



IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST PROVINCIAL DIVISION, MAHIKENG

APPEAL CASE NO: CA 4/16

In the matter between:

RICHARD RAMAISA MATSHABA

Appellant

And

THE STATE

Respondent

DJAJE AJ, GUTTA J

DATE OF HEARING : 19 AUGUST 2016

DATE OF JUDGMENT : 1 September 2016

COUNSEL FOR THE APPELLANT : ADV GONYANE

COUNSEL FOR THE RESPONDENT : ADV JACOBS

JUDGMENT

DJAJE AJ

[1] This appeal came before us on 19 August 2016 and the following order was made:

- “ 1. The application for the re-enrolment is granted;*
- 2. The appeal against conviction and sentence is granted;*
- 3. The conviction and sentence is set aside;*
- 4. The immediate release of the Appellant from detention is ordered.”*

The reasons for the above order are now provided hereunder.

[2] The Appellant was arraigned before the Regional Court in Itsoseng on a charge of housebreaking with intent to rape and rape. He was convicted and sentenced to life imprisonment. His appeal was against both conviction and sentence. It was alleged in the charge sheet that the Appellant on 16 June 2012 broke and entered the house of Annah Leshage, an 80 year old woman and had sexual intercourse with her without her consent.

[3] The complainant testified that whilst sleeping at her house she felt someone touching her face and then throttling her. She immediately enquired from the person how he gained entry into the house and the person responded that he entered through the

window. Further that he was there to balance his money that Lesego spend at the tavern. Lesego is the complainant's granddaughter. The person jumped on top of her and started to have sexual intercourse with her. She testified that the lights in the bedroom were off and she could not identify her attacker. Afterwards she ran to her neighbour to ask for help and the neighbour called the police.

- [4] The complainant's neighbour, Mr Sekoto testified that during 16 June 2012 around midnight the complainant knocked at his door asking for assistance. Further that the complainant reported to them that she was raped by a person who was wearing khaki clothes and he then called the police.

- [5] The investigating officer testified that he arrested the Appellant and had his blood extracted for DNA testing. The Appellant's blood was found to be a match with the blood stains found on the complainant's night dress according to the evidence of the Forensic Expert.

- [6] The Appellant testified that on 16 June 2012 he was at the tavern celebrating his birthday until 02:00 and thereafter he went home to sleep. He denied being at the complainant's house and raping her.

- [7] In convicting the Appellant the court *a quo* considered the evidence before it, and found that the state succeeded in proving the guilt of the Appellant beyond reasonable doubt.

Submissions

- [8] It was argued on behalf of the Appellant that the court *a quo* erred in finding that the state proved its case beyond reasonable doubt as the complainant could not identify the person who raped her. Further that the court *a quo* misdirected itself in finding that the DNA chain of evidence was properly followed to conclude that indeed the Appellant was the donor.
- [9] The Respondent in its submissions conceded that the identity of the Appellant was not proven beyond reasonable doubt. Further that the chain of custody of exhibits leading to the DNA results obtained was not proven beyond reasonable doubt.

Law

- [10] Section 212 (8) (a)(i) (ii) (aa) and (bb) of the Criminal Procedure Act 51 of 1977 ("CPA") provides that:

- (a) In criminal proceedings in which the collection, receipt, custody, packing, marking, delivery or despatch of any fingerprint or body-print, article of clothing, specimen, bodily sample, crime scene sample, tissue (as defined in section 1 of the National Health Act, 2003 (Act No.

61 of 2003), or any object of whatever nature is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges –

- (i) that he or she is in the service of the State or of a provincial administration, any university in the Republic or any body designated by the Minister under subsection (4);
- (ii) that he or she in the performance of his or her official duties –

(aa) received from any person, institute, State department or body specified in the affidavit, a fingerprint or body-print, article of clothing, specimen, bodily sample, crime scene sample, tissue or object described in the affidavit, which was packed or marked or, as the case may be, which he or she packed, or marked in the manner described in the affidavit;

(bb) delivered or despatched to any person, institute, state department or body specified in the affidavit, a fingerprint or body-print, article of clothing, specimen, bodily sample, crime scene sample, tissue or object described in the affidavit, which was packed or marked or, as the case may be, which he or she packed or marked in the manner described in the affidavit.

[11] In the matter of *Bamba v The State* (20089/14) [2014] ZASCA 219 (11 December 2014) at par 17 Mocumie AJA stated as follows:

“Lastly, what this case illustrates is that the utmost care must be taken by the police particularly investigating officers in the recovery, storing, recording and conveying of ballistic exhibits which is to be subjected to ballistic examination. In addition, the state must ensure that the requisite evidence to prove these requirements is led. This is to avoid material discrepancies seen throughout the entire proceedings in the trial court.”

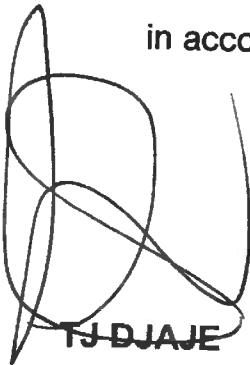
See also: *S v Sithole* 2013 (1) SACR 298 (GNP)

Analysis

- [12] In the current matter the forensic expert's evidence lacks reference from whom the samples were received contrary to what is provided for in section 212(8) (a) (ii) (aa) of the CPA. The same goes for the delivering of the samples to the laboratory as per the provision of section 212(8) (a) (ii) (bb) of the CPA. The investigating officer also testified that he was not the one who delivered the samples to the laboratory for testing but that it was Constable Mofokeng. The state failed to call Constable Mofokeng to confirm that he delivered the samples to the laboratory.
- [13] The state has not adduced any evidence in respect of the delivering and receipt of the exhibits at the laboratory. There was also no evidence in relation to the gathering and marking of the samples. The investigating officer did not give evidence as to who gathered the evidence from the scene and where it was stored.
- [14] The importance of proving the chain of evidence is to indicate the absence of alteration or substitution of the exhibits. If no admissions are made by the defence the state bears the onus to prove the chain of evidence. The state must establish the name of each person who handled the evidence, the date on which it was handled and the duration. Failure by the state to establish the chain of evidence affects the integrity of such evidence and thus rendering it inadmissible.

[15] The court *a quo* in convicting the Appellant relied on the DNA evidence as the only evidence that links the Appellant to the commission of the offence. The investigating officer testified that blood was extracted from the Appellant by a doctor at the hospital and the blood sample was then stored in SAP 13 at the police station. There is no evidence that the said blood sample was sealed and what number allocated thereto. Therefore, the sequence from collecting the Appellant's blood samples to the DNA testing is flawed.

[16] The Respondent in my view correctly conceded that there are material irregularities in the chain of custody of exhibits leading to the DNA results obtained. The effect of this is that the trial was not in accordance with justice and the conviction cannot be confirmed.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

TJ DJAJE

ACTING JUDGE OF THE HIGH COURT

I AGREE


~~NGUTTA~~

JUDGE OF THE HIGH COURT