

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: A315/2009

In the matter between:

MOGAMAT SAMUELS

Appellant

Versus

THE STATE

Respondent

JUDGMENT DELIVERED ON 27 OCTOBER 2010

Allie, J

[1] The appellant was convicted in Wynberg Regional Court on two counts of rape and two counts of indecent assault. He had pleaded not guilty. All counts were taken together for the purpose of sentence and he was sentenced to **20** years direct imprisonment.

[2] He appeals against the conviction.

[3] The complainant alleged that while she and her boyfriend, Clive Morkel was lying in their wendy house in front of an incomplete building, they heard a car pull up. Mr Morkel opened the door of the shack and recognised one, Bradley who serviced a portable toilet on the building site. He said that Bradley had come about the dog at the site. Bradley and the appellant threatened to harm them if they did not open the door of the wendy house. The appellant came in and asked what the complainant was doing with an older man, namely, Mr Morkel. He then chased Mr Morkel out of the shack and told the complainant to move further back on the bed and to undress. He threatened to shoot her with a

gun if she did not have sexual intercourse with him. He pulled her pants down half way and she pulled it down the rest of the way.

[4] He had sexual intercourse with her in the wendy house. He took her to the incomplete building at the back where he penetrated her anally twice, vaginally once and compelled her to perform fellatio twice. He then took her back to the wendy house and on the way they encountered Mr Morkel. The complainant alleged that she told Mr Morkel that she had been raped.

[5] Once in the wendy house the complainant said that the appellant attempted to rape her again but he was interrupted when the police arrived. She said that the appellant told the police that she was his girlfriend but she told the police that that was not true.

[6] Later during cross examination the complainant admitted that she asked the appellant whether he used TIK. She also said for the first time that when the appellant approached her on the bed when he first entered the wendy house, she felt in his pants' pockets for a gun but he did not have one there. He told her that he only had his money and cell phone in his pocket.

[7] During cross examination she admitted that she had given the particulars of her bank account to the mother of the appellant after he was arrested and she discussed the issue of Mrs Samuels paying her to withdraw the charges. She however denied that she agreed to withdraw the charges in exchange for payment and alleged that she was trying to entrap Mrs Samuels for bribery.

[8] The accused's version is that he went with his friend Bradley to the wendy house of the complainant and her boyfriend. Bradley asked him to keep the complainant busy by talking to her so that Bradley could discuss taking the dog with Mr Morkel.

[9] He testified that the complainant asked him if he used TIK, and then she took out a TIK lolly and they used it together. Thereafter she wanted money from him and he said he will give her some when he is at the car. He then wanted to know what she would give him in return and she started performing fellatio. Thereafter the police arrived. He denied raping her, indecently assaulting her and taking her to the incomplete building behind her wendy house. His version clearly does not make sense because if she had given him a TIK lolly, he would not have asked her what she would do for him as she would already have given him something in return for the money he was going to give her.

[10] A court does not however have to believe the version of an accused to acquit him.

[11] The state has an obligation to first discharge the onus of proving beyond reasonable doubt that the accused committed the offences.

[12] The testimony of the complainant together with that of Mr Morkel and the lack of medical evidence to prove unequivocally that forced penetration occurred, creates considerable doubt. Once the complainant could feel no gun in the pocket of the appellant, the element of coercion that she relied upon to explain her submission to appellant falls away.

[13] The scenario she sketched in her evidence-in chief is that of a woman frightened by the threat of being shot with a gun, who chose to co-operate rather than resist. She offered no explanation about how she could be so at ease in the company of the accused that she could chat with him about whether he used TIK. Mr Morkel failed to support her allegation that the accused chased him away. He in fact stated that he took the opportunity to slip away to a neighbour and to summon the police because his only concern was that Bradley and the appellant would steal the dog. He testified that when he returned after calling the police he found the appellant and the complainant holding hands and walking from the incomplete building into his shack. He waited outside the closed door of his shack and did not hear the complainant resist the advances of the appellant at all.

[14] At one state the complainant's evidence points to being raped thrice although she states pointedly that she was raped twice. The inconsistencies in her evidence were not clarified. On a conspectus of all the state's evidence, I can find no evidence to support the allegation by the complainant that she was raped and indecently assaulted.

[15] In the circumstances the appeal succeeds and the convictions and sentence are set aside.

ALLIE, J

I agree

K MATTHEE, AJ