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

**APPEAL CASE NO: A113/2022
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED
16.05.23**

In the matter between:

M.L

APPELLANT

And

THE STATE

RESPONDENT

NEUTRAL CITATION: *M L vs The State* (Case Number: A113/2021) [2023]
ZAGPJHC 490 (16 May 2023)

MABESELE J ET KUMALO J

J U D G M E N T

MABESELE, J:

[1] This is an appeal against conviction and sentence. The appellant was convicted in the Regional Court on a charge of kidnapping, rape and assault with intent to cause grievous bodily harm. He was sentenced to 5 years' imprisonment on a charge of kidnapping; life imprisonment on a charge of murder and 12 months imprisonment on a charge of assault with intent to cause grievous bodily harm.

[2] The main issue in this appeal is to determine whether the magistrate correctly found that the state has proved its case against the appellant beyond reasonable doubt or the magistrate ought to have acquitted the appellant on the basis that his version that he did not commit the offences for which he was convicted is reasonably possibly true.

[3] The complainant and appellant are cousins. The appellant and other cousins reside at the family home. The home has three rooms; consisting of kitchen, dining room and a bedroom. There is also, a room and two shacks on the premises. The main house was occupied by the appellant. The cousins occupied a room and the shacks near the main house. The complainant was not residing at the family house. She lived with her partner elsewhere. The relationship between her and the partner became sour and she always wanted to go back to the family home since she had no place to stay.

[4] The complainant testified that on the night of 16 December 2018, she was in the company of friends at the third house from the family home. At about 23:30 she went to the family home to dress warmly as she was feeling cold. There were no people in the house when she arrived. After she had entered the bedroom she decided to take a bath. As she was about to do so, the appellant arrived and forcefully pushed the door of the bedroom. Thereafter the appellant hit her with open hand three times, strangled her and pushed her to the bed. He then undressed her, climbed on top of her and had sexual intercourse with her without her consent. This incident continued

throughout the night and the appellant would take break from time to time. At about 06:00 the appellant got exhausted and fell asleep. It was at that time that she escaped and ran to M's room outside the house to ask for help. M is the younger brother of the appellant. She reported to M that the appellant had raped her. After the report was made, M took her to Pimville to inform other family members. From Pimville they went to the Police station to report the incident. From the police station they proceeded to Hillbrow hospital where she was examined by the medical doctor.

[5] She testified during cross-examination that she did not see V that morning when she reported the incident to M. V is the other brother of the appellant. She saw V after she had returned from the hospital.

[6] She said that since the arrest of the appellant she has been occupying a shack of her cousin and the cousin is occupying the main house. She had initially occupied the main house.

[7] It is not in dispute that the complainant was clinically examined at the hospital and the medical doctor confirmed penetration into the vagina of the complainant. The clitoris and labium minora were swollen. There were cracks on the posterior fourchettes and they appeared red. There were also cracks on the vaginal wall, on the opening. The injuries were fresh because most of them were red.

[8] V M testified that at approximately 06:00 there was a knock on the door of the shack. His partner, who he referred to as baby mama, went to open the door. The complainant was the one who was knocking. He was still under the blanket then. He could hear the complainant crying and telling his baby mama that the appellant has raped her. He got out of the blanket at around 07:00-08:00. He said that the complainant was taken to the hospital by a younger brother of the appellant. He saw the complainant before she was taken to the hospital. He did notice that the complainant had abrasions on the neck. He saw the appellant when the police were taking him away. After the police had taken the appellant away he entered the room of the appellant and

found an earring that belonged to the complainant and a rosary belonging to the appellant. He saw the luggage of the complainant in the dining room.

[9] The version of the appellant was that on 16 December 2018 he went to sleep at 20:00. No one came to his house that night whilst he was asleep. He did not see the complainant that night. The relationship between the complainant and him was not cordial as the complainant wanted to stay at the family home by force. There was no space for her at the family home. He denied that the complainant had kept her clothes in his room. He said that the complainant does not have the keys to the house. He was the only one who had the keys. He said that the complainant instituted criminal charges against him so that she could occupy the house once he is kept in custody. He was arrested by the police officers in the morning of 17 December 2018.

[10] The law is clear that an accused person is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the corollary is that he must be acquitted if it is reasonably possible that he might be innocent (S V Van Der Mayden 1999(1) SACR 447(W) at 449-j-450-a).

[11] The evidence of the medical doctor that there was evidence of penetration into the vagina of the complainant and that the complainant sustained injuries in her vagina is not in dispute.

[12] The state relied on the evidence of a single witness as rightly stated by the magistrate in his judgement. The magistrate rightly stated that such evidence should be approached with caution.

[13] The complainant testified that she went to the bedroom of the appellant to get warm clothes and decided to take a bath. It was around 23:30. There was no one in the house when she arrived. It is common cause that the complainant did not reside at the family home. The complainant did not explain how she gained access into the house since there is no evidence that she had keys to the house or broke in to gain access. She did not explain when did she put her clothes in the room and how did she gain access. The

magistrate did not deal with these important aspects in his judgement. In fact, the appellant testified that he was the only one who had keys to the house and went to sleep at 20:00. The version of the complainant that after she escaped from the room she went to M and reported the rape incident is not corroborated by M. M was not called to testify. For these reasons, the version of the complainant that she was in the bedroom of the appellant is not persuasive.

[14] The version of V that the complainant made a report to his baby mama, in his presence, that the appellant had raped her is without merit. The evidence of the complainant is clear that she made a report to M who, immediately thereafter, took her to Pimville. The complainant never saw V that morning. She only saw him after she had returned from the hospital.

[15] V testified that after the police officers had arrested the appellant he entered the bedroom and found the earring of the complainant. He again saw clothes of the complainant in the dining room. However, he did not explain on what basis did he believe that the earring and clothes belonged to the complainant, regard being had that since the complainant was not residing at the family home, V would not know the earrings and clothes of the complainant. For these reasons the magistrate incorrectly found that V corroborated the version of the complainant insofar as it relates to a report that she was raped by the appellant and the clothes of the complainant in the appellant's house. V was a poor witness and unreliable.

[16] The version of the appellant that the complainant was not in his bedroom on the night of 16 December 2018 is strengthened by his version that he was the only one who had the keys to the house. His version that the complainant falsely implicated him so that she could occupy the house seems to be reasonably possible if one considers the version of the complainant that after the arrest of the appellant she occupied the house and later agreed with the cousin to exchange occupation.

[17] In view of the above, it cannot be said that the magistrate rightly convicted the appellant on the basis that he is the one who had sexual intercourse with the complainant without her consent.

[18] In the result, the following order is made.

18.1 The appeal against conviction and sentence is upheld.

18.2 The conviction and sentence on all the charges are set aside.

M.M MABESELE

(Judge of the High Court Gauteng Local Division)

I agree

M. P KUMALO

(Judge of the High Court Gauteng Local Division)

Date of Hearing : 08 May 2023

Date of Judgment : 16 May 2023

Appearances

On behalf of the Appellant : Adv T.P NDHLOVU

Instructed by : Legal-Aid Board

On behalf of the Respondent : Adv. V.H MONGWANE

Instructed by : Director of Public Prosecutions