

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED. ✓

12/3/2018

DATE

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SIGNATURE

CASE NO: A888/16

In the matter between:

SITHOLE DANIEL

and

THE STATE

JUDGMENT

MTATI AJ:

INTRODUCTION

- [1] Appellant was convicted on two counts of rape in the Regional Court at Vereeniging. Both counts emanate from an incident that took place on 13 October 2013 at Orange Farm where Appellant allegedly raped the victim on two occasions. Appellant was initially also charged on a count of sexual assault but was acquitted on this charge. He was legally represented.
- [2] Leave to appeal against conviction and sentence was refused by the trial court and same was granted by two judges in chambers on petition. This appeal relates to both conviction and sentence against Appellant.

BACKGROUND

- [3] The State called two witnesses being the complainant and her boyfriend. Complainant testified that she visited the premises of the Appellant, who is a traditional healer, for treatment of her womb. She does not remember whether the whole process of healing and application of medicine was explained to her. Appellant requested her to undress herself and sit at a place within the consulting rooms where she would steam herself with some boiling water with medicine therein.
- [4] She was also given a foreign object referred to on the record as an "artificial penis" that had medicine applied thereon and this object she had to insert in her genitalia. After this process she was then called to lie on a bed and at this moment Appellant inserted this foreign object again inside her genitalia.
- [5] Whilst lying on the bed Appellant touched her breasts and inserted his penis whilst touching her breasts. She did not see if Appellant inserted his penis but came to that conclusion since both his hands were touching her breasts. She also testified that she reprimanded Appellant from inserting his penis inside her and to this reprimand

Appellant stated that that is how he works and she will be healed. She also could not tell if Appellant ejaculated inside her private part because she was a bit dizzy as a result of the medicine that was applied on her.

- [6] She was then directed to take a bath and she left to the car where her boyfriend was waiting. She reported to the boyfriend that she was raped later on the same day when they got home in Pretoria. She could not relate the story earlier because she felt embarrassed and they were also with a child and the boyfriend's brother inside the vehicle *en route* to Pretoria.
- [7] The boyfriend was also called to testify and his testimony was that the Appellant is known to him as he has in the past brought people who needed medical attention. On this day the Appellant explained to them the process that was to be followed in healing the complainant. He went inside the consulting room with the complainant and after she undressed herself he then left as he wanted to attend to some errands at Orange Farm.
- [8] According to his testimony he was called by complainant when she was finished with Appellant. It should be mentioned that complainant testified that she never called her boyfriend but went straight to the car. He testified further that, on arrival at home, his girlfriend started crying and it is only then that he was informed of the rape incident. Complainant was then taken to the police to lodge a charge of rape.
- [9] A photo of the "artificial penis" as well as a report by the medical practitioner (J88) who examined the complainant were handed in as exhibits.
- [10] In cross examination of the complainant, the following testimony came to the fore:
 - a. Her inference that she was raped was as a result of a hard object that she felt entering her private part;
 - b. She in fact consented to the insertion of the foreign object because she wanted to be healed;

c. She initially testified that she was only penetrated inside her private part but upon being confronted with the J88 which mentioned penetration through her anus, she relented and confirmed that the penetration was also through her anus;

d. She did not scream for help or push the Appellant because she wanted to be healed.

e. On being asked if she felt any movement from Appellant upon penetrating her with his penis the response to this question was that she cannot remember.

[12] The Appellant also testified and his testimony is that upon arrival of the complainant he explained the procedure to be followed in the presence of her boyfriend. He denied that he penetrated the complainant with his penis. His evidence is confirmed by the complainant's boyfriend to the extent of the procedure to be followed.

[11] The State conceded in the proceedings before this court that count 2 being penetration of complainant with a foreign object cannot stand as clearly consent was given by the complainant as part of the healing process.

[12] The court is then left with count 3 being the penetration with Appellants penis. It is so that the complainant was a single witness to the act of rape inside the consulting room of the Appellant. Her boyfriend left the room soon after she undressed herself.

ISSUES FOR DETERMINATION

[13] In my view the main issues to be decided by the court are the following:

a. If the complainant satisfied the court as a single witness in all material respects;

b. If there was consent on any of the two charges of rape; and;

c. If the State has proved beyond reasonable doubt that Appellant committed the offence of rape by inserting his penis to the private part of complainant.

APPLICABLE LAW

[14] Section 208 of the Criminal Procedure Act 51 of 1977 provides:

“An accused may be convicted of any offence on the single evidence of any competent witness.”

It is indeed so that the trial court was best placed to determine the credibility of the evidence by witnesses including that of the Appellant. However, in my view, it is not sufficient to merely cite the application or relevance of section 208 of CPA without actually evaluating the evidence of a single witness and satisfying oneself that it meets the minimum required threshold. The trial court on page 82¹ of the transcribed record, appear to only mention that *“section 208 of the Criminal Procedure Act states clearly that [if] the court is satisfied that the uncorroborated evidence of a single witness is clear and satisfactory in all material respects and that the truth has been told despite [the], it having some shortcomings or imperfections the court may convict on the evidence of such single witness.*

Now when applying this principle to the complainants evidence, I am satisfied that the complainant’s evidence is trustworthy and that the truth has been told.”

[15] It does not appear to me that the court evaluated the contradictions emanating from the evidence of the complainant and her boyfriend. The question of whether or not the complainant was informed of the ensuing procedure is material for if she was informed, then she shall have consented to the insertion of the foreign object inside her genitalia.

[15] In the matter of **S v Sauls & Others**² it was noted that the absence of the word “credible” (in section 208) is of no significance; the single witness must still be credible. In **S v Chabalala**³ it was pointed out that the *“...correct approach in determining the guilt of an accused is, to*

¹ Page 82 line 4

² 1981 (3) SA 172 (A) 180H

³ 2003(1) SACR 134 (SCA) 139i-j to 140a

weigh up all the elements which points towards the guilt of the accused against all that are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."

- [16] The evidence of the State must prove the guilt of the Appellant beyond reasonable doubt. If on the other hand the explanation is reasonably possibly true, then he is entitled to an acquittal. This follows the burden resting on the State to prove the guilt of the accused beyond reasonable doubt. See **S v M**⁴; **S v Kubheka**⁵; and, **S v Makobe**⁶.
- [17] The complainant's boyfriend confirmed that he knows the Appellant very well and has in the past also brought people to Appellant who required healing on their private parts. It is noteworthy that the complainant does not say she was not told of the procedure to be followed but that she does not remember being informed. The confirmation of this explanation being done from the complainant's boyfriend leads me to believe that the explanation was indeed given to the complainant.
- [18] If the explanation was indeed provided it then means there was consent to use the foreign object and Appellant should be acquitted on count 2.
- [19] In determining the circumstances surrounding count 3 the court should take into account the evidence of the complainant when she testified that she did not see the Appellant actually inserting his penis into her private part. She also mentioned that she was dizzy. Further, it came up on the testimony of her boyfriend that when he arrived the complainant had finished with Appellant and was sitting with the wife of the Appellant when the complainant herself testified that she went straight to the car.

⁴ 1946 AD 1023

⁵ 1982 (1) SA 534 (W)

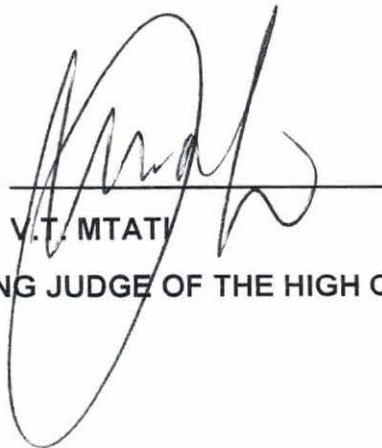
⁶ 1991 (2) SACR 456 (W)

[20] In my view the complainant may have been dizzy through use of the medication and as such not remembering what all took place. This is also corroborated by her statement to the Doctor who examined her on the same day when the alleged offence took place where she said the foreign object was inserted in her anus. The Appellant's version in my view is reasonably possibly true and the State has failed to prove its case beyond reasonable doubt.

[21] I accordingly propose the following order:

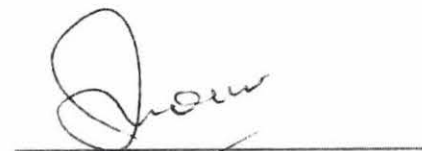
ORDER

1. The Appeal is upheld; and,
2. The conviction and sentence on the two charges of rape by the Regional court are dismissed and set aside.

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ACTING JUDGE OF THE HIGH COURT

I concur, and it is so ordered.

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J.W. LOUW

JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant:

Adv: R VAN WYK

Instructed by:

BMH ATTORNEYS

VEREENIGING

On behalf of the respondent:

Adv: AP WILSENACH

Instructed by:

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PRETORIA 0001