THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 776/2016

In the matter between:

GERT PETRUS JACOBUS GROBBELAAR KOTZE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Kotze v The State* (776/16) [2017] ZASCA 27 (27 March 2017)

Coram: Shongwe, Majiedt, Van der Merwe and Mocumie JJA and Schippers AJA

Heard: 16 February 2017

Delivered: 27 March 2017

Summary: Criminal Law ─ conviction on housebreaking with intent to commit indecent assault and indecent assault ─ whether the State proved the identity of the appellant and all the elements of housebreaking with intent to commit indecent assault and indecent assault beyond reasonable doubt.

ORDER

On appeal from: North Gauteng Division of the High Court, Pretoria (Bertelsman, Raulinga *et* Phatuli, JJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

Mocumie JA (Shongwe, Majiedt and Van der Merwe JJA and Schippers AJA concurring):

[1] The issues in this appeal are twofold, namely whether the appellant was properly identified by the complainant as the perpetrator, and, whether he was correctly convicted on a charge of housebreaking with intent to commit indecent assault and indecent assault, ie whether the alleged offences were proved beyond reasonable doubt.

[2] The appellant, Mr Gert Petrus Jacobus Grobbelaar Kotze, was charged in the Klerksdorp Regional Court, with housebreaking with intent to commit indecent assault and indecent assault. The State alleged that the appellant broke into and entered the home of the complainant, a 13 year old girl, with the intent to indecently assault her and that he indecently assaulted her. He was convicted as charged and sentenced to five years' imprisonment, of which half was suspended conditionally for five years. His appeal to the court a quo, with leave of the trial court, was dismissed and leave to appeal was refused. The present appeal is with special leave of this court.

The evidence before the trial court

[3] The State presented the evidence of the complainant, her […] and Mr Morne Crause (Morne), a friend of the appellant. The complainant testified that on the night of

9 March 2001 she was at home in Wilkoppies, Klerksdorp. She was with […]. Their parents and their brother were out of town. The complainant lived with her parents and brother in the main house while […] occupied a flatlet in the backyard on the premises.

[4] The complainant testified that earlier that night, she was watching television in the main house when the appellant arrived with a friend, Quintin. The appellant was in a romantic relationship with […]. She knew him from prior occasions when he and […] fetched her from where she was visiting with his car and, also when he spent a night at her home when their parents were away. Upon his arrival that evening, she took him through the house to the flatlet where […] was. She went back to watch television but fell asleep on the couch. […] subsequently put […] to bed in her bedroom, where she slept with her clothes on. She was wearing a t-shirt and shorts. Later that night, as the complainant was sleeping, the appellant came into her bedroom and switched on the light which was connected to the fan in the middle of the bedroom. She was surprised by his presence in her bedroom. She opened her eyes and looked at him. He switched the lights off and left the room.

[5] Shortly afterwards she noticed a silhouette in her bedroom which she made out to be the appellant. She described him as tall and chubby. The complainant switched on her bedside lamp but the appellant reached out and switched it off. He then sat next to her on the bed. He put his hand under the duvet cover and touched her upper thigh. She jumped up from her bed and tried to get to the door. The appellant grabbed her from behind and pinned her down onto the carpet. She was on her knees. Without taking her shorts off, the appellant started to rub her private parts and fondled her breasts by putting his hand under her t-shirt. She again tried to escape but could not. She screamed but no one heard her because the appellant had his hand over her mouth. His hand smelled of liquor. He continued to rub her private parts. She asked him to stop, but he continued. In evidence she said that it made her feel uncomfortable and bad. After a few minutes, he fell backwards and she managed to run away. She ran through the kitchen door which was open, into the garden. The outside light at the kitchen was on. She hid behind a wall next to the swimming pool. Shortly thereafter she

walked towards the garden near to her bedroom window, from where she saw the appellant leave the house through the kitchen door. He was tripping over his feet but did not fall. He went into the flatlet and sat on a bench next to the sliding door.

[6] A short while later, as she was hiding in the garden, she heard […] her name. She did not answer the first time as she was scared. When […] called her the second time, she answered. […] to fetch her where she was hiding and brought her back into the house. She told […] that the appellant had touched her inappropriately. […] left her in the house and went to confront the appellant and chased him away. The police were called. A charge of indecent assault was opened against the appellant. She subsequently received medical treatment.

[7] […] testified that, at around 20h30 that night, the appellant visited her with his friend Quintin who was drunk. Later Morne joined them and all four sat and enjoyed drinks together. It was common cause during the trial that the complainant had opened the remote controlled gate […] friends and had walked them through the main house to […] flatlet. The party later decided to visit a local pub. Quintin, who was asleep at this point, was left behind in the flatlet. Just before leaving home, […] went to check whether the complainant was still asleep. She told the complainant that she was going out for a while. Thereafter she closed all the doors and windows of the main house. As she did this, Morne and the appellant followed her and walked with her through the main house. She said that they were standing behind her when she locked the back door (kitchen door). The key was kept under a cloth covering a birdcage which stood on the dishwasher next to the kitchen door. However, the kitchen window did not close properly. The catch could be lifted and the window opened from outside. Once opened, anyone who put his or her hand through the window and could reach the birdcage to remove the key, would be able to gain access to the house through the kitchen door. […] testified that she had done this before. She said that she had opened a bag of dog food with a knife earlier that day, that she left it on the table outside the house, and that the knife could be used to open the window. After closing the doors and windows of the

main house, she did the same in the flatlet, except for one door which she did not lock in case Quintin woke up and wanted to leave.

[8] The appellant, […] and Morne left her house at around 23h00, and went to a pub known as 'Good Fellas', where […] said that the appellant constantly picked fights with her over insignificant issues. There, they decided to go to Exit club. She had been driving the appellant's car as he was under the influence of alcohol. Morne followed them in his own car. Upon arrival at Exit club, the appellant again picked a fight with her and then grabbed the car keys from her. He moved to the driver's seat and drove away at a high speed. He did not tell her or Morne where he was going. This happened at around 01h00. She and Morne went into the club, sat on the first level and spoke about the appellant's behaviour. The appellant never returned to the club to fetch her. She had to ask for a lift home from a patron whom she knew at the club, as Morne had also left by this time. The patron agreed to give her a lift and dropped her off at her home in the early hours of that morning. When she opened the front door and walked into the main house, she was surprised to find the kitchen door open because she knew that she had closed and locked it when she left earlier on. She went into the complainant's bedroom but could not find her. She panicked and called out her sister's name several times until she responded from outside the main house in the garden. She went outside and found her sister crying. The complaint told her that the appellant had touched her inappropriately. She brought her back to the main house into their parents' bedroom and locked her inside. The appellant and Quintin were asleep in the flatlet. She confronted the appellant and chased him off the premises, and then called the police. When the police arrived, she took them to the appellant's home in Orkney where he was found sleeping. He was arrested on the basis of the complainant's allegations.

[9] Morne confirmed that he was with […] and the appellant on the night in question. The complainant opened the door for him and took him through the main house to the flatlet. He, […] and the appellant decided to go to a pub and left Quintin behind as he was drunk. He said that when […] had closed and locked the doors and windows of the main house prior to their departure, he walked with her, but said that the appellant was

not present. The appellant went straight to his car. He also contradicted […] evidence that when the appellant left Exit club, he was angry with her and drove off without telling them where he was going. Instead he said that the appellant took the car keys in order to park the car properly, far from the pavement where […] parked it. He said that the three of them went into the club once the appellant came back after parking the car ─ and that the appellant never left his company until late. At some point, he could not find the appellant or […]. He then left the club on his own.

[10] The appellant testified in his own defence. He denied the charges. He confirmed that he was at the complainant's home on the night in question at the invitation of […] He denied that he was present when […] closed the windows and locked the doors of the house ─ he said that he went directly from the flatlet to his car. He said that he did not know where the key to the back door was kept, or that the mechanism of the kitchen window was defective. Apart from confirming that he, […] and Morne left the premises to visit a pub and later a club, he said that when they arrived at Exit club, they went straight to the bar to place their drinks orders. For most of the time, he was with Morne and […] was with her friends and he even reprimanded her for this. At some stage […] disappeared and he went to look for her all over the club, without success. Morne also disappeared. Now worried, he then left the club to look for […] at her home. He thought she might have gone home. At her home, he climbed over the wall and went to the flatlet but she was not there. He only found Quintin who was still sleeping. All the doors to the main house were closed. He climbed over the wall again, and returned to the club.

[11] On his way back to the club, he had a tyre puncture. He stopped to fix it. Thereafter, he went back to the club to look for […] again, but did not find her. Assuming that somebody had taken her home, he went back to the flatlet, climbed over the wall again but, again, found only Quintin sleeping there. The doors of the main house were in the same condition as the previous time when he came to the property. He thought that […] was already home or nearby and went to sleep on the bench in the flatlet. Later, he was woken up by […], […] hitting him with a shoe, but he could not understand

what she was saying. He asked her what the matter was. Quintin suggested that they leave the premises and they did. They went to sleep at his home in Orkney. They were later woken up by the police who informed him of the complainant's allegations. He maintained that he never went inside the main house that night after he had been taken through to the flatlet by the complainant; that he was not at any stage in the complainant's bedroom whilst […] was not home; that he was unaware of a knife lying on the table outside the kitchen window; that he did not use it to open the window to get the key to gain entry to the main house; and that he did not indecently assault the complainant.

The findings by the trial court and the full court

[12] On the evidence presented, the trial court found that the complainant, despite being a child of 13 years at the time, was an honest and impressive witness and had no reason to falsely implicate the appellant. It found that the complainant and […] corroborated each other on material aspects including the fact that the appellant, as a result of having visited their home prior to the night in question, knew where the key to the main house was hidden, and thus gained entry into the main house with intent to indecently assault the complainant. The trial court further found that although the appellant was not a poor witness and stuck to his version, there were numerous improbabilities in his version and that of his friend, Morne, which led to its rejection of his version as false.

[13] The full court confirmed the findings of the trial court, in particular that the complainant was an honest witness in her identification of the appellant as her assailant inside the main house on the night in question. It also found that when the appellant did not find […] in the main house, in his drunken state, he indecently assaulted the complainant. I will revert later to this finding, which I believe the full court made erroneously.

The appellant's submissions

[14] In this court, it was submitted that the trial court misdirected itself materially by finding that the State had proved the offence of housebreaking with intent to commit indecent assault and indecent assault. It was argued that the trial court was not justified to draw the inference from the evidence presented that the appellant had the intent to commit indecent assault when he entered the main house. On the issue of the identity of the appellant, it was submitted that there was limited lighting during the assault for the complainant to positively identify the appellant. Further that there were contradictions between the evidence of the complainant and […] on the lighting inside the main house at the time of the incident. It was argued that there was no reason why the trial court rejected the evidence of Morne who corroborated the appellant's version that he, Morne, was with the appellant at all material times and that the appellant never left him […] at Exit club as she testified. And the appellant could not have seen where the key to the main house was hidden by […].

Discussion

[15] The correct approach in assessing evidence in a criminal case is 'to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'[1]

[16] The process which should be applied in evaluating the evidence against which it must be determined whether an accused's version is reasonably possibly true ─ which would entitle the accused to an acquittal was stated by this court in *S v Trainor*[2] as follows:

'A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must

---

[1] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.
[2] *S v Trainor* 2003 (1) SACR 35 (SCA) para 9.

corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong.'

[17] Where a trial court is faced with two mutually destructive accounts, logic dictates that 'both cannot be true. Only one can be true. Consequently the other must be false. However the dictates of logic do not displace the standard of proof required either in a civil or criminal matter. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and in the process measured against the probabilities. In the final analysis the court must determine whether the State has mustered the requisite threshold proof beyond reasonable doubt.'[3]

[18] As regards the evidence concerning the identification of the appellant, the following needs to be said. Authorities dealing with the dangers of incorrect identification are legion. The *locus classicus* is *S v Mthetwa*[4] where this court warned that 'because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution.' In *R v Dladla*[5] this court, affirmed the following:

'One of the factors which in our view is of the greatest importance in a case of identification is the witness' previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased. *Even in the case when a witness has some difficulty in the witness-box in giving an accurate description of the facial characteristics and clothes of the person whom he has identified, the very fact that he knows him provides him with a picture of the person in the round which is a summary of all his observations of the person's physiognomy, physique and gait, and this fact will greatly heighten the probability of an accurate identification. . . . In a case where the witness has known the person previously, questions of identification marks, of facial characteristics, and of clothing are in our view of much less importance than in*

[3] *S v Janse Van Rensburg & another* 2009 (2) SACR 216 (C) para 8.
[4] *S v Mthetwa* 1972 (3) SA 766 (A) at 768A.
[5] *R v Dladla & others* 1962 (1) SA 307 (A) at 310C-E. See also *Arendse v S* [2015] ZASCA 131; 2015 JDR 2054 (SCA).

*cases where there was no previous acquaintance with the person sought to be identified***.** What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made.' (My emphasis.)

[19] In the present case, the unrefuted evidence is that the complainant knew the appellant prior to the incident as alluded in para 4 above. The appellant also confirmed this. And the unchallenged evidence is that of all […] friends who visited her at home, particularly on the evening in question, the complainant knew only the appellant. She said '[e]k het net vir Gerhard geken, dit is al'.[6]

[20] At the time of the assault, the appellant was able to identify the appellant on three separate occasions. First, she recognised him immediately when she saw him inside her bedroom the very first time. He had switched on the light and she looked at him, before he switched off the light and left the room. Second, when he came back into the room to indecently assault her, apart from calling him by his name, Gerhard, she said she saw his silhouette and correctly described him by his physique, 'tall and chubby'. The hand he put over her mouth to stop her from screaming any further she said smelled of liquor. It is common cause that the appellant was intoxicated that night. The complainant could not have known this unless her evidence is true. And third, when she was hiding in the garden after she had fled from the appellant, she saw him leave the main house through the kitchen door. He was unsteady on his feet, walked to the flatlet and went to sit on a bench next to the sliding door. The light at the back door was on and so was the light at the door of the flatlet. And it is on this bench where […] later found the appellant sleeping. Now the complainant could never have known that the appellant went to sit on the bench unless she had seen him. Mr Erasmus, who appeared for the appellant, fairly and unreservedly conceded this. So, the complainant's identification of the appellant as the person who assaulted her was undoubtedly both honest and reliable.

---

[6] I only knew Gerhard, that is all. (Own translation.)

[21] I am therefore satisfied that the trial court was correct in finding that the State had proved beyond reasonable doubt, the identity of the appellant, as the person who indecently assaulted the complainant on the night in question.

[22] I turn now to the second issue raised by the appellant ie whether the State succeeded in proving that the appellant had the necessary intention to commit indecent assault at the time he broke into the main house.

[23] Housebreaking with intent to commit a crime consists in unlawfully breaking into and entering premises with intent to commit a crime.[7] Crucially, the intention to commit an offence must be present when both the breaking and entering are effected.[8] The purpose of the crime of housebreaking is to preserve the sanctity of the home against intrusions that involve danger or harm to the inhabitants. And because the crime is committed only by those who break and enter with intent to commit a crime, what the crime does, in effect, is to provide that a person who, intending to commit a crime enters the premises for this purpose can be punished even though he has proceeded no further than to force entry into the premises.[9]

[24] In criminal law, mere thoughts are not punishable. In other words, what a criminal thinks before (s)he puts those thoughts in action is always only known to the criminal. On that basis, across the world it is accepted that (s)he cannot be convicted for his or her (criminal) thoughts. In general, intent as the most critical element of an offence is very difficult to prove. Despite this difficulty, the State is bound to prove not only that the accused person acted unlawfully but that (s)he also had the necessary intent to do so. In the absence of direct evidence, and in the absence of presumptions in some cases, from time immemorial, the State has had to rely on circumstantial evidence to prove this elusive yet critical element. The courts have had to consider all the facts and

[7] JRL Milton *South African Law and Procedure Vol II Common-law Crimes* 3 ed (1996) at 792.
[8] JRL Milton above at 806, with cases cited therein.
[9] JRL Milton above at 792.

circumstances of the case placed before them and, by use of inferential reasoning, if such circumstances point to such guilty intent, convict such a person as charged.[10]

[25] In this case, the facts are that the appellant broke into the house and shortly thereafter, entered the complainant's bedroom and indecently assaulted her. The appellant falsely denied both. He therefore gave no explanation why he broke into the house. He should not be given the benefit of speculative possibilities as to his presence in the house, which he did not raise. In the result, I am satisfied that the conviction of housebreaking with intent to commit indecent assault was justified. The appeal against conviction therefore stands to be dismissed.

[26] In the result, the following order is made:
The appeal is dismissed.

BC Mocumie
Judge of Appeal

Appearances

For Appellant: J C Erasmus
Instructed by:
Johan Horn Attorneys

[10] *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204; 2016 (1) SACR 431 (SCA) para 34.

Symington & De Kock Attorneys, Bloemfontein

For Respondent: D W M Broughton
Instructed by:
The Director of Public Prosecutions, Pretoria
The Director of Public Prosecutions, Bloemfontein