



**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

|                              |        |
|------------------------------|--------|
| Reportable:                  | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates:    | YES/NO |

Case No:A317/17

In the matter between:

**SYDNEY MAQWAWE NYEMBE**

Appellant

and

**THE STATE**

Respondent

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**CORAM:**

VAN ZYL, J et LOUBSER, J

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**JUDGMENT BY:**

LOUBSER, J

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**HEARD ON:**

12 FEBRUARY 2018

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**DELIVERED ON:**

1 MARCH 2018

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[1] **INTRODUCTION:**

- [1] The appellant was convicted and sentenced to 5 years imprisonment in the Regional Court of Bloemfontein on a count of Rape. The sentence was imposed in terms of the provisions of **Section 276(1)(i) of Act 51 of 1977**, and the Appellant was not declared unfit to possess a firearm.
- [2] The Court *a quo* found on the evidence that the Appellant had penetrated the vagina of the complainant with his finger and without her consent, thereby committing the offence of Rape. At the time of the commission of the crime, the Appellant was a recruit at the Tempe Military Base, while the complainant was a 22 year old student at the Free State University.
- [3] The appeal is against conviction only. An application by the Appellant for leave to appeal against his conviction was dismissed by the trial Magistrate, but subsequently the Appellant obtained such leave on petition to the Free State High Court. On appeal, Mr M.L Khomela submitted Heads of Argument on behalf of the Appellant, but before us Mr. M Koenane appeared for the Appellant.

**[II] SUBMISSIONS MADE ON APPEAL:**

**[4]** Mr. Koenane contended that the evidence of the complainant was not reasonably possibly true and that the Respondent had therefore failed to prove the guilt of the Appellant beyond reasonable doubt. Mr. C.F Steyn appearing for the Respondent, on the other hand, submitted that the Appellant was correctly found to be an unreliable witness and that the trial court had correctly found that his version of denial was not reasonably and possibly true.

**[III] THE EVIDENCE:**

**[5]** A reading of the record of proceeding in the trial court shows that the facts presented by the Appellant on the one hand, and by the complainant on the other, were to a large extent common cause. For instance, it was common cause that the complainant lived alone in a flat near the Military Base, and that on the night in question, the Appellant was unable to gain access to the Base where he wanted to go to sleep. Apparently he was unable to gain entry because he had lost his entry card. Because they have met before, he called her around midnight to explain his

predicament, and eventually she allowed him into her flat to sleep over for a couple of hours until he could make contact with his friends inside the base to help him gain access. She allowed him to lie down on the one side of her double bed, where he fell asleep. She went to sleep on the other side of the bed.

[6] This is where the common cause facts come to an end. According to the complainant, she woke up at about 3 in the morning when the Appellant was struggling to unzip his pants and to undress her. When she resisted, he held her around her neck and penetrated her with his finger. At this point she was crying and she was fighting to escape his clutches. He then suddenly stood up, put his hand on his mouth and told her he was sorry, he did not know what came over him.

[7] According to the Appellant, none of this ever happened. He woke up at about 3 in the morning, and he found the complainant making calls on her phone. Because he wanted to be in time for his physical training at the base, he then got up, said goodbye to her and left.

[8] The complainant testified that after he had left, she immediately called her boyfriend in Durban, who is also the father of her son, and she told him what had happened. He instructed her to call the police and he told her that he was on his way to her. She called the police, and went to the police station later in the morning where the Appellant also arrived after he was summoned by the police. The Appellant apologised to her at the police station. When the Appellant testified in his defence, he admitted his apology at the police station. The complainant further testified that her boyfriend arrived later in the day from Durban to support her.

[9] The complainant's boyfriend was also called to testify for the prosecution. He told the court that he was a senior buyer in the employment of Transnet. When he was asleep on the night in question, the complainant called him at about 3 in the morning and he could hear that she was upset and crying. She told him what the Appellant had done to her. He then drove to Bloemfontein to find out what had transpired, where he arrived later in the morning.

- [10] It needs mentioning here that when the complainant testified, it was put to her in cross-examination by the Appellant's attorney that the charge against him was the result of her boyfriend telling her that he had found out that she had shared a bed with the Appellant and that he was going to leave her and to terminate his financial commitments toward her and the child. When the Appellant himself testified, he never said a word about this, and in addition, when the boyfriend testified, he was not confronted with this allegation at all.

[IV] **FINDINGS OF THE COURT *a quo*:**

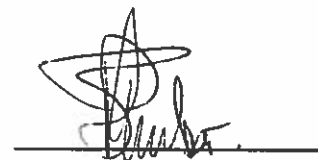
- [11] The Magistrate found the complainant to be an honest and intelligent witness. Because there was no bad blood between the Appellant and the complainant prior to the incident, he found it highly improbable that she would want to falsely incriminate the Appellant with such a serious charge. The Magistrate found it further inconceivable that the complainant would call someone in Durban in the early hours of the morning in an upset state of mind if nothing had happened to her. He found the version of the accused to be not reasonably and possibly true.

[V] **DETERMINATION:**

[12] It is clear from the judgment in the court *a quo* that the Magistrate took into account the judicial principles applicable to the evaluation of evidence and the caution required in the approach to the evidence of a single witness. It is also clear that the Magistrate carefully weighed up the conflicting versions placed before him in reaching the conclusion that the prosecution has proven the guilt of the Appellant beyond a reasonable doubt. In my view, this conclusion cannot be questioned in the light of the evidence presented in the court.

[13] I consequently make the following order:

1. The appeal against conviction is dismissed.



P J LOUBSER, J

I concur:



C VAN ZYL, J

On behalf of Appellant:

Adv. M. Koenane

Instructed by:

Mabitle Attorneys

Bloemfontein

On behalf of Respondent:

Adv. C. F. Steyn

Office of the Director Public Prosecutions

Bloemfontein

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