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

CASE NO.: A117/2019

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

In the matter between:

MBONISWA, XOLA

Appellant

and

THE STATE

Respondent

NEUTRAL CITATION: *Mboniswa Xola vs The State* (Case Number: A117/2019)

[2023] ZAGPJHC 542 22 May 2023

Delivery: The judgment was delivered electronically through the email to the legal representatives and was uploaded on the caselines on 22 May 2023.

MABESELE J ET KUMALO J

JUDGMENT

KUMALO J

INTRODUCTION

- [1] The appellant appeared in the Regional Court sitting at Westonaria in the Regional Division of Gauteng. He was charged with 6 counts of rape and one count of assault with intent to do grievous bodily harm.
- [2] Counts 1, 3 and 5 related to the alleged rape of E N M and counts 2,4 and 6 related to the alleged rape of J P C and the assault charge related to E N M. It is alleged that the appellant stabbed her on her buttocks with a knife with intent of causing her grievous bodily harm.
- [3] The accused pleaded not guilty to all the counts but was found guilty on all charges. Count 1, 3 and 5 were taken together and count 2, 4 and 6 were also taken together for purposes of sentences. He was sentenced to life imprisonment in each instance.
- [4] The appeal before this court is by way of automatic right of appeal in terms of section 309(1) of the Criminal Procedure Act 51 of 1977, read with sections 10 and 43(2) of the Judicial Matters Amendment Act 42 of 2013. The appellant is appealing both conviction and sentence.
- [5] It is common cause that the appellant met the complainants at a Shell Filling station situated near Jacobsville in Westonaria. It was late at night (around 02h00) and the complainants were on their way home to Fuchsville but were stranded because they could not get a lift to take them home.
- [6] The appellant approached them and offered them accommodation. They accepted the offer and walked with him to his place of residence. On arrival, the gate was locked and he jumped over to go get the key.
- [7] Upon arrival, they proceeded to the backroom where the appellant offered them a place to sleep, a coke and bread. He left the room.
- [8] The first complainant testified that appellant later came back in the room and at that stage the room was dark. She testified that she heard J, the second complainant say 'you hurting me'. She recognized the appellants voice when he allegedly said 'if you scream, I will kill you.'

- [9] He ordered them to take off their clothes and started raping her. When he was done with her, he went to J and penetrated her with his penis.
- [10] The first complainant further testified that when he was done with J he came back and penetrated her for the second time but lost erection. He then went back to J and asked her to suck his penis.
- [11] It was further her testimony that whilst J was sucking his penis he inserted his fingers into her vagina. She also heard that he inserted a TV remote into J's vagina. All this was done without their consent.
- [12] It was further her testimony that they managed to run to the gate and scream. The appellant's mother appeared from the house and enquired from them as to what happened. Before they could explain, the appellant explained to the mother that it was her friend who had hurt them.
- [13] The appellant's mother enquired from the first complainant if it is the appellant who raped her but she responded and told the mother that it was not the appellant but his friend. She testified that the reason she did not tell the appellant's mother that it was the appellant who raped her it's because she was scared and they only wanted to go home.
- [14] The second complainant also testified that while she was sleeping at the appellant's place of residence, she felt a sharp object on her neck and at that moment the first complainant was crying saying that this guy is having sex with her and after that he also climbed on top of her and had sex with her. She felt her states that he demanded that she suck his penis and also inserted a remote control into her vagina.
- [15] They eventually managed to scream and the appellant's mother came out from the main house. They did not inform the appellant's mother what happened in the house because the appellant was standing right in front of them, and he said they should not say anything.
- [16] The last witness called by the State was Ms. N M. She testified that the first complainant was her cousin. She received a call from the Accused telling her

that he had accommodated the complainants after he found them stranded at the Shell Garage. He gave her the address where they were, and she and her husband went to fetch them. They did not initially tell her what had happened to them but only disclosed that they had been raped in the car going home.

[17] Appellant testified on his behalf to the effect that he met the complainant at the Shell Garage as stated by the complainants. He fancied and had a crush on J and hence he approached them to introduce himself.

[18] He offered to accommodate them at his residence and they accepted it. Whilst walking to his residence he made a proposal to J which proposal was accepted.

[19] As part of the proposal he wanted to have sex with J and she had agreed. They agreed that they would wait until her friend passed out. Indeed, that is what happened.

[20] Whilst they were busy having consensual sex the friend woke up and asked why they would do this in front of her knowing that she also has feelings. It is his version that J laughed it out and said that they're just enjoying themselves. It is a one-night stand and she can join in the fun if she wants to and this is what happened.

[21] Clearly the issue of sexual intercourse was common between the parties except for the fact that it was by consensus or not. That's the dispute is whether the sexual intercourse was with or without the complainants' consent.

[22] The question as to the guilt or innocence of an accused the court is obliged to consider the evidence as a whole and the state bears the burden to prove the guilt of the accused beyond reasonable doubt. It must be emphasized that this is not beyond every reasonable doubt. However, where there is reasonable doubt the accused must be given the benefit of the doubt and be released on that basis.

- [23] In *S v Jaffer*¹ the court held that when applying the test whether or not the accused version is true 'one must remember that the court does not have to believe his story, still less has to believe its details. It is sufficient if it thinks there is a reasonable possibility that it might be true.'
- [24] The complainants in this matter in particular, the first state witness testified that in the morning thereof, she had the opportunity to report the matter to the mother of the appellant but failed to do so. The mother called her aside into her bedroom asked her to tell her the truth about what had really happened but she lied to her. Again, when her sister arrived with her husband, she again did not tell them the truth about what really happened. It was only when the husband of the sister further enquired when they were driving home that they disclosed that they had been raped by the appellant.
- [25] This, in my view raises, issues about the credibility of the state witnesses. They lied to the appellant's mother even though she implored them to tell her the truth about what had really happened. They also lied to the sister and husband when they came to fetch them.
- [26] Based on the above, I am of the view that there could never have been any credible evidence upon which the court could convict.
- [27] Confronted with all of the above discrepancies, the State Counsel conceded, correctly so in my view, that the conviction cannot in these circumstances stand.
- [28] The court does not have to be convinced that every detail of an accused version is reasonably true in substance. The court must decide the matter on the acceptance of that version. The version cannot be rejected merely because it is improbable, it can only be rejected on the basis of inherent improbabilities if it can be said to be so improbable that it cannot be reasonably possibly true.

¹ 1988 (2) SA 84 CPD

- [29] Is the version of the appellant so improbable that it cannot be reasonably possibly true? The complainants on the day in question were drunk.
- [30] Appellant's version of the events is that he proposed to the first State Witness and his proposal was accepted. J, the second state witness testified as to her state of sobriety and confirmed that she was drunk. Enroute to the appellant's place, the appellant and the first state witness had a conversation. She does not know what it was all about as she was lagging behind.
- [31] Indeed, after she had had a meal, she fell asleep only to be waken up by the appellant later to rape them.
- [32] If the court is to take into consideration all of the above and the fact that the State in argument conceded that there was no credible evidence for the court to have convicted the appellant, this court is of the view that the appellant ought to have been given the benefit of doubt and the learned magistrate erred in that regard.
- [33] In the circumstances, the following order is made:
1. The appeal against both conviction and sentence succeeds; and
 2. The conviction and sentence of the appellant is set aside

I agree

KUMALO MP J

Judge of the High Court of South Africa
Gauteng Local Division, JHB

MABESELE MM J

Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Appearances:

Counsel for the Appellant: Mr L.F. Musekwa

From the Legal- Aid South Africa

Counsel for the Respondent: Adv. Mongwane

From the office of The Director of the Public Prosecution South Gauteng.

Hearing Date: 08 May 2023

Delivered: 22 May 2023