IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA]

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

8/08/2017 .....
DATE SIGNATURE

CASE NO: A364/2016

In the matter between:-

BAFANA HENDRY MAHLANGU Appellant

and

THE STATE Respondent

JUDGMENT

SKOSANA AJ

[1] This is a criminal appeal against the judgment of the Magistrate handed down on 18 September 2014. The appellant was convicted of rape, which conviction was based on a plea of guilty by the appellant accompanied by a statement made in terms of section 112(2) of the Criminal Procedure Act no.51 of 1977 ("CPA"). Leave to appeal was initially refused by the Magistrate but later granted after a petition to the Judge President of this Division.

[2] Alongside the appeal is an application for leave to present further evidence constituted by statements made by the complainant, Ms Thembi Elizabeth Zwane and by the applicant.

[3] In summary, the salient facts of this matter are the following:

[3.1] The applicant was charged with rape, the actual charge being the following:

"That the accused is guilty of the crime of contravening the provisions of section 3 read with sections 1,55, 56,(1), 57, 58, 59, 60 and 61 of the Criminal Law amendment Act (Sexual Offence and Related Matters) 32 of 2007 also read with sections 92(2) and 94 and sections 256, 257 and 281 of the Criminal Procedure Act 51 of 1977, the provisions of section 51 and

5 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended as well as sections 261 and 92(2) and 94 of the Criminal Procedure Act 51 of 1977.

In that on or about 31/07/2011 and at or near Leslie in the Regional Division of Mpumalanga, the said accused did unlawfully and intentionally commit an act of sexual penetration with a female person to wit, Thembi Elizabeth Zwane (23 years) by having sexual intercourse with her without her consent."

[3.2] The charges were essentially based on section 3 of the Criminal Law Amendment Act (Sexual Offences Act) no. 32 of 2007. Initially the appellant was charged for the same offence together with three other suspects. However, the charges were later withdrawn against three of those suspects, the fourth one having disappeared.

[4] On 18 September 2014, the matter came before the learned Magistrate, Mr Ball. The appellant was represented by Mr Bosman, an attorney. After the charges had been put to the appellant and read out on to record, the appellant confirmed that he understood the charges and pleaded guilty thereto. Thereafter Mr Bosman confirmed that the plea was in accordance with his instructions and consequently presented a statement in terms of

section 112 (2) of the CPA. It would appear that Mr Bosman represented the appellant at the instance of the Legal Aid South Africa.

[5] Since the appeal concerns the conviction of the appellant on the basis of his plea, it is important to quote the section 112(2) statement in full:

"The accused admits that he is guilty of the crime of contravening the provisions of Sections 3 read with section 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Procedure Amendment Act 32 of 2007 also read with section 92(2) and 94 and sections 256, 257, 281 of the Criminal Procedure Act no. 51 of 1997 as well as the provisions of Sections 515 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended as well as Section 261 and 92(2) and 94 of the Criminal Procedure Act 51 of 1977.

Accused admits that on or about 31 July 2011 at or near Leslie in the Regional Division of Mpumalanga the said accused did unlawfully and intentionally commit an act of sexual penetration with a female person to wit Tembi Elizabeth Zwane, 23 years of age by having sexual intercourse with her without her consent.

The accused admits that he knew it was an offence to have sexual intercourse with a person without her consent.

Accused admits that he met the said complainant on the road close to Leslie and pulled her to the veld where he took the complainant, Tembi Elizabeth Zwane's panty off and thereafter raped the said complainant by having sexual intercourse with her without her consent.

Accused admits that he made this statement voluntarily without being forced to do so or influenced to do so while being of sober mind.

Accused admits that the contents of this statement were explained to him. He understands the contents thereof and that the said statement was interpreted to him."

[6] The statement was signed by the appellant, his attorney and an interpreter by the name of Mr Mahlangu. After the statement had been handed up by the appellant's attorney, the appellant orally confirmed to the Magistrate that the contents of the statement were interpreted to him by the official court interpreter in the presence of his attorney, that he understood what was interpreted to him and that he confirms the contents of the statement. Thereafter the State accepted the plea and the statement was also admitted as exhibit A whereupon the Magistrate convicted the appellant as charged.

[7] After previous convictions were admitted on behalf of the appellant, mitigation circumstances were presented as well as aggravating circumstances. As appears above, the charge against the appellant referred to specific sections of the Minimum Sentences Act[1] which required that a sentence of not less than 10 years be imposed on him. However, in imposing the sentence of ten years, four years of which was suspended for 5 years, the Magistrate regarded the fact that the appellant had admitted guilt to the charges and the substantial time that he had already spent in custody awaiting trial, as substantial and compelling circumstances entitling him to deviate from the prescribed minimum sentence of 10 years imprisonment[2] (Minimum Sentences Act). In terms of section 51(5) of the Minimum Sentences Act, the operation of such sentence shall not be suspended. The suspension of a portion of the sentence therefore constituted deviation.

[8] The appellant now brings an appeal against the conviction on the basis that the Magistrate ought not to have accepted the plea of guilty by the appellant. The grounds for this contention appear in summary to be the following:

[8.1] That the appellant was wrongly convicted of the statement made in terms of section 112(2) of the CPA because he signed the statement under the false belief that a term of imprisonment would

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[1] **See section 51(2)(b)(i) read with Schedule 2 Part III of the Criminal Law Amendment Act 105 of 1997**

[2] **See footnote 1 above**

not be imposed upon him. This belief was created by his own legal representative, Mr Bosman. Mr Omar who appeared for the appellant further argued that, though this is not contained in his own affidavit, this promise to the appellant was also made by the Prosecutor.

[8.2] That the Prosecutor failed to disclose a statement by the appellant and another statement by the complainant which contained exculpatory information. It is these statements that form the basis of the application to lead further evidence on appeal.

[8.3] That the complainant's statement refers to Lebohang as the place where the offence took place and not Leslie as alleged in the charge sheet and that, while such statement mentions by name the persons who had allegedly raped her, it did not mention the name of the appellant.

[8.4] Further, it was contended on behalf of the appellant that section 19(1) of the Superior Court Act 10 of 2013 empowers this court to receive further evidence on appeal and that the Magistrate did not do enough in order to comply with the requirements of section 112(2) of the CPA.

[9] The power of this court to allow the leading of further evidence on appeal has always existed even before the advent of the Superior Court Act[3]. However, the courts have always held that such power must be exercised only in special circumstances[4].

[10] The requirements for the exercise of the power in section 19(b) of the Superior Court Act have been a circumscribed as follows:

[10.1] That there should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

[10.2] That there should be a *prima facie* likelihood of the truth of the evidence; and

[10.3] That the evidence should be materially relevant to the outcome of the trial[5].

[11] The above stringent conditions for the exercised of the powers of the court are normally strictly applied and if any of those requirements are not complied with, the application to lead further evidence will fail[6].

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[3] See section 22 of the now repealed Supreme Court Act 59 of 1959, which contained substantially the same provisions as the present sub-section

[4] Colman v Dunbar 1933 AD141 at 161-2; De Aguiar v Real People Housing (Pty) Ltd 2011 (1) SA 16 (SCA) at 19 D-20D; Prophet v NDPP 2007 (6) SA 169 (CC) at 185E; Rail Commuters Action Group v Transnet Ltd 2005 (2) SA 359 (CC) at 388 C-E & 389 A-B; President of the RSA v Quagliani 2009 (2) SA 466 (CC) at 490 B-C

[5] See De Aguiar (supra) at 20E-21B; Rail Commuters Action Group (supra) at 388C-390D

[12] The grounds raised on behalf of the appellant do not fulfil the requirements set out above. First, the appellant was represented by an attorney. There is no allegation that such attorney was incompetent or even inexperienced. It can also be safely assumed that the appellant's attorney was in possession of the docket containing the statements which are a subject matter of this application. He ought therefore to have been aware of the allegedly exculpatory material contained in those statements. There is no explanation proffered as to why those statements were not used at the trial.

[13] Second, although Mr Omar alleges to have been authorized by the appellant to depose to the affidavit on his behalf, there is no particular reason stated why the appellant himself did not depose to the affidavit in support of the application to lead further evidence on appeal. All that Mr Omar states is that it would have been an inconvenience. I am of the view that where an allegation is made, for instance, that the appellant was misled by his own attorney or the prosecutor, the matter becomes serious enough for the appellant himself to depose to the affidavit, especially because Mr Omar was not present when all that occurred.

[14] The exculpatory nature of the appellant's statement is of no moment since it is natural for any person in this position to deny the charges or

[6] **R v De Beer 1949 (3) SA 740 (A) at 748; S v De Jager 1965 (2) SA 612 (A) at 613 E-F**

allegations against him. As far as the statement by the complainant is concerned, to me it is also of no consequence that the statement refers to Lebohang instead of Leslie as the place where the offence had occurred. Of importance is that the charge sheet alleges that the offence occurred at Leslie and the section 112(2) statement drawn on behalf of the appellant which he accepted before the Magistrate as correct, admits that he met the complainant on the road close to Leslie where the offence took place.

[15] It is also not correct that the section 112 statement merely repeated what is contained in the charge sheet. On the contrary, the statement went further and explained how the rape had taken place including that the appellant had pulled the complainant to a nearby veld where he took off her underwear and proceeded to have sexual intercourse with her without her consent. The statement also covers *mens rea* by stating that this conduct was intentional, unlawful and committed with the full knowledge that it was wrongful.

[16] The statement further states within itself that it was made voluntarily without any force or influence being exerted on the appellant and that the statement had been explained to him in the language that he understands. He also confirmed this orally before the Magistrate.

[17] I did not read anything from the provisions of section 112(2) of the CPA and the cases that have been relied upon on behalf of the appellant to the effect that the Magistrate should ask for statements from the docket or other information which may prove the innocence of the accused person. On the contrary, the questions that may be asked in terms of section 112(2) are limited as opposed to those that may be asked by the Magistrate in terms of section 112(1)(d) where the accused is either unrepresented or merely makes an oral admission of facts. Section 112(2) allows the presiding officer to convict and sentence the accused on a strength of such statement in lieu of questioning the accused under sub-section (1)(b). It is only where there are areas which need clarification that the presiding officer may exercise the discretion to put questions to the accused to clarify the matter raised in that statement.

[18] In this case, there is nothing that required clarity in the written statement handed up on behalf of the appellant nor is it contended that there was any ambiguity. The contents of the statement were sufficient to satisfy the Magistrate that the appellant is guilty with the offence of which he had been charged and to which he was pleading guilty.

[19.] In the circumstances, I find no reason to either grant leave for further evidence to be led or to set aside the appellant's conviction. Such evidence in any event relates to matters which may not be material to the

case and which ought to have been raised either during the trial or at least when the application for leave to appeal was sought before the Magistrate.

[20.] In the circumstances, the following order is made:

[20.1] The application for leave to lead further evidence is dismissed;

[20.2] The appeal is dismissed.

DT SKOSANA
Acting Judge of the High Court

I concur.

NP Mali
Judge of the High Court

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

CASE NO: A392/16.

Reportable

Of interest to other Judges.

In the matter between:

THOMAS SPHIWE MAHLANGU
APPPLICANT

and

THE STATE
RESPONDENT

J U D G M EN T

Coram: RE Monama et A Basson, JJ

Introduction.

[1] The Appellant was charged and convicted in the Regional Court, Benoni on one count of robbery with aggravating circumstances in terms of the

provisions of the Criminal Procedure Act read together with the provisions of Section 51(2) of the Criminal Law Amendment Act (" the Act"). He was sentence to the imprisonment period of 18 years. During the trial he was represented.

[2] On 19 June 2013 he was granted leave to appeal both the conviction and the sentence by the trial court. The Appellant attacks the evidence of the voice identification and that the sentence of 18 year is "strikingly inappropriate".

The applicable principles.

[3] It is trite that we can only interfere with the conviction when there is a material misdirection. Insofar as the sentence is concerned we can only interfere with sentences that have been improperly imposed by the sentencing court. This court does not have unlimited or *carte blanche powers*[1].

The proceedings in the trial court.

[4] The Appellant pleaded not guilty and did not disclose the reasons. The State led evidence of one witness, being the complainant. Mr Wilford John Charles. The complainant testified that during the early evening of 16 June 2013 he was alone at home. At about 19:00 he went outside in response to the persistent barking of the dogs. He exited the house through the front door which he left open. Three men confronted him with guns. He was threatened with death at gun point. He was assaulted in the bedroom and was ordered to lie flat. He was tied up with cables and his head was secured with a blanket. His assailants demanded R1,5 million. They search him and took his wallet which contained his bank cards. They demanded and he gave them the pin number of his bank cards. Some of them went twice to withdraw money from his account at the nearby ATM. They used his vehicle.

[5] During this ordeal they ransacked the house and helped themselves to the food. One of them who guarded him said the following:

> "Makulu you do not recognise me I used to work for you three years ago." [2]

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[1] See S v Le Roux and Others 2010(2) SACR 10 SCA at 26 A-D

[2] See line 2-9 of the record.

The complainant testified that he replied in the negative but that he recognised the voice as that of the Appellant who had worked for him for a period of two years but absconded some two months before the incident.

[6] The complainant testified about the goods that were stolen and in July 2009 he identified the Appellant thorough his voice at a parade. At the parade he identified the Appellant but requested that another person and the Appellant attend the second parade as he wanted to be sure. He testified about the goods that were stolen during the robbery. The BMW that was also stolen was recovered after an hour.

[7] The Appellant denied all the allegations. He testified that he was not amongst the robbers. He was at a tavern in Barcelona with a friend by the name of Letabe. He also visited his mother. The next morning he was on his way to work. He was in a taxi and observed several motor vehicles including security vehicles at the gate of the complainant. He then phoned one Sibongile to enquire.

[8] During cross – examination the complainant persisted that the voice he recognized is that of the Appellant. On the other hand the Appellant contended that he was not amongst the robbers on 16 June 2009. However, he conceded that if he had worked with somebody for a long time it is possible to recognise him through his voice.

The evaluation of evidence in the trial court.

[9] The trial court commenced its evaluation by referring to the well-known principle. that there is no onus on the Appellant. The State must prove its case beyond reasonable doubt. The trial court adopted the correct approach to the evidence of the single witness[3].

[10] The only issue for the trial court to determine was the identity of the perpetrator. The court had the benefit of the direct evidence of the complainant. Such voice evidence must be accurate, the recollection of the events must be accurate and the conveyance of the events must be accurate. The complainant had no hearing problem, he was with the Appellant for approximately six hours and the complainant has known the Appellant for a considerable time. The complainant was credible.

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[3] See page 45 of the record.

Evaluation of the process in the trial court.

[11] Section 37(1)(C) of the Criminal Procedure Act makes provision for an identification parade. It has been held that the voice is part of the category of marks, characteristics or feature of the body. Provided that the parade was properly held, the evidence of voice is acceptable in our courts,[4] but must be credible in the sense of reliability.

[12] The recommended safeguards relating to an identity parade were observed rigorously. The procedure was not challenged. The most important safeguard is the fact that the complainant has known the Appellant for a long time. During that period he became familiar of the voice of the Appellant. The room for a mistake is substantially minimised. Furthermore, the evidence of the Appellant regarding the taxi story has been refuted.

[13] The State witnesses have been found credible in the sense of reliability. This positive finding of the trial court cannot be faulted. Accordingly, the submission by Miss Masete for the Appellant must be rejected. The corroboration that she sought is abundantly there. *In casu* the trial court has correctly addressed the concerns stated in a series of the decisions of the courts since the advent of S v Mthethwa [5]. I found no misdirection.

The sentence of 18 years imposed by the trial court

[14] The Appellant was charged with the offence of robbery with aggravating circumstances[6]. He was represented throughout. The Appellant confirmed that he understood the charge[7]. He was convicted as charged[8]. Accordingly, the submission by Miss Masete that the trial court cannot rely on the provisions of the Act must be rejected.

[15] Notwithstanding the statement in the preceding paragraph, it is necessary to restate the jurisdictional requirement necessary to attract the sentence in excess

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[4] See Levack and Others v Regional Magistrate, Wynberg and Another 2003(3) SACR 187 SCA

[5] 1972 (3) SA 766 (AD) See also S v Charzen and Another 2006(2) SACR 143 SCA.

[6] See Annexure C to the record.

[7] See page 1 of the record

[8] See line 20 page 47 of the record.

of 15 years. In this case a sentence of 18 years was imposed. The relevant provisions of the Act read as follows:

'51(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in---

(a)Part II of Schedule 2, in case of –

(i) a first offender , to imprisonment of not less than 15years;

(ii) a second offender of any such offence, to imprisonment for a period of not less than 20 years;....."

It is common cause that the Appellant has been convicted of the offence referred to in the above section and that he has one previous conviction of theft and not robbery or robbery with aggravating circumstances. It must be noted that even common robbery is not sufficient to trigger the sentence of more than 15 years if the offender has no previous conviction of robbery with aggravating circumstances[9].

[16] In the circumstances of this case I find that there is a misdirection. The appeal must succeed. Accordingly, the order of the court is set aside and replaced with the following order:

1. The appeal against the conviction is dismissed ,
2. The appeal against sentence succeeds,
3. The sentence of the trial court is set aside and replaced with the following sentence;
   "The appellant is sentenced to 15 years imprisonment
   and he is declared unfit to possess a firearm. "
4. The sentence is antedated to 26 February 2013.

[9] See S v Mokela 2012(2) SACR 431 SCA at 434J to 435A-E

I agree,

A BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

And it is so ordered

RE MONAMA,

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, PRETORIA.

Appearances

For the Appellant:	Ms MM Masti.
Instructed by:	Justice Center, Pretoria.
For the Respondent:	Adv. M Marriott .
Instructed by:	Office of the State Attorney, Pretoria.
Date of hearing:	28 August 2017.
Date of judgment:	15 September 2017.