

SOUTH AFRICA / JUDGMENT

Seleke v S (A879 /14) [2015] ZAGPPHC 772 (26 October 2015)

[2015] ZAGPPHC 772

COURT

North Gauteng High Court, Pretoria

BEFORE

N A Engelbrecht, Ranchod

CASE / FILE NUMBER

A879 /14

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IN
THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
Case
number: A879 /14

DATE:

26 AUGUST 2015
In

the matter between:

JOHNNY
TSEKO
SELETE.....Appellant
And
STATE.....R
espondent

JUDGMENT

ENGELBRECHT J A

Background

[1] This is an appeal from the Regional Court sitting at Fochville. The appeal is in respect of sentence and conviction.

On the 20th June 2014 the appellant was convicted of the following counts: -count one Rape, count two Rape; count three Rape; count four Assault with intent to do grievous bodily harm, and count five Housebreaking with intent to steal and theft.

[2] All counts were taken as one for the purpose of sentence and appellant was sentenced to life imprisonment.

[3] In terms of Section 10(9) of the Judicial Matters Amendment Act 42 of 2013, the appellant has an automatic right of appeal. The appeal is in respect of conviction and sentence. The appellant and his co-accused were arrested for the commission of the above mentioned offences. Of the three accused, Mr Piet Selete elected to plead guilty on one count of rape. At the time of the trial of Mr Johnny Tseko Selete and his co-accused, Mr Piet Selete had already served his sentence. The state used Mr Piet Selete as a state witness in terms of Section 204 of the Criminal Procedure Act 51 of 1977. All five counts were preferred against the

appellant and his co-accused. On 12 February 2013 the appellant pleaded not guilty to counts 1,2,3 and 5 and guilty on count 4. The co-accused of the appellant pleaded not guilty to all five counts.

[4] The facts of this matter are briefly as follows: On the evening of 25 December 2010 the three accused were at a tavern in Leratong Kokosi Location. After having consumed alcohol at said tavern they set about their plan to go to the farm of the employer of Mr Piet Selete. There they intended breaking into the premises and removing a motor vehicle. On route to the farm they met the complainant and her boyfriend. At that time the appellant was in possession of a weapon that was either a knife or panga and thirty centimeters in length. The appellant used this weapon to subdue the complainant and her boyfriend by assaulting them with it. Mr Piet Selete testified that the appellant later showed him that he had two Nokia cell phones from the complainants. Shortly after the assault, the boyfriend of the complainant [P.....], ran away from the scene. The appellant held onto [P.....], walked into the middle of the bush where he raped her. Shortly after raping complainant they walked a short distance and the co-accused of the appellant also raped her. It was the appellant who enquired from Mr Piet Selete if he does not also want to have sex with the complainant. Mr Piet Selete confirmed such and partook in the act about 3 metres, from where his co-accused raped the complainant.

According to the complainant the appellant and his co-accused were not present when Mr Piet Selete raped her. The appellant and his co-accused continued walking in the direction of the farm where they were going to take the motor vehicle. Not only did they break into the store room but also removed a Nissan Hardbody with registration number [D..... NW] the property of Rian Els. Only the appellant and his co-accused broke into the store room. Only when the state witness Mr Piet Selete went to find out what was taking his co-accused so long that she, the complainant managed to hide herself from them and eventually escape. Mr Piet Selete testified that he assisted his co-accused in getting the motor vehicle off the premises by driving it out the store room, through the gate and out of the yard. Mr Piet Selete further testified that on route to Vereeniging, they were involved in a motor vehicle accident. They left the vehicle at the scene of the accident and left for the township. On route the appellant complained of pains to his body and was removed to the hospital by ambulance. The appellants version is that he and the complainant planned this scam together and as usual they share the proceeds. Complainant rejected his version as false. At no time did she conspire with the accused to commit any offence and then become the victim of multiple rapes. Not to mention falsely accuse the appellant after receiving her share of the proceeds of crime.

[5] In considering the matter of mens ma in *S v Mgedezi* and others 1989(1) S A 687(A) at 703 B-F Botha A J said the following “A view of the totality of the defence cases cannot legitimately be used as a brush with which to tar each accused individually nor as a means of rejecting the defence versions en masse. The global view taken by the trial court of the defence cases led it to draw two inferences:

- (a) that each accused was present at the scene and participated in the execution of the threat against the mpimpi's; and (b) that the defences of all of them were false beyond reasonable doubt. With respect, as a matter of simple logic I consider both inferences to be wholly insupportable. First as to (b): an explanation given in evidence by an individual accused for his unawareness of the relevant events in the compound whilst these were taking place cannot logically be rejected on the grounds that all the other accused

professed similar unawareness for different reasons and that it is unlikely that all of them could in fact have been so

unaware..... The trial court erred by precluding itself from performing its

duty to consider the evidence each accused separately and individually, to weigh up that evidence against the particular evidence of the individual state witness or witnesses who implicated that accused, and upon that basis then to assess the question whether that accused's evidence could reasonably possibly be true”.

[6] There was no evidence before the trial court that the appellant and his co-accused acted in concert when raping the complainant. It is not in dispute that they planned breaking into the store room and departing with the motor vehicle. From the evidence it is clear, they met the complainant and her boyfriend on route that particular evening and on the spur of the moment decided to assault the complainant's boyfriend following which the appellant raped

the complainant. The rape incidents did not take place in succession as if in a gang rape style but separately and at different points in their walk to the farm. The rape incidents can also be described as on the spur of the moment if one has regard to the prompting of the appellant as regards Mr Piet Selete's

participation or not in the sex act with the complainant. If anything it was an indication that sexual activity was not discussed among the accused. And thus, there was no meeting of the minds between the accused as to the commission of the rape. The respondent conceded that although the duration between the rapes is not clear, the conduct of the accused as far as the rape is concerned, was not planned. And as such each accused should account for his sexual conduct.

[7] Since the appellant is not found to have acted in concert with the other two accused his sentence should be in terms of Part III of Schedule 2(as amended) read with section 51(b) of Act 105 of 1997.

The following order is made:

ORDER

The appeal against conviction for Counts 2 and 3 is upheld.

The appeal against conviction for Counts 1, 4 and 5 is dismissed.

The appeal against sentence is upheld and the sentence is set aside. The matter is remitted to the trial court for consideration of sentence Afresh.

N A Engelbrecht

Acting Judge of the High Court

I agree and it so ordered Ranchod J

Judge of the High Court

For the Appellant R S Matlapeng

Pretoria Justice Centre 2nd Floor, FNB Building Church Street, Pretoria

For the Respondent Adv M Molatudi.

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