



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Not Reportable
Case no: 15/2022

In the matter between:

THE STATE

and

PHUMLANI TELEKE

Accused

JUDGMENT

Govindjee J

[1] The complainant is an elderly lady living alone in a village near Stutterheim. Her home has a single door, which she locks by way of three bolts. During the early hours of 7 November 2021, she was awoken by two kicks on the door of her residence. She left her bed and went to the kitchen. An intruder had gained entry to her home and was standing in her kitchen.

[2] The complainant advised the intruder that she did not have any money, assuming that this was the reason for his entry. He replied that he did not want

money, but wanted to sleep with her, infect her with HIV/AIDS and kill her. He pushed her into her bedroom and onto her bed, removed her trousers and panties and had sexual intercourse with her. He also struck the complainant with his fists while demanding money from her, during the time of the intercourse. Once he had satisfied himself, he instructed her to turn over, which she did out of fear. He proceeded to rape her again, by penetrating her anus with his penis.

[3] The intruder had not completely removed his pants during the incident. After waiting for some time once he had fallen asleep, the complainant left the home and reported the matter to her neighbour, Mrs Yalezo, informing her that the perpetrator was still at her house. She only observed Mr Teleke, a person she knew from church, later that morning, when she returned to her home. By that time, community members had gathered, the police had been summoned and Mr Teleke was arrested. He has pleaded not guilty to charges of housebreaking with intent to commit robbery and rape, and rape.

[4] The complainant was taken to hospital for examination. It is common cause that the district surgeon in Stutterheim examined the complainant on the day. She was found to suffer from bruising around her left eye and both lips. A gynaecological examination revealed tears around her vagina and anus.

[5] During cross-examination, the complainant indicated that she had not smelt liquor on the breath of her attacker. He had kicked her door twice, breaking the bolts that she had affixed, spoken clearly to her and had been steady on his feet when pushing her. He had fallen asleep on top of her and she had to move slightly to one side before he fell to the side of the bed so that she could escape. The version put to the complainant was, in essence, that Mr Teleke had drank copious amounts of alcohol at a tavern with his girlfriend and her sibling. He smoked drugs for the first time once they left the tavern. The last thing he could remember after having left the tavern was standing with other men in the street consuming alcohol after having smoked drugs. On the version put, he must have passed out in the complainant's house because of his state of intoxication. He awoke in the morning when he was being assaulted by men from the community and thought that he was at his parental home.

[6] Mrs Yalezo, the complainant's neighbour, testified that she had been woken by the complainant, who reported that she had been raped twice by a person who was asleep at her house. It was the early hours of the morning, but still dark outside, and neighbours had been called. Her husband went to the complainant's house. The witness observed injuries to the complainant's eye. She had later seen Mr Teleke and spoken to him. He did not appear to be intoxicated and she had not smelt any alcohol.

[7] Mr Siziba had been called by Mrs Yalezo to assist her husband. He met Mr Yalezo at the doorway to the complainant's home. They went inside and he observed a person he later identified as Mr Teleke sleeping with his shoes on, with his trousers and underwear around his ankles. Mr Teleke woke up, pulled up his pants and asked where he was. When asked why he was sleeping at the home of the complainant, Mr Teleke indicated that he had heard the complainant crying while walking with his girlfriend, and had entered to investigate. He could not understand why he had been sleeping with his trousers and underwear pulled down in the complainant's bed. He did not appear to the witness to be intoxicated and spoke normally. The witness had made a statement to the police indicating that Mr Teleke had made various comments which he and the others present could not hear. He clarified in evidence that Mr Teleke had made contradictory statements which did not make sense to him, for example saying that he had heard the complainant crying but still enquiring where he was. Details of the alleged crying did not appear in Mr Siziba's statement to the police. It was specifically put to him that Mr Teleke would testify that he had never heard the complainant crying, and that the omission in Mr Siziba's statement supported that version.

[8] Constable Tshiva, the investigating officer, explained that she had been stationed at a Family Violence, Child Protection and Sexual Offence Unit in the area for a decade. She had interviewed the accused with his consent just before 14h00 on the day in question, having informed him of his rights. He had been sober at the time. He had chosen to make a statement in isiXhosa, which was Constable Tshiva's mother tongue, and signed each page of the pro forma document used for this purpose once it had been translated and read back to him. Constable Bayi had

commissioned the document. The statement recorded reflected that Mr Teleke had fought with his girlfriend at the tavern. While urinating he had heard the complainant shouting and calling for help because she had been raped and the rapist was inside the house. He entered her home and asked about the rapist. The complainant told him that the rapist was still in the house but that she was leaving to call for help. According to the statement, Mr Teleke sat on her bed in her absence and fell asleep, to be woken by community members sometime later.

[9] Constable Tshiva had also visited the scene and observed that the door was broken on the side where it had been latched, with broken pieces of the bolts placed on a table. She had seen the complainant later that day, and observed that she had been shocked, with a bruised face and swollen eye. The complainant remained afraid and had not received any counselling.

[10] It was put to Constable Tshiva, to her bemusement, that Mr Teleke would deny making the statement to her, and that his signature was different to the one appearing on that document. She clarified that a statement would not have been taken had Mr Teleke appeared to be of unsound mind or under the influence. She was certain that he had made a statement to her and they had engaged regarding the injuries he said he had suffered at the hands of community members. There were no injuries visible to Constable Tshiva at the time.

[11] Mr Teleke testified that he was 35 years of age, living near Stutterheim. He had been with his girlfriend and her sister at a tavern near his home on the evening in question. They had consumed five litres of wine, partially completed a bottle of gin and consumed eight or nine beers. After a quarrel with his girlfriend, she and her sister had left him. He collected a few remaining bottles of beer and left the tavern. He decided to proceed to his parental home but came across young men who were smoking. He then smoked the drug Tik for the first time, initially believing that it was a cigarette but subsequently paying R20 to enable them to purchase more of the substance. He continued consuming alcohol. Near his destination, and while urinating, he had heard the complainant, a person known to him, calling for help. The complainant indicated that there was somebody inside her home. He followed her and stood in the doorway while she proceeded through the house. He picked up a

piece of firewood and asked her where the person was. She told him she would wake up neighbouring community members because the attacker was still in the house. He had been standing at the time but must have then passed out. He only woke while he was being assaulted by community members. At that stage his pants were around his waist. His response was to ask them why they were doing this when he was at his own home. They told him to look at the ceiling to see if he still thought he was at his own home. When they asked him what he was doing there, he responded by advising them that he had been called by the complainant to assist her. They accused him of lying and called the police.

[12] Mr Teleke maintained that he had never made a statement to the police and had never signed anything. He disputed the signature on the 'Statement Regarding Interview with Suspect' form that had been admitted into evidence. As to his state of sobriety, he argued that he was 'rejuvenated' by the drugs he had consumed and had not slept even while at the police station. The drugs had given him the energy to keep walking. The complainant had already been raped and was seeking help when he arrived at the scene.

[13] It is trite that a conviction can be based on the evidence of a single witness, as well as on circumstantial evidence. In criminal cases, a court is often required to draw inferences because witnesses have made no direct assertions regarding the facts in issue. These inferences must comply with certain rules of logic.¹ The first rule is that the inference sought to be drawn must be consistent with all the proved facts. The second rule, bearing in mind the standard of proof in criminal matters, is that the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn, failing which there will be doubt as to whether the inference is correct. A court must consider the cumulative effect of all the items of circumstantial evidence, rather than considering each circumstance in isolation. It remains for the state to satisfy the court that the evidence taken as a whole is, beyond reasonable doubt, inconsistent with an accused's innocence.

¹ *R v Blom* 1939 AD 188 202-203.

[14] In addition, an inference of guilt can only be drawn from facts which have been objectively established, with due allowance made for reasons why an accused person may have been a mendacious witness or dishonestly denied certain facts.² It is particularly important not to draw the inference that because an accused person is mendacious he is probably guilty.

[15] It is evident that the complainant was raped during the early hours of 7 November 2021 as she testified. While a single witness to the rape, her evidence was credible and reliable and spoken truthfully. She reported her ordeal to her neighbour almost immediately. The uncontested medical report that followed her rape confirms her various injuries, including the facial bruising. It must be accepted that an intruder kicked open her door, as she testified, and that she was then raped twice. On the first occasion she was punched in her face while her attacker enquired about money. She was unable to identify her assailant and, as such, there is no direct evidence that links Mr Teleke with her attack. His guilt or innocence must be determined in the light of the circumstantial evidence and the inferences which may be justified on the proved facts, properly distinguished from speculation.

[16] Mr Teleke's defence appears to be bifurcated. The first prong, and the one relied upon by his counsel during argument, is based on his lack of criminal capacity based on his state of intoxication. The second, based on the disputed statement made to the police but also his own testimony in court, suggests his arrival on the scene after the rape had been perpetrated, and following the complainant's cries for help. The two converge at the moment that Mr Teleke fell asleep in the home of the complainant, there being no dispute that he was found in that state in her bedroom later that morning. It is convenient to deal with the defence based on his own testimony first.

[17] The witnesses for the state were, overall, impressive, providing consistent, credible testimony about the events of the day in question. Importantly, Mr Siziba's testimony that Mr Teleke was found sleeping on the complainant's bed with his pants and underwear pulled down was never disputed. Mr Teleke, by contrast, offered a

² *S v Mtsweni* 1985 (1) SA 590 (A) 593D-594G.

haphazard and contradictory version of events. His initial instructions to his counsel, which formed the basis of the version put to the complainant and the other state witnesses, was that the very last thing he could remember was standing with men in the street, having smoked drugs and while drinking alcohol. That version was jettisoned almost immediately once he entered the witness box. Mr Teleke could now recall several details about what transpired even after his supposed experimentation with drugs. His version now returned to that which had been captured by Constable Tshiva, where he played the role of the good Samaritan in coming to the aid of the complainant.

[18] The contradictions did not stop there. Mr Teleke felt energised and testified that he could remember everything that transpired until he passed out. He tried to indicate, during examination-in-chief, that he had still been fresh at the police station, not requiring sleep. Yet he persistently denied making the statement to Constable Tshiva, even though that statement accords with his own testimony. The evidence of Constable Tshiva regarding the statement made by Mr Teleke must be accepted. More so when coupled with the version contained in the signed and commissioned statement containing Mr Teleke's explanation at the time, and which ultimately accords with his evidence in court. While Mr Teleke appeared defiant early during his testimony, he was not a credible witness. His demeanour during cross-examination appeared to be resigned, particularly when he was unable to explain some of the inconsistencies and improbabilities of his version.

[19] Mr Teleke's version effectively suggests that the complainant was raped by somebody else prior to his entry into her home. He had been rejuvenated by the drugs he had taken and had heard that the elderly complainant, a fellow churchgoer known to him, had just been raped by an intruder who was still in the house. Nevertheless, Mr Teleke suggested that he remained where he stood in the complainant's home and promptly fell asleep, again a version never put to any of the state witnesses. He neither took steps to search the home for the intruder, nor did he leave the house with the complainant to seek help. Once woken, he could remember specifics of what transpired, including his visit to the police station and details of his interactions with the police.

[20] Mr Teleke's own version brought into issue the identity of the perpetrator of the crimes in question. Where the identity of the perpetrator of a crime depends on human observation and is in dispute, the court must carefully consider all the surrounding circumstances before deciding whether the state has proved beyond reasonable doubt that the accused is the perpetrator.³ The complainant was unable to identify her rapist in the dark, and the state relies on the circumstantial evidence of Mr Teleke's sleeping presence in her bedroom later that morning, which is not in dispute, to support its case.

[21] On my analysis of the evidence, and considering the credibility and reliability of the various witnesses, as well as the overall probabilities, it must be accepted that he was found with his pants down, that he was initially disoriented when woken and that he later made a voluntary statement to Constable Tshiva, which she captured accurately. The evidence of Constable Tshiva and Mr Siziba confirm this. Both witnesses testified convincingly, and Mr Siziba provided specific details of the state in which Mr Teleke had been found, noting not only his dropped pants but also that he had still been wearing his shoes at the time.

[22] Taking the evidence as a whole, the inference that Mr Teleke committed the crimes for which he was charged is consistent with all the proved facts, most notably his sleeping presence in the complainant's home with his pants down, and these facts are such as to exclude every reasonable inference save the one drawn. There is, therefore, no doubt that the inference drawn is correct. His own version, when properly tested against the accepted facts, cannot be reasonably possibly true. In addition to suffering from inconsistencies, omissions, selective recollection and lack of candour, it is inherently improbable.

[23] As indicated, counsel for Mr Teleke also suggested the defence of lack of criminal capacity due to intoxication, which must now be considered.⁴ The test for criminal capacity requires an accused person to be able to distinguish between right and wrong, that is to realise that he or she was acting unlawfully, and to be able to

³ *S v Mthethwa* 1972 (3) SA 766 (A) 768A-C.

⁴ *S v Chretien* 1981 (1) SA 1097 (A).

act in accordance with that realisation by resisting the temptation to act unlawfully.⁵ It is trite that a court should not lightly infer that a person acted involuntarily or was not criminally responsible, or that the required intention was lacking because of intoxication. Such an approach would hobble the administration of justice.⁶ The test which determines whether intention has been excluded by intoxication is subjective. The court must consider whether, in the light of all the circumstances, including the degree of intoxication, Mr Teleke had the intention to commit the crimes for which he has been charged. In doing so, it is open for the court to draw certain conclusions about his state of mind or intention from his conduct during the events in question, remembering that the same comprehension and judgment cannot be ascribed to a person who has consumed alcohol as it does to a normal sober person. It is also generally accepted that lack of memory is not necessarily indicative of a person lacking criminal capacity at the time the wrongful acts were committed. Mere consumption of alcohol prior to the commission of an act does not automatically entitle a person to rely on intoxication as a defence.⁷

[24] It remains for the state to prove that Mr Teleke had criminal capacity at the relevant time, aided by the following:⁸

- ‘(i) in discharging the onus the State is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily;
- (ii) an accused person who raises such a defence is required to lay a foundation for it, sufficient at least to create a reasonable doubt on the point;
- (iii) evidence in support of such a defence must be carefully scrutinised;
- (iv) it is for the Court to decide the question of the accused’s criminal capacity, having regard to the expert evidence and all the facts of the case, including the nature of the accused’s action during the relevant period.’

⁵ *S v Laubscher* 1988 (1) SA 163 (A) at 166H – I.

⁶ *S v Chretien* *ibid* at 1105H, 1106D.

⁷ Also see s 1 of the Criminal Law Amendment Act 1 of 1988. For the sake of completeness, it might be added that the state made no mention of this section in the charge-sheet, nor was it relied upon in argument: see *Director of Public Prosecutions, KwaZulu-Natal v Ramdass* 2019 (2) SACR 1 (SCA) paras 49, 51. There is good reason for this: a conviction in terms of this section requires proof beyond reasonable doubt that the accused lacked criminal capacity, which is the antithesis of the state’s case.

⁸ *S v Eadie* 2002 (1) SACR 663 (SCA) para 2.

[25] While I accept that Mr Teleke had been drinking with his girlfriend and her sister, and that he later consumed a drug and continued drinking once they had left him, the evidence in its totality does not suggest that Mr Teleke was so intoxicated that he was unable to control his actions. Leaving aside that Mr Teleke himself appeared to depart from this defence during his testimony, any suggestion that the level of intoxication was so high is manifestly exaggerated, and completely unsupported by the evidence. His girlfriend or her sister were, for example, not called to lead evidence supporting the quantity of alcohol he says was consumed. His proved conduct is also indicative of a person acting consciously and voluntarily. It must be accepted that he kicked open the door of the complainant's home, engaged her in her kitchen, pushed her onto her bed, undressed her, interacted with her verbally and struck her while raping her, instructed her to turn over and raped her again before falling asleep. None of the state witnesses observed behaviour suggestive of an extreme level of intoxication. While it may be accepted that Mr Teleke was initially disoriented when woken, this is unsurprising considering that there were community members standing over him and that his immediate act was to lift his trousers. This itself is suggestive of his awareness and ability to distinguish between right and wrong, and realisation of his unlawful conduct. He was subsequently able to answer their questions, even explaining his version that he had heard the complainant's call for help.

[26] On the facts, it cannot be said that he completely lacked criminal capacity, or was no longer aware that what he was doing is wrong, so that he cannot be criminally liable for his conduct.⁹ His various actions were, in my view, voluntarily and intentionally performed and he possessed criminal capacity at the time he kicked open the door with the intention to rape the complainant, and proceeded to twice rape and hit her. The state has succeeded in demonstrating that there is no reasonable doubt as to his criminal capacity at the time. I might add that, unlike cases such as *S v Ramdass*,¹⁰ Mr Teleke has not established a sufficient foundation for this defence to succeed. There is no evidence from which an inference can be drawn that his entry into the complainant's home, and subsequent conduct, was involuntary, in

⁹ Cf *Director of Public Prosecutions, KwaZulu-Natal v Ramdass* op cit para 32.

¹⁰ 2017 (1) SACR 30 (KZD). Also see *Director of Public Prosecutions, KwaZulu-Natal v Ramdass* ibid para 36.

the sense that he was unable to distinguish between right and wrong or prevent himself from committing these acts.¹¹

[27] Taking into account all the evidence, the ineluctable conclusion is that the state has proved beyond reasonable doubt that the person found sleeping on the bed with his pants down was the same person who raped and hit the complainant after having kicked open her locked door with the intention to rape her. That person is Mr Teleke. Mr Teleke's version of events is so improbable that it is simply not reasonably possibly true in substance and must be rejected accordingly. The state has proved his criminal capacity at the time beyond reasonable doubt. Finally, while the state has proved both counts, the evidence supports only a conviction of housebreaking with intent to commit rape in respect of count 1.

Order

[28] I make the following order:

- a. On count 1, the accused is found guilty of the crime of housebreaking with intent to commit rape;
- b. On count 2, the accused is found guilty of rape as charged.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 12 April 2022

Delivered: 14 April 2022

¹¹ See *Director of Public Prosecutions, KwaZulu-Natal v Ramdass* op cit para 36.

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