IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

(1) NOT REPORTABLE
(2) NOT OF INTEREST TO OTHER JUDGES
(3) REVISED.

Case Number: A233/2017

20/3/2018

In the matter between:

TSHIFHIWA NETSHIFHEFHE Appellant

AND

THE STATE Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J.

[1] The appellant was convicted in the Atteridgeville Regional Court on three counts, to wit robbery with aggravating circumstances, attempted murder and sexual assault as defined in terms of the provisions of the Sexual Offences Act, 32 of 2007. The appellant received a sentence of 15 years imprisonment in respect of count 1, eight years imprisonment in respect of count 2 and three years imprisonment in respect of count 3. The

sentences in respect of count 1 and 2 to run concurrently. Accordingly, the appellant was sentenced to and effective sentence of 18 years.

[2] The appellant was granted leave to appeal both the conviction and sentence on petition to this court.

Point *in limine:* Incomplete record

[3] The events culminating in the commissioning of the crimes, stretched over a period of four days. E M, the employer of the victim, testified that she met the appellant on the 5th of August 2014 at a night club and that he accompanied her home. He remained at her residence until the commissioning of the crimes on the 8th of August 2014.

[4] Ms Mande was not present during the assault of the victim, but testified to the events prior to and after the assault. Her evidence as reflected in the record is comprehensive.

[5] Although the victim's evidence in chief was fully recorded, only a portion of the cross-examination appears from the record. However, the appellant's version that he was not at the residence of Ms M on the Friday in question and that he denies the allegations against him as put to the victim, is reflected in the record. The remainder of the cross-examination could, consequently, not have taken the matter any further.

[6] The appellant's evidence in chief was not fully recorded and commences with an account of his academic background. Thereafter the appellant dealt fully with the evidence of both Ms M and the victim. In other words, the appellant's version was fully recorded.

[7] The cross-examination and re-examination of the appellant was also fully recorded.

[8] In view of the aforesaid defects in the record, Mr Pistorius, counsel for the appellant, submitted that the appellant would be materially prejudiced if the appeal is argued on the record as it stands.

[9] In support of this contention, Mr Pistorius referred to several decided

cases on the issue *in casu,* to wit *S v Gumbi* 1997 (1) SACR 273 (W); *S v Joubert* 1991 (1) SA 119 (A) and *S v Schoombie* 2017 (2) SACR 1 (CC).

[10] The principle that an appellant might be prejudiced if an appeal is heard on an incomplete record is well established and borne out by the cases *supra.* Each matter should, however, be judged on its own merits in order to determine whether the principle *supra* is applicable.

[11] Mr van der Merwe, counsel for the State, quite correctly referred to the following passages in *S v Chabedi* 2005 (1) SACR 415 (SCA):

"However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect records/ of everything that was said at trial." [417f-g]

and

"The question whether the defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal." [417h]

[12] Applying the aforesaid dicta to the facts *in casu,* it is clear that only a portion of the cross-examination of the victim does not form part of the record. The appellant's evidence relevant to the consideration of the appeal was fully recorded.

[13] In the premises, I am of the view that the appeal can be properly considered on the record as it stands.

Conviction

[14] It was not in dispute that the victim was brutally assaulted and robbed of her possessions in the residence of Ms M on Friday, the 8th of August 2014. The only issue in dispute is whether the appellant was the perpetrator of the crime.

[15] Ms M testified that she did not sleep at her residence on the Thursday night preceding the attack. On Friday morning she phoned the victim to enquire about food for lunch. The victim told her that they would eat the food that the appellant had bought. Upon realising that the appellant was at her residence without her knowledge or consent, she demanded to speak to him. The victim handed the phone to the appellant and Ms M, in no uncertain terms, ordered the appellant to leave her residence.

[16] Ms M phoned twice after the first call and on both occasions the appellant was still at her residence. Sometime after the third call, Ms M received a call from her daughter and learned about the attack on the victim.

[17] The victim testified that the appellant was the person who attacked her. The appellant simply denied that he was present at the residence of Ms M on the morning of the attack.

[18] The court a *quo,* quite correctly rejected his version and found the appellant guilty as charged. I could find no reason to interfere with the conviction and the appeal against conviction stands to be dismissed.

Sentence

[19] The attack on the victim was exceptionally brutal. The appellant initially stabbed the victim at the back of her head with a knife. He thereafter stabbed her several times with a screwdriver. He proceeded to tie the victim's hands and legs with a curtain rope. The appellant undressed the victim and ordered her to lie on the floor. Upon realising that the victim was in her menstrual cycle, he did not rape her but plucked her pubic hair out. The victim testified that it was very painful. Whilst lying on the ground the appellant bit the victim on her left cheek and right ear. The bite on the cheek was so severe that the mark was still visible when she testified in court.

[20] The victim's ordeal was sadly not over and she was thereafter stabbed with the screwdriver in her mouth. Lastly and prior to leaving the scene, the appellant strangled the victim.

[21] The victim bled profusely and had to spend approximately eight days in

hospital. The trauma and pain the victim experienced is unimaginable. What motivates one human being to brutally assault another human being in the manner the appellant attacked the victim, is inexplicable.

[22] Mr Pistorius, to his credit, conceded that a term of 18 years effective imprisonment is not disproportionate to the crimes committed by the appellant.

[23] Consequently, the appeal against sentence cannot succeed.

ORDER

[24] In the result, I propose the following order:

The appeal against conviction and sentence is dismissed.

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N JANSE VAN NIEUWENHUIZEN J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

I agree.

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THOBANE A J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

MAUMEL A J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

APPEARANCES

Counsel for the Appellant:	Advocate P.F. Pistorius
Instructed by:	Emile Viviers Attorneys *REF: E VIVIERS/VN013*
Counsel for the Respondent:	Advocate F.W. Van der Merwe
Instructed by:	Director of Public Prosecutions (084 294 7780)