13.3 the trial court failed to deal with the absence of Monareng's DNA in the mixture.
- [14] Whether or not IM was raped and R[...] assaulted and robbed of his cell phones was not the issue. What was in issue was the identity of the perpetrator(s).

- [15] The issue that was determined by the trial court, which remains an issue in this court as well, is whether the appellant, together with three other men, raped IM or he had consensual sexual intercourse with IM that day before the alleged rape and robbery incident.
- [16] Although the appellant agreed to sexual intercourse with IM on that date, he denied raping her and alleged that they had a sexual relationship. As such the sexual encounter was with the consent of IM.
- [17] It is common cause that the two complainants, IM and R[...], were unable to identify their assailants because the incident occurred at night and it was dark. When convicting the appellant, the trial court, as a result, relied on the DNA evidence which tied the appellant to the commission of the offence of rape and the evidence of Monareng a co-perpetrator in the commission of the offences.
- [18] The appellant contends that the trial court should not have convicted him due to the fact that it should have rejected the evidence of Monareng as unreliable mainly because Monareng was not sworn in in terms of s 204 of the Criminal Procedure Act. According to the appellant, Monareng was a perpetrator in the incident. And, in the circumstances where a witness is warned in terms of s 204 of the Criminal Procedure Act, such a witness is obliged to testify and give answers frankly and honestly. Monareng was not warned to give evidence frankly and honestly. Monareng testified that he was one of the people who raped IM on the night in question, yet his DNA was excluded as a donor to the DNA mixture found on IM. The appellant submitted that the only evidence available that would have lent credibility to Monareng's evidence was if his DNA was found in the DNA mixture, and yet it was not found. One would have expected to find Monareng's DNA in the mixture if his version of the events is correct, so the argument went.
- [19] On the totality of the evidence presented, my view is that the trial court was correct in accepting the version of the respondent and rejecting that of the appellant. The trial court, correctly so, found the evidence tendered by the respondent's witnesses to be truthful in its entirety. The two complainants were truthful as they did not falsely implicate the appellant in the commission of the offences. Their evidence was in favour of the appellant. They both testified that they did not know their assailants. Even in court they still persisted to say that they do not know the appellant at all. The trial court's credibility findings in respect of the two complainants cannot be faulted. The two complainants were reliable witnesses, they did not contradict themselves under cross examination nor did they contradict each other. They told their respective stories as they remembered it and corroborated each other on material

issues.

- [20] The evidence of the complainants as to the commission of the offences was corroborated by that of Monareng. Monareng did not know the complainants. He, however, corroborated their evidence in all material respects. He was able, word to word, to state all that happened that night, from the time the four accosted the complainants until after the commission of the offences.
- [21] From the reading of the trial court's judgment it does not appear as if the trial court approached Monareng's evidence with the caution required in law. Monareng was the appellant's accomplice and as such his evidence ought to have been approached with the necessary caution. However, from the judgment it can be ascertained that the trial court looked for safeguards in order to avoid the danger of falsely convicting the appellant. It found such safeguards in the truthfulness of Monareng's evidence in that it corroborated that of the complainants as to the commission of the offences in all material respects. In its credibility findings in respect of Monareng, the trial court made a finding that his evidence dovetailed with that of the complainants and that his evidence was never shaken. It stated, correctly so, that Monareng gave such detailed account of the incident that it could hardly be believed that the evidence was made up.
- [22] The provisions of s 204 (1) of the Criminal Procedure Act are invoked in circumstances where a witness expects to be indemnified against prosecution on a particular charge. This, however, was not the case in this instance. It is common cause that Monareng was not warned in terms of s 204 of the Criminal Procedure Act. The respondent's submission is that it deliberately did not ask the court to warn Monareng because the section was not applicable in that there was insufficient evidence against Monareng and the case against him had already been withdrawn. Monareng gave evidence that he did not expect anything in return from the prosecution for his evidence -he did not expect to be indemnified for any charge.
- [23] The appellant's submission that the court should have rejected the evidence of Monareng because his DNA was excluded from the DNA mixture found on the vagina of IM, is unfounded. There are numerous reasons why Monareng's DNA could have been excluded from the mixture. The reasons were not explored during trial and for this court to go into them would amount to pure speculation.
- [24] Much as there is no onus on the appellant to prove his innocence, however, his version must be reasonably possibly true. The trial court found the version of the appellant not to be reasonably possibly true and rejected it. The trial court found it highly improbable that the appellant could have proposed love and made love to a woman the one day and after that phoned her a couple of times and because she does not answer delete her telephone number. The trial court was correct.

- [25] The objective correctness of Monareng's evidence in corroborating that of IM and R[...] supports the truthfulness of their evidence. It must be remembered that Monareng and the complainants did not know each other. Yet Monareng's evidence corroborated the complainants' evidence word for word as to the commission of the offences.
- [26] I am satisfied that Monareng's evidence constituted sufficient corroboration to link the appellant conclusively to the rape, assault and robbery. When the evidence of Monareng is accepted, the appellant's evidence must be rejected as being not reasonably possibly true. The trial court was, therefore, correct to have convicted him. The appeal on conviction stands to be dismissed.
- [27] As regards the appeal on sentence, the appellant in his heads of argument attacked the sentence imposed by the trial court on the basis that the imposed sentence was too harsh and that a shorter period of imprisonment would have been justified given the circumstances of the case. The appellant's submission being that an effective sentence of 20 years would have been an appropriate sentence.
- [28] The charge of rape against the appellant was read with the provisions of s 51 (1) (a) and Part I of Schedule 2 of the Criminal Law Amendment Act, 105 of 1997. In terms of the said provisions a regional court shall sentence a person convicted of rape when committed in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice (gang rape), to imprisonment for life.
- [29] Such sentence may not be Imposed where substantial and compelling circumstances exist warranting the imposition of a lesser sentence. It is clear from the record that the trial court did not find substantial and compelling circumstances justifying the imposition of a sentence less than the prescribed minimum sentence of life imprisonment. Although at the hearing of the appeal the appellant's counsel argued for a lesser sentence, he could, however, not argue that there are substantial and compelling circumstances with confidence. His contention was that even though there was no evidence of trauma and injuries suffered by IM, he conceded that that would not tilt the scale in favour of the appellant
- [30] It is trite law that the determination of a sentence in a criminal matter is preeminently a matter for the discretion of the trial court. In the exercise of this function the trial court has a wide discretion in: deciding which factors should be allowed to influence the court in determining the measure of punishment; and, in determining the value attached to each. See *S v Kibido* 1998 (2) 5ACR 214 (SCA) at 216G - H
- [31] I am satisfied that the trial court when imposing sentence, took all the relevant factors into consideration and meted out an appropriate sentence. The sentence imposed, is in my view, commensurate with the gravity of the offence and does not in any way evoke a sense of shock. The appeal on sentence must as a result not succeed.
- [32] In the premises I make the following order:

32.1 The appeal against both conviction and sentence is refused.

32.2 The conviction and sentence imposed by the trial court are confirmed.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

I agree

J.J. STRIJDOM

ACTING JUDGE OF THE HIGH COURT

Appearances:

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