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REPUBLIC OF SOUTH AFRICA



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

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

3/05/2018

DATE

SIGNATURE

CASE NO. A 283/2017

MAKHUVELA: NORMAN

Appellant

and

THE STATE

Respondent

JUDGMENT

INGRID OPPERMAN J

INTRODUCTION

[1] This is an appeal against both conviction and sentence. The appellant, Mr Makhuvela, was convicted in the Germiston Regional court of rape in

contravention of section 3, read with sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and related matters) Amendment Act, 32 of 2007 having been legally represented during his trial.

[2] He was sentenced to life imprisonment and accordingly has an automatic right to appeal against both his conviction and sentence.

[3] He was accused number 1 in the court *a quo* and Mr Sibusiso Skondo J. ('Mr J.'), was accused number 2, who was charged and convicted of assault with intent to do grievous bodily harm and sentenced to 5 years imprisonment.

SUMMARY OF THE EVIDENCE

[4] On the evening of 29 May 2015, the complainant met her then boyfriend of 3 months standing, Mr J., at a tavern where she consumed 11 x 750ml bottles of Hunters Dry, and a 12th on her way to Mr J.'s residence, a room. At his room, which she was visiting for the first time, at about 2h00 in the morning of 30 May 2015, they had consensual intercourse in the presence of the appellant who was lying in the corner. Mr J. then ordered the appellant and a third person ('*the third person*') to have sex with the complainant whereafter Mr J. assaulted her with an iron rod. She attempted to defend herself with a broken bottle and managed to escape. She was assisted by security personnel who, she says, took her to the hospital.

[5] Ms Kokwane Phangula, a police constable ('*the constable*') testified that she had been called to the Germiston Police Station to take the complainant to hospital, which she did. This occurred at about 12h00 on 30 May 2015. After the complainant was examined the constable was contacted to fetch her again.

[6] The constable and one other, fetched the complainant from the hospital, and the complainant directed them to the room of Mr J.. He was not there but

the appellant was lying on the bed. The complainant identified the man lying on the bed as the person who had raped her. She also identified the iron rod, which had been used to assault her. This rod they confiscated. The constable, who effected the arrest of Mr J. on 28 September 2015, testified.

[7] Upon her return to her home, the complainant told two of her friends what had happened. A professional nurse, Ms R. (*the nurse*), testified that on the day in question, she was working at B. G. Hospital (*the hospital*), had examined the complainant and had recorded her findings on the J88 form. The clinical findings included findings that the complainant's head was swollen, that there were bruises on her right thigh, a laceration on her right upper forearm, multiple bruises on her back, lacerations on her lower right eye, both hands had lacerations on the inside and she had lacerations on her left breast.

[8] She had concluded that these injuries were in keeping with the complainant having been physically assaulted with a hard, blunt object. An examination of the complainant's genitalia revealed irregular tears at 6 and 3 o'clock with a cleft at 5 o'clock. Her cervix was found to be inflamed which injuries were found to be consistent with forceful penetration with a hard blunt object. The nurse found her to have been extremely drowsy during examination which she attributed to having been either tired or inebriated.

[9] The state then closed its case whereafter the appellant and Mr J. applied for a discharge in terms of section 174 of the Criminal Procedure Act. The judgment in respect of such application is not part of the record but it was evidently refused. The appellant and Mr J. then closed their cases without testifying or leading any evidence. The magistrate then called two witnesses Ms B. N. (*Ms N.*) and Ms M. M. (*Ms M.*). The reason for doing so does not appear from the record.

[10] Ms N. testified that she had met the complainant and Mr J. at a tavern where they had both told her that they were involved romantically. They left saying Mr J. was to give the complainant money. In the morning she saw the complainant who explained that Mr J. had forced one Dumdum, the appellant, to have sex with her and had assaulted her with an iron rod. Ms N. said that the complainant's face was swollen.

[11] Ms M. testified that the complainant arrived at her home, which she shared with the complainant. The police had accompanied her. She had explained to her that Mr J. had 'forced' himself onto her and had then woken up a certain Venda guy to rape her. Mr J. then assaulted her with an iron rod having confronted her about a cell phone. Ms M. was asked to identify the appellant whom she identified as Dumdum. She was also asked whether the complainant had identified the Venda man to her. She said that the complainant had not mentioned his name.

ISSUES

[12] The issue in this appeal in relation to the appellant, is whether the identification of the appellant as the perpetrator of the rape, was both honest and reliable.

ASSESSMENT OF EVIDENCE

[13] The evidence of the complainant is that of a single witness. The court *a quo* had regard to the cautionary rules applicable when assessing this type of evidence. It is clear that the court *a quo* was aware of the fact that it could only convict on the evidence of a single witness if such evidence were satisfactory in every material respect. It correctly referred to *R v Mokoena*, 1932 OPD 79 and *S v Sauls*, 1981 (3) SA 172 (A) at 180e and cautioned itself that it had been held that such rule does not replace common sense.

[14] In my view, the learned magistrate incorrectly concluded that the evidence of the complainant was satisfactory in all material respects in respect of the identification of the appellant. My reasons include:

- 14.1. During her evidence in court, the complainant testified that Mr J. had compelled the appellant to rape her. She had testified that after her and Mr J.'s consensual sex, he had instructed the appellant, who had just prior thereto been sleeping in the corner of the room on the floor, to have sex with her.
- 14.2. In her statement made to the police she had said that after sex with Mr J., two men had come into the room and had demanded to have sex with her. The complainant's explanation, when confronted with this contradiction, far from clarifying the situation, compounded the confusion. It was and remains unclear what the role of this third person was. He seems, on both versions, just to have appeared, have raped her, and disappeared again.
- 14.3. It seems that the charges were formulated with reference to the complainant's sworn statement as Mr J. was not charged with compelled rape which offence attracts a minimum sentence of life imprisonment.
- 14.4. On the facts initially presented to the state as formulated in the sworn statement, the appellant and the third person entered the room and quite independently demanded sex. The version presented in court was fundamentally different. The version presented in court was to the effect that at least one of the two

perpetrators, the appellant, was compelled - by Mr J.. In my view, this contradiction goes to the root of the state's case.

14.5. Even if I were wrong in this assessment, the following discrepancies further support the conclusion that the complainant's evidence was not satisfactory in all material respects. The complainant had told the constable that she had gone to Mr J.'s room where they had encountered some people where one of such people had raped her. This appears to be her first report after the rape, which report is inconsistent with her sworn statement and her evidence in court.

14.6. The complainant had told neither Ms N. nor Ms M. that she had been raped by a third person. She had told Ms N. that she had been raped by Dumdum, the appellant. Yet, she had failed to mention his name in her sworn statement. If she had not mentioned his name to the police and in her sworn statement because she only knew him by sight, then how could she have told Ms N. that she had been raped by Dumdum.

14.7. She had told Ms M. that she had been raped by a Venda man. She did not mention his name to her.

[15] To have consumed 9 litres of cider (12 x 750ml) during a period of no more than 8 hours (18h00 to 02h00), must have impaired both the complainant's judgment at the time and her recall of the events.

[16] In *S v Jackson*, 1998 (1) SACR 470 (SCA) Olivier JA held at 476 E – F as follows:

"In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In

our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule”

[17] In my view and particularly by virtue of the consumption of the vast quantities of alcohol, the evidence of the complainant calls for a cautionary approach. The objective circumstances attending the complainant’s observation does not instil confidence even for one who did not consume one drop of alcohol.

[18] The complainant testified that it was dark in the room. No evidence was led as to the lighting along the route she followed from the room to the security personnel. One does not know how much opportunity she had to observe the perpetrator/s. The learned magistrate found that the pursuit from the room to the security staff afforded her sufficient opportunity for observation. I disagree with that conclusion. It may well be that the lighting along the way was such to draw that conclusion but there were no facts placed before the court to draw such a conclusion. The court simply does not know what the conditions were prevailing at the time.

[19] The magistrate’s finding that, if she could identify the iron rod, she could identify the appellant, is unsustainable. Identifying a person’s features and identifying an iron rod can simply not be compared. In addition, she felt the blows of the iron rod which made the identification of the weapon easier.

[20] The next question which falls for consideration is whether the failure on behalf of the appellant, to have testified can assist the state in discharging the onus which rests upon it. In this regard the learned magistrate relied much on the *dicta* in *Osman and Another v Attorney General Transvaal*, 1998 (2) SACR 493 (CC) and *S v Boesak*, 2001 (1) SACR 1 (CC) at 11e to the effect that the

fact that an accused person has a right to remain silent, does not mean that there are no consequences attaching to a decision to remain silent during the trial.

[21] It is so that where there is evidence which calls for an answer and an accused person elects to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation, to prove the guilt of the accused.

[22] The weight of the evidence in this matter did, in my view, not call for a response. The state of sobriety of the complainant, the numerous material contradictions in the state's case as well as the absence of facts presented to assist the court in assessing the objective circumstances attending the observation by the complainant of the identity of her attacker, were lacking and a response was not called for. The State's case, primarily because of the contradictions in the single witness's testimony, simply did not attain the level of coherency and persuasiveness to put the appellant on his defence to the degree that his failure to testify counted against him sufficiently to enable him to be convicted.

[23] The duty of a judicial officer in a criminal case has been articulated many times. In *Rex v Hepworth* 1928 AD 265, dealing with what was termed a '*technical issue*' (ie, the oath had not been administered to a witness and this was uncovered after the testimony was given) Curlewis JA held at 277:

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figurehead, he has not only to direct and control proceedings according to recognised rules of procedure but to see that justice is done."

[24] In *S v Van den Berg* 1996 (1) SACR 19 (Nm) the issue was that inadequate evidence had been adduced by the prosecution about whether diamonds were rough or uncut. The trial court had discharged the accused at the end of the state case. On appeal, the court held that the magistrate ought to have followed up on this aspect pursuant to the powers in terms of sections 167 and 186. The court ordered the trial to be re-opened. In addressing the application of the sections the court approved the *dictum* in *Rex v Hepworth*, and at 65g held further:

“The result is that the South African criminal trial is a compromise between the "accusatorial" and the "inquisitorial" systems. The presentation of evidence is normally left to the parties, but if the Judge considers that the material before him is not sufficient to enable him to arrive at the truth, he may pursue the investigation himself.' It should be abundantly clear that even though our system is a 'compromise' or can be described as 'mixed', the accusatorial element remains the dominant element.”

[25] A court has a duty to intervene and has a very wide discretion when deciding whether evidence is essential, which a court of appeal will only interfere with on very limited grounds - see *S v Gabaatholwe and Another*, 2003 (1) SACR 313 (SCA).

[26] The learned magistrate was accurately aware of the admissibility and weight which should be attached to first reports. She referred to section 58 of Act 32 of 2007 and the case of *S v Hammond* 2004 (2) SACR 303 (A) which held that evidence of first reports were admissible to show consistency and to negate consent. That may be so but what the magistrate overlooked, in her assessment of these witnesses, was that there were material inconsistencies. The magistrate concluded that ‘*The*

complainant was consistent in her report that accused 1 raped her and that accused 2 assaulted her with an iron rod'. The two witnesses called by the court did not support the evidence of the complainant as found by the learned magistrate. I have listed the discrepancies above.

[27] In my view, the learned magistrate was faced with a case which had been poorly presented. She admirably tried to find the truth. The trial in this matter has left me with a grave sense of disappointment about the way the allegation of rape was investigated and the way the case for the State was presented to the court. This imposed an immense and unfair burden on the magistrate to fulfil her proper role as impartial arbiter. The court was asked to convict and sentence a man to life imprisonment. The stakes could not be higher.

[28] What was put before the court does not resonate with the seriousness of the charges. Care must be taken in any criticism of a given prosecution (or a given defence) and is not to be glibly made because it is impossible for the critic to know what the instructions were or what enquiries were made that might have produced nothing helpful. Not unmindful of those considerations, I find that there nevertheless remain inadequacies in the presentation of the State's case in this trial that are alarming.

[29] The prosecution should present evidence in an orderly fashion and explain why witnesses were not called. It occupied an inordinate amount of time during the hearing of this appeal to establish the sequence of events.

[30] It was (and remains) not at all clear whether the complainant went to the hospital first and then to the police station or the other way around. Indeed, the learned magistrate was of the view that the police had

interviewed the complainant at the hospital. The complainant was not led on the lighting in the room nor on the lighting on the route to the security personnel.

[31] The security personnel were not called as witnesses, nor was a reason proffered for this omission. In *S v Sebofi*, 2015 (2) SACR 179 (GJ) at [65] – [67] Sutherland J (with whom I concurred) held:

‘[65] The calibre of the case presentations, both prosecution and defence, were unacceptable for a case of this seriousness. A prosecutor cannot present a case by just pouring out a jumble of random facts as if one was pouring treacle from a jar. It is unfair to a court and it retards the aim of a fair trial, which apart from other factors, needs to be coherent and orderly.....

Moreover, victims of rape, as a class of vulnerable people in our society, ought to have a reasonable expectation that their cases are taken seriously enough to be investigated properly and tried at a standard that the guilty do not wriggle free because of un-insightful and superficial attention to details by those who are responsible to protect them. (See the remarks about the role of the police: *S v Minister of Safety and Security & Others* 2012 (1) SA 536 (CC) at [37] [53] – [61])

[67] In rape cases the most familiar scenario will be that the victim is a single witness. Therefore, it is a foreseeable and generic aspect of such cases. Accordingly, any police officer who is involved, and that includes the officer who receives the complaint, the officer who takes the victim’s statement, the arresting officer and the investigating officer ought to appreciate that an axiomatic line of enquiry is what circumstances might offer corroboration or throw suspicion on the truth or accuracy of the complaint....’

[32] Care should be taken when written statements are taken from complainants. Police officers to blame for inaccurate statements, should be called to testify to own up for such wrongdoing thereby protecting the credibility of the, often single, witness.

[33] Although Mr J.’s conviction does not serve before me and anything I hold in that regard will be *obiter*, I do think it important to note that a big

distinguishing feature between the evidence relating to the appellant and the evidence underpinning the conviction of Mr J., is the fact that the complainant was in a relationship with Mr J. and thus knew him well.

CONCLUSION

[34] Having regard to all the evidence presented, I am not persuaded that the state has discharged the onus resting upon it in relation to the conviction of the appellant. It cannot be said that beyond a reasonable doubt he was the man who raped her on the order of Mr J.. The presence of the alleged third man is enough to cast sufficient doubt on the issue of identity. Combined with the level of alcohol consumption and the different versions of events given by the complainant as a single witness, the Court cannot conclude that his identification as the rapist was proved beyond a reasonable doubt.

ORDER

[35] I accordingly grant the following order:

- 35.1. The appeal succeeds;
- 35.2. The conviction and sentence of the appellant is set aside.

Ingrid Opperman
Judge of the High Court
Gauteng Local Division, Johannesburg

I Agree

MB Mahalelo
Judge of the High Court

Gauteng Local Division, Johannesburg

Heard: 26 April 2018

Judgment delivered: 3 May 2018

Appearances:

For Appellant: Adv AH Lerm

Instructed by: Legal Aid South Africa

For Respondent: Adv MPD Mothibe

Instructed by: Office of the Director of Public Prosecutions