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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: no
(2) OF INTEREST TO OTHER JUDGES: no

Case number: **A247/17**

In the matter between:

Khoale, Lerato Oriel

Appellant

v

The State

Respondent

JUDGMENT

Introduction

[1] The appellant was arraigned in the Regional Court for raping one K[....] K[....]. He was convicted, and on 3 September 2012 he was sentenced to a term of ten (10) years imprisonment. He appeals against both his conviction and sentence.

[2] The appellant does not deny that on 4 April 2008 he had sexual intercourse with the complainant. Most of the facts and circumstances surrounding this event are not really in dispute. They are very carefully and concisely articulated in the judgment *a quo*.

[3] The undisputed facts are: the complainant was a third year student at the University of Johannesburg, studying for a BCom (Accounting). The appellant was known to her and her family and over time they became close friends. He became interested in having a romantic relationship with her. She did not share his interest, but they nevertheless remained friends. The appellant ran a business owned by himself- an internet café based in Germiston. On 3 April 2008 he asked her to come to the premises in order to assist him with the accounts and she agreed. She met him at the Park Station in Johannesburg where they both boarded a train to Germiston. She specifically indicated to him that she had to be back in Braamfontein, where she resided, by 18h00. He promised her that he would see to it that she would be back in Braamfontein by that time. Once they got to his business they commenced work. They took lunch at a fast-food café named Wimpy and during lunch he propositioned her but she rebuffed him. They returned to his premises where they continued to work. At 17h00 she asked him to take her back to the train station so that she could travel to Braamfontein. He promised her that he would do so in time but kept her busy with work in the meantime. After 18h00 he promised her that he would arrange transport for her to return to Braamfontein. At 20h00 he accompanied her to the Germiston train station for her to board a train to Braamfontein. They

discovered that there were no trains travelling to Braamfontein anymore that day. He suggested they go to Spruitview where he would arrange a taxi for her to get to Braamfontein. As she had no choice she agreed. At Spruitview, they discovered that there were no taxis travelling to Braamfontein. He suggested they go to his friend's place, where he promised he would arrange for her to be transported to Braamfontein. When they got there they discovered that his friend could not assist, instead his friend confronted her and asked her why does she not want to sleep over at Spruitview. He suggested they go to his auntie's place, which is in Spruitview. Again, she had no choice but to agree. They got to his auntie's place at 21h00. At his auntie's place he told his auntie that they would be sleeping over. She agreed to sleep over on the condition that they do not share a room. His auntie prepared a bed for them. It was a single bed of double size. She indicated that she was not happy to be sleeping with him. She specifically told him that she will not share a bed with him. He pressurized her into accepting the generosity of his auntie to provide them with accommodation – he said to her that she should not be disrespectful to his aunt who was willing to host them for the night. She relented but indicated that she would want to be left alone while they were sleeping. She asked to borrow a pair of shorts to sleep in but was provided with one that did not fit. She went into the bedroom by herself and removed her pants but kept her top and underwear on and climbed into bed. She placed pillows between herself and himself so that their bodies would not come into contact with each other. She left the light on and went to sleep. He came into the room, switched off the lights and climbed into bed. At some point while they were sleeping he penetrated her and

ejaculated inside of her – how this came to be is in dispute, which I will deal with in a moment. At no time did she scream or alert anyone else in the house while all this occurred. She cried herself to sleep. In the morning he told her to bath herself. She said she did not want to. He pressurized her to do so. She relented. Breakfast was prepared for her and the rest of the household. While eating her breakfast his cousin asked her why she appeared to be so glum and said to her that he was a very good man. She told his cousin that if the cousin knew what he had done to her, the cousin would not hold such a glamorous view of him. She did not tell anyone in that household that he raped her while she was forced to share a bed with him there. After breakfast he arranged for a friend to transport himself and her to a taxi rank. There she boarded a taxi to Braamfontein where she met her friends. When one of her male friends enquired about her whereabouts the previous day and night she said that she was kidnapped. Later that morning she met her friend, a Ms L[....] M[....] (L[....]). She told L[....] of her ordeal the evening before and said that the appellant had come inside of her. L[....] advised her to report it to the police. She did not heed the advice. On 9 April 2008 she received an email from him, which is dealt with in greater detail below. She tried to make contact with Nthabiseng Rape Crisis Centre but was not successful. Two weeks later she informed a male friend of hers of the alleged rape. He immediately took her to Brixton Police Station, where she tried to report the incident. The police were not willing to accept her report because she was unable to furnish the address where the alleged rape took place. At the end of that week she informed her parents. She told her dad that she could not report the incident to the police

because she did not have the address of the appellant's aunt where the incident took place. Her dad and her uncle got together and managed to acquire the address from the appellant. They took her to Moroka Police Station where she tried to lay a charge against the appellant but the police were unwilling to listen to her. She returned to Brixton Police Station where she was able to lay a charge against the appellant as she now had the address of the appellant's aunt. The appellant kept on trying to make contact with her. On 6 May 2008 she discovered that she had fallen pregnant as a result of him ejaculating inside of her. She terminated the pregnancy because she was of the view that a child born from such circumstances would be a permanent reminder of her rape. The termination was a violation of her deeply held religious beliefs.

[4] The only issue in this case is whether the complainant consented to the sexual intercourse or not. In this regard the complainant and the appellant present different accounts of what transpired while they shared a bed.

Her version:

[5] According to her he tried to force himself on her at about 23h00 but she succeeded in repelling him and managed to fall asleep. At about 02h00 he woke her, pulled her hair and said she will have sex with him. She was lying on her stomach, climbed on her back, removed her panty and penetrated her from behind. She was crying while all this occurred. After ejaculating inside her he returned to his side of the bed and went to sleep. She remained on her side of the bed, continued to cry and fell asleep.

His version:

[6] His version of what transpired is completely devoid of detail. He merely said that they had consensual sex while they shared the bed and denied that he had forced himself on her. He gave absolutely no account of how it happened or at what time it happened. He failed to specifically address any part of her account, such as her dividing the bed into two separate sides by placing pillows in the middle; or her account that she told him prior to agreeing to accept the hospitality of his aunt that she would want to sleep in a room separate from himself. Instead of providing details of what happened, the appellant relied on certain aspects of her evidence to discredit her version.

Aspects of her evidence relied on by the appellant

[7] During her evidence the complainant stated that when the incident occurred, her cell-phone battery was dead and therefore she was unable to make contact with her friends or anyone else. However, a record of her cell phone calls was presented as evidence and this record shows that her number was used to make a few calls at the time she claimed the battery of her phone was dead. Further on 4 April 2008 she deliberately misinformed her friends that she was kidnapped on the evening of 3 April 2008. According to her on the 4 April 2008, i.e the same day as the alleged rape took place, she informed L[....] that the appellant had “*come inside her*”. L[....] also testified at the hearing in the court *a quo*. In evidence in chief she stated that the complainant had told her

she was raped by the appellant. During cross-examination this averment was not presented as unambiguously as it was during her evidence in chief. L[....] equivocated from saying that the complainant reported to her that she was raped to saying that the complainant reported to her that the appellant attempted to rape her. These three portions of the evidence, as well as the fact that the complainant only opened a case against the appellant two weeks later were used a platform by the appellant to argue that the complainant was a dishonest witness, and therefore her claim that the appellant had raped her should be found to be false. Mr Guarneri, for the appellant, argued that (i) the fact that the complainant's reason for not calling her friends or anyone else that evening of the 3 April 2008 or the morning of 4 April was contradicted by the documentary evidence in the form of her cell phone records; (ii), the fact that she falsely told her friends on 4 April that she was kidnapped on 3 April; (iii) the fact that she took two weeks to lay a charge; and, (iv) the fact that L[....] claimed that she told her that the appellant attempted to rape her indicates that the appellant was a dishonest witness, and therefore her claim that she was raped must be disbelieved or doubted

[8] I find that there is no merit in the submissions of Mr Guarneri. They constitute a partial account of the evidence. Reading and analysing the evidence in its entirety would not allow for such a conclusion to be drawn. Put differently, these problematic aspects of her evidence are insufficient to make a finding that she was dishonest about being raped.

[9] Apart from the undisputed facts referred to in [3] above, there are two key actions on the part of the appellant that need to be taken note of when determining whether the complainant's version that she was raped, or the appellant's version that they engaged in consensual sex, is correct. They are:

- a. Four days after the incident, on 9 April 2008, the appellant, according to the complainant, sent the complainant an email wherein he stated:

"Dear Sunshine,
Darling, I know now that it was so uncalled for of me to force myself unto you, I was a stupid to have not listen to you when you said you weren't ready and I admit my foolishness. I wasn't thinking properly, truly I was thinking via my dig and please for give me I would want to loose you, honestly I am deeply sorry and I love you to bite. For the record I am mean it when I say I care and will cater for the both of us and offcourse I will definitely deposit the cash as soon as you want me to!!!!

Anyway I have an interview to attend sometime next week at the JSE, regarding our sponsorship from Umsombovu Youth Fund, wish me Luck it truly HELP

Take care!!!

Ps Ratots" (quotation is verbatim)

- b. Sometime after she laid a charge against him he sent her an SMS which reads:

"Tumi, I still think you are being unfair by blowing everything out of proportion and try to push me away by using insulting vocab. I think you need to grow up and make sound decision by yourself for future and of course you need friends who have your best interest at heart. However, me and friends it is like water and oil and for the record I do not regret ejaculating. On giving a chance I will do it again.
PA Ratots"

[10] The appellant denied that he sent her the said SMS. His denial was bare. In the course of this denial he failed to deal with the document which contains

this email message. It shows that the email was sent by one Lerato Khoale whose address is indicated as lkhaole@yahooo.com. In my view, he was obliged to deal with the evidence and his failure to do so is fatal for his case. Similarly, with the SMS. They simply cannot be ignored. In any case, it was very difficult for him to deal with the email as it contained information that only he was privy too – information about his interview with the JSE. The email and SMS messages add great weight to the version of the complainant.

[11] All this evidence shows that the complainant's claim that the sex was non-consensual is correct. It shows that the appellant pursued a romantic relationship with her, despite her opposition to such a relationship; that he orchestrated a situation where the complainant had no choice but to stay overnight with him at his aunt's house, thus rendering her vulnerable and subject to his mercy and goodwill; that he had no regard for her desire not to share a room or a bed with him; that he made no attempt to assist her in ensuring that she was properly clothed before she retired to bed; that he disregarded her desire to protect herself by keeping the light on; that he had no regard for her efforts to divide the bed into two separate parts; that he climbed into the bed naked while knowing that she was not willing to have any intimate contact with him; and finally, that he could not accept her decision not to have sexual intercourse with him.

[12] In my view, the conspectus of all the evidence shows beyond reasonable doubt that the appellant raped the complainant. He was correctly convicted by the court *a quo*.

Sentence

[13] According to the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997, a minimum sentence of ten years' imprisonment was to be imposed upon the appellant unless the court found that there were substantial and compelling circumstances to depart from this minimum sentence. In assessing this issue of what sentence should be imposed the learned magistrate said that she would treat the following factors as substantial and compelling circumstances justifying a departure from the minimum sentence:

- a. The appellant was a first offender;
- b. The complainant did not suffer any physical injuries; and,
- c. The appellant spent five months in prison awaiting the finalisation of his trial

[14] Despite saying that these constituted substantial and compelling circumstances justifying a departure from the minimum sentence, the court *a quo* proceeded to impose the minimum sentence of ten years. In my view the first two of those factors do not constitute compelling and substantial circumstances warranting a departure from the minimum sentence. However, as for the third factor our courts have taken it into account time spent in prison

while awaiting trial as a factor warranting a reduction in the sentence. This is to ensure that once a person is convicted s/he is given fair credit for already enduring a restriction on his/her freedom by being incarcerated while the trial progressed. The leading case on this score is *Brophy*¹ where a full bench of this Court endorsed the approach of Schutz J (as he then was) who, in *Stephen*² said that: "*Imprisonment whilst awaiting trial is the equivalent of a sentence of twice that length.*"³ One way of dealing with this is to ante-date his sentence to the first day he was incarcerated. Another way is to reduce the minimum sentence by a period commensurate with the period of time already served whilst awaiting the finalisation of the trial. In my view, given that he spent five months awaiting trial, he is entitled to a reduction of the term of imprisonment from ten years to nine years and seven months.

Order

[15] In the circumstances the following order is made:

1. The appeal of appellant against his conviction is dismissed.
2. The appeal of appellant against his sentence is granted. The sentence of ten years imposed by the court *a quo* is set aside and replaced with the following:

"The accused is sentenced to 9 years and seven months imprisonment."

VALLY J

¹*S v Brophy and Another* 2007 (2) SACR 56 (W) at [19]

²*S v Stephen and Another* 1994 (2) SACR 163 (W)

³*Id.*

JULY AJ

Date of hearing: 1 February 2018

Date of judgment: 2 February 2018

For appellant: Adv E Guarneri instructed by the Legal Aid

For the state: Adv P Nlarasele from the office of the DPP