

REPUBLIC OF SOUTH AFRICA



A56/2018

12/02/2018

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

REVIEW NO: 18/2018

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED ✓

08/02/2018

DATE

SIGNATURE

In the matter between:

THE STATE

and

THEMBILE JITA

JUDGMENT

PETERSEN AJ:

[1] The accused pleaded guilty to a contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007 (Rape) read with section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997 pursuant to the provisions of section 112(2) of the Criminal Procedure Act, Act 51 of 1977 ("the Criminal Procedure Act") and was consequently convicted as charged.

[2] The facts on which the plea was based and the accused consequently convicted are as follows: During the evening of the 21 September 2014, he was in the

company of an unknown male he had met earlier that evening at a Tavern. As they were walking from the Tavern close to an open veld they noticed a man and woman walking ahead of them, and approached the couple. He had a knife in his hand. The man ran away and his companion chased after him. He decided to rape the woman, who is the complainant. He forced her to get down on her knees in the veld, undressed her, then himself, penetrated her vagina with his penis and engaged in non-consensual sexual intercourse with her. He left the complainant in the veld with his companion. As he left his companion was lying on top of the complainant. He was later arrested after being linked by DNA.

[3] The State proved four (4) previous convictions against the accused, all related to contraventions of the Drugs and Drug Trafficking Act, Act 140 of 1992 for possession of drugs in 2010, 2011, 2013 and 2014. Save for the 2014 conviction where the accused was sentenced to six (6) months imprisonment, he paid an admission of guilt fine.

[4] The accused testified in mitigation of sentence. During the course of examination in chief and questioning by the regional magistrate, the following emerged:

EXAMINATION BY MS ODENDAAL FOR THE ACCUSED

"Now sir I noted that you have several previous convictions and that most of them are drug related. At the time of the incident were you using drugs or not? — No I was heavily drunk.

Right but could you still distinguish between right and wrong? — I was heavily drunk, could not distinguish between right and wrong.

Sir when you raped the complainant you knew you was doing something wrong? — No I did not know but I have committed it.

Sir the problem is the following. If you know come and say oh I did not know what I was doing was wrong, you are creating a defence. — No I made a mistake it is not like that, I made a mistake because of alcohol.

But you knew what you were doing and you knew it was wrong? — Yes.

COURT

Okay can I ask you one question.

You say you were, so intoxicated and apparently you did not know what you were doing. Why did, why, when, when you saw this gentleman and the lady walking in front of you, why did you take out a knife? — I never had a knife.

...

You mentioned in the plea that you had a knife, apparently to fight with. (Indistinct). — Your Worship I am not the one who was having a knife, the person who was in my company is the one who was in the possession of a knife.

...

And there and then he came back to rape the girl? Or to climb on top of her? — Yes he had sexual intercourse with her while the knife was placed on his teeth.

...

When he finished you also partook? — Yes when he finished and he then called me that I must come.

And you partook? — Yes for the first time I refused. But he said to me that if I refuse he is going to stab me.

So was it your intention to do this? — Yes it was not my intention."

[5] The regional magistrate stopped the proceedings at this stage and forwarded the matter on review premised on the accused's evidence that he was threatened with a knife by his companion and that it was not his intention to rape the complainant. In his reasons he states that doubt exists in his mind whether the proceedings are in accordance with justice as it seems that the accused has a defence to the charge of rape. He holds the view that the conviction must be set aside with an order that the proceedings commence *de novo* before another judicial officer.

[6] Section 113(1) of the Criminal Procedure Act provides as follows:

"If the court at any stage of the proceedings under section 112(1)(a) or (b) or 112(2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation. (my emphasis)

[7] The regional magistrate reasons for submitting the matter on review is twofold:

1. He is in doubt whether the accused is guilty in law, of the offence to which he had pleaded guilty, and
2. He believes that the accused has a defence to the charge of rape.

[8] The provisions of section 113(1) of the Criminal Procedure Act are clear and unambiguous in respect of both reasons for review put forward by the regional magistrate. The purport of which is that the regional magistrate was enjoined to record a plea of not guilty and proceed with the trial. There is no irregularity in the proceedings to merit the setting aside of the proceedings on the stated reasons.

[9] In the result, it is ordered:

That the matter be remitted to the regional magistrate who is enjoined to record a plea of not guilty in terms of section 113(1) of the Criminal Procedure Act 51 of 1977 and to call on the prosecutor to proceed with the prosecution.



AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree and it is so ordered



TA MAUMELA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

REVIEW RECEIVED ON 30 JANUARY 2018

JUDGMENT DELIVERED ON 08 FEBRUARY 2018