

NOT REPORTABLE

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

CASE NO: CA&R 20/2017

In the matter between

YANGA FANKI

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

HARTLE J

[1] The appellant appeals against both his conviction on one count of rape and the consequent sentence of life imprisonment imposed by the Regional Court, Zwelitsha, sitting at Peddie. The premise for the sentence of life imprisonment is that the rape involved the infliction of grievous bodily harm.

[2] The challenge against the conviction is that the trial court erred in finding that the identification evidence adduced at the hearing was beyond reproach or that the state had established beyond reasonable doubt that it was the appellant who had perpetrated an attack upon the complainant and thereafter raped her. The further ground that since the state had simply relied on the J88 medical report to establish the fact of an occurrence of rape without adducing the evidence of the examining doctor, which somehow called this finding into question despite the fact that the report was admitted by consent, was not pressed upon at the hearing of the appeal. Although as a standalone ground it was correctly without any merit because of the concession by the defence, the absence of the doctor's oral testimony and professional opinion does have some bearing on the overall assessment of the circumstantial evidence which formed the basis for the catenate inferential reasoning culminating in the conviction of the appellant. I discuss this below.

[3] The appellant pleaded not guilty to the charge of rape and raised an alibi defence.

[4] The difficulty for the state in proving its case at the trial is that the complainant, unbeknown to her, had supposedly been raped whilst in a state of unconsciousness after an attack upon her on the night of 7 January 2012. She only learnt later from the doctor at the hospital who examined her, once she had properly regained her senses, that she had been sexually assaulted in addition to being subjected to a physical assault. The state therefore had to rely largely on circumstantial evidence and the trial court on inferential reasoning to sustain the conviction.

[5] At the outset of the trial, the state handed in the relevant J88 report together with the customary affidavit in terms of section 212 (4) of the Criminal Procedure Act, No. 51 of 1977 (“CPA”). Not surprisingly, there was no objection from the defence given that the appellant’s defence was one of an alibi. The report records the doctor’s professional conclusion that the complainant had been sexually assaulted. “Fresh” bruises to her labia minora at 2 o’clock and 6 o’clock positions were in evidence. The doctor also noted a “yellowish, purulent and offensive” vaginal discharge. In addition, the complainant had suffered three lacerations to the forehead, one to her scalp and above her right ear and bruising to her upper and lower lips. She was noted to be “slightly confused” still upon examination at 10h15 on the day after the attack upon her. Swabs were taken for forensic analysis although the nature of these was not disclosed in the J88 report.¹

[6] The complainant testified that the appellant has been known to her for a long time since they both reside in the same area albeit at least a kilometer and a half apart. She knew where he lived in Maganische. They had at least greeted one another upon sight before. On the night of 7 January 2012, she had been sent by her mother to look for a seven-year-old missing child at “past ten”. She found the child (she didn’t say when exactly) and proceeded home carrying him on her back. As she was about to reach her home near a stream someone approached her from behind and told her to stop. She turned to look behind her and asked who it was. He said it was “Yanga,” which is the appellant’s name. She waited for him until he came closer and he then faced her, standing in front of her. He asked her whose

¹ Usually the collection of forensic evidence from a patient of sexual assault is completed by a doctor using the standard sexual offences collection kit. The collection is recorded on a template form and entails a collection from either clothing (usually a panty), head or pubic hair, skin or from the anus or genital organ of the complainant. In the case of a female patient, separate swabs are collected from the vulva, vestibule, vaginal vault or cervical os.

child it was she was carrying on her back. She said it was hers. He argued with her that she does not have a child, but she insisted that it was hers. He then pulled the child off her back and threw him to the side. They became engaged in a physical struggle. He asked her if she wanted to die. She fell and when she made a move toward the child to respond to his crying, he picked up something and hit her with it on the back of her head. At this point she lost consciousness, only coming to her senses at the Cecila Makiwane Hospital the following day. She could conclusively say it was Yanga Fanki, the appellant, who had engaged with her in a fight and who had assaulted her. She also assumed that it must have been him who had raped her. She had had an opportunity in the moonlight to get a good visual of him. He was shirtless but had worn a shirt draped over his shoulder. She also recognized his voice.

[7] She claimed that at the time of this confrontation and fight they were alone, except for the presence of the child.

[8] She clarified that she had last had consensual sexual intercourse before the rape on 28 November 2011. She was not drawn on the issue of the vaginal discharge.

[9] Next the state adduced the evidence of the complainant's sister, M G. She claimed to have known the appellant from residing and schooling in the same area as him. In fact, they were classmates in standard one. The complainant had schooled there as well, although she was in a different class.

[10] Vitally, she did not refer to any times in giving her account of the night's events. She and the complainant had attended a circumcision ceremony earlier at Makasi's homestead. Afterwards they "took a shortcut" via a shebeen. She was drinking alcohol, but not the complainant. She did not say when they left, under what circumstances or in whose company they had been.² They arrived home (seemingly together) and she herself went to sleep. Later she was awoken by one Bongani who came to tell her that she should come and fetch the complainant. She arrived at a place (she did not explain where in relation to their home) where she discovered her sister lying, covered in blood. The tights and panties which she had been wearing were off her lower body and lying next to her.

[11] The complaint was in a state of confusion and although she spoke, she did not make any sense. She privately arranged for her to get to the hospital, because neither the police nor the ambulance came when called. The time of her arrival at the hospital was not stated. Evidently she was first taken to Nompumelelo Hospital and later transferred to the Cecilia Makiwane Hospital.

[12] The complainant told her about four days later at the hospital that it was "Yanga" who did this to her.

[13] Bongani Nonqulo testified that he had encountered the appellant earlier at the same initiation ceremony where he, the complainant and her sister were at Makasi's homestead. They had been sitting there and drinking together. (Notably neither the complainant nor her sister related seeing the appellant.)³ He personally

² Notably the complainant did not mention these preceding events at all.

³ The complainant failed to relate at all that she had been at a traditional ceremony before the attack or in her sister's company at a shebeen before going out again on her own to look for the child. Significantly, if they had kept

left the ceremony at “past ten”. The complainant and her sister left before he did. The appellant followed and seemingly he left last.⁴ On his way home, he heard “a scream” coming from down at the stream.⁵ He shouted: “What is it?”, but nobody responded. He then picked up two stones and ran down the stream toward the place where he discerned the sounds had emanated from. He found the complainant lying there on the ground. She was bleeding and had been assaulted. He noticed her tights and sandals lying beneath her feet. He decided not to touch her but to call her relatives instead, which he did. Her sister, M, returned with him to the scene.

[14] Asked under cross examination if he had seen anyone else around at the time he mentioned the name of one Xolisa Maneli who he saw there “standing next to (his) friends”. (This revelation that even more people other than Xolisa were present near the rape scene was not taken further.) He had pertinently asked him what he was doing there. The response elicited was that he was coming from his girlfriend. He refuted the assertion put to him on behalf of the appellant that the latter had not been at Makasi’s homestead where the circumcision ceremony had been held until the following day, that is on the 8th.

[15] Probed by the trial court about the presence of Xolisa in relation to where the complainant was found he explained that he had observed him about twenty metres away standing outside a yard (next to the complainant’s home) near a fence.

company with the appellant one would have expected her to have mentioned this in her testimony especially to assure the trial court that she was satisfied that he was her aggressor later on that night because she had seen him earlier.

⁴ It is not altogether clear from the record whether he or the appellant left first.

⁵ Perhaps something was lost in translation because it is not clear if there was screaming (as in more than one scream) or a single scream.

He had seen him on his way to report to the complainant's relatives *after* finding her lying there. He claimed to have asked Xolisa where he was coming from as there was "somebody injured down there", suggesting thereby that Xolisa ought to have known something about what had happened to the complainant. Xolisa was not called upon to testify.

[16] The state placed on record that nothing of significance had come from forensic material "that was removed" linking any person to the commission of the offence. It is not clear if the prosecutor meant taken only at the time of the medical examination, or at the crime scene as well. The latter placed on record that:

"Your Worship, the material that was removed was presumabl(y) hair (that) has been removed from the face. No hair has been detected on the facecloth and panty. Presumabl(y) blood has been detected on (swabs), blood stripings. (sic) No semen has been detected on the cervical or (swab) vaginal (vault swab) (indistinct). I would assume that many of the other things that were taken were in fact the victim's, Your Worship, and not necessarily linking any person to the commission of the offence."

[17] Given the assumptions made by the prosecutor, the state's case was left lacking in any real explanation as to why no DNA result could avail. How the facecloth featured was not given any context in the evidence at all. If it was found at the crime scene, one would have expected it to have been accounted for in the evidence, but it was not.

[18] The state having been alerted to the exact nature of the appellant's supposed alibi defence in his plea explanation next called the three witnesses who the appellant claimed would vouch for him being elsewhere at "the time" of the

alleged rape drinking together with him.⁶ One “Khusta” at whose home a traditional ceremony had been held (it was not clarified if this was the same ceremony held at Makasi’s homestead) confirmed that he had seen the appellant, but said that he had left around 5pm when everyone else did and returned later around 8pm. He had informed the appellant that the people were already asleep, and he consequently left. Another witness, “Ace,” confirmed seeing him at the same ceremony while he himself was there, but this was during the day. Finally, the last witness, “Sitandwa,” also confirmed having seen the appellant at the ceremony, but only during the day.

[19] When the appellant himself testified, he surprisingly confirmed Khusta’s testimony that everyone had left the traditional ceremony at the latter’s home around 5pm and that when he arrived around 8pm he was told that the people are sleeping and left.⁷ He claimed not to know the complainant at all and denied raping her. Under cross examination by the state he persisted with his alibi that he had been drinking together with the last three state witnesses.

[20] In its judgment the trial court indicated its satisfaction that the identity evidence was reliable because the complainant knew her aggressor reasonably well. The magistrate reasoned that she had had an opportunity to clearly see him. She had conversed and indeed argued with and assaulted him in retaliation when he grappled with her. She recognized his voice, and the appellant had also identified himself by name.

⁶ The relevant time of the rape was never established with any certainty.

⁷ Interestingly, if the complainant, her sister and Bongani had been at the same ceremony, Bongani at least said that he had left there at “past ten”, which does not accord with Khusta, Ace and Sitandwa’s evidence.

[21] Taken in isolation, the magistrate cannot be criticized in his evaluation of her testimony in these respects. The witness was even astute to have noticed the oddity about the appellant being shirtless, the way he carried his shirt draped over his shoulder and the fact that it had fallen off at some stage. He was probably also justified in remarking that the appellant's alibi (on the assumption that it was known *when* the complainant was raped) had not been supported because the people who he claimed to be drinking with until the early hours of the morning plainly refuted this. The matter was however far more complex than this and the question whether each "fact" excluded all other inferences save the one sought to be drawn could not be considered in a piecemeal fashion.⁸ The state still bore the burden of proving its case beyond reasonable doubt against the entire network of facts, unfortunately mostly all circumstantial, before the court could make the leap which it did to find that the only reasonable inference which could be drawn in all the circumstances is that the person who attacked the complainant is the one who raped her, and that that was the appellant.

[22] Because the complainant seemingly "reliably" identified the appellant as the person with whom she had an argument and a scuffle that night, it does not necessarily follow that it was he who had raped her in-between losing consciousness and later being discovered in the state in which she was found, especially for the reasons which I highlight below. It may well have appeared to the trial court to be *alone* a reasonable inference, but against the background of the entire spectrum of facts, it was in my view not the *only* reasonable inference to be drawn.⁹

⁸ See R v De Villiers 1944 AD 493 at 508.

⁹ See R v Sole 2004 (2) SACR 599 at 666 g – i

[23] The trial court appeared to consider as a relevant feature that there was no prior argument or quarrel between the complainant and the appellant when they met on that day in question (as if to suggest that he must then have had an ulterior motive in assaulting her), asking itself:

“When the accused said and he took the child from the complainant’s back and threw it away, why did he do that? What did he have in mind? What did he want to do to the complainant?”

[24] This consideration was however clearly unhelpful in rendering the complainant’s testimony, or assumption that the appellant (assuming the identity evidence itself to be reliable) raped her after attacking her, in any way more compelling.

[25] The court also considered whether it was “reasonably possible” that the appellant would hit the complainant on the head “just for fun” and then “just walk away” after she had fallen and lost consciousness, but this question presupposes that he did not walk away to justify the inference that he had sexually assaulted her afterwards.

[26] Without interrogating Bongani’s evidence at all, the court used this as the basis for concatenating that whoever or whatever was making the complainant scream was interrupted and that Bongani must have come upon the scene immediately afterwards.

[27] Apart from the fact that the evidence was devoid of exact or even probably certain times of when the relevant events happened that night, the court appeared to ignore the fact that Xolani was also on the scene with friends in the immediate vicinity of where the complainant was found lying in the manner Bongani claimed to have come upon her, asking itself the following rhetorical question:

“Is it reasonably possible that then a person, another person who was just walking by, saw the complainant lying there badly injured and decided to rape her?”

[28] This without further ado led the court to the conclusion that the only reasonable inference to be drawn is that the appellant was the perpetrator, whereas the question immediately begs itself why the complaint could not have been assailed by one of the other persons on the scene while she lay there after losing consciousness and until her presence was later discovered there by Bongani.

[29] The trial court on the basis of this reasoning accepted the few speculative conclusions drawn above as proven facts on the basis of which it sought to justify the ultimate fact that it was the appellant who raped her without critically examining the primary facts which formed the starting point in the inferential chain.

[30] In this respect there was much lacking in the state’s case when considered holistically. In the first instance, although time was of the essence, the state was reckless in establishing a seamless timeline. The complainant said she left at “past ten” to look for the child, but it is unclear how long she took before encountering the appellant on her version. Her sister gave no times of any critical events. Bongani’s evidence (apart from not being confirmed by the complainant, her sister

and the appellant concerning their all drinking together before the rape) does not make sense concerning the time they all dispersed from Makasi's homestead.

[31] Moreover, if the two sisters left shortly before Bongani did, how does one account for their visit to the shebeen before going home? Further how was Bongani able to come upon the complainant shortly thereafter (post attack) if she had after visiting the shebeen returned home before going out to run the errand for her mother which in itself must have taken some time? Bongani did not indicate what time he found the complainant, neither did her sister give an indication of what the time was when she returned with Bongani to the rape scene or what time it was when they reached the hospital, if it was on the 7th at all. All of this makes a red herring of the appellant's alibi being refuted by the witnesses who would supposedly have confirmed it because it is by no means clear what time the complainant must have been raped.

[32] There is further merit in Mr. Gigwa's submission that if one accepts that the complainant was rendered unconscious when a blow to her head was delivered, it is most unlikely that she could have screamed more than once, if at all. But if she did, and Bongani had come on the scene shortly thereafter, there would not have been time for the appellant to have raped her on his account. Also, if he had come on the scene immediately upon hearing the complainant scream, he would have encountered the seven-year-old boy who by the complainant's account was crying when he was thrown to the side, but his narrative revealed nothing about the presence of such a child. If Bongani immediately after the "scream" had gone to report, again where was the young boy even on the sister's account?

[33] It was also curious in my view that Bongani only mentioned the presence of other persons on the scene under cross examination. Their presence there in itself should have scuttled the single assault and rape perpetrator theory adopted by the court in coming to its conclusion that it must have been the appellant and no one else who raped the complainant.

[34] In my view the court too hastily accepted a factual premise that was somewhat questionable and used this as its foundation upon which to infer the ultimate fact which it did.

[35] I add to the mix that the complainant's evidence, apart from not being reconcilable with her sister's and Bongani's in material respects, is dubious if regard is had to her description of how she was hit with something from behind, whereas the injuries noted by the doctor were to the front of her face and head. She also did not attribute any of the injuries to the scuffle between her and the appellant or the fact that she fell down. In addition she regained consciousness quite a while after the event, which suggests significant trauma to her head. Nowhere in her account did she relate the earlier events of that night which appeared to be common cause as far as everyone else's testimony was concerned and, conversely, no one else related the story of the presence of a child. In this respect the doctor's opinion might have been of some assistance regarding the complainant's ability to reliably recall the events of that night. It is significant in my view that it was only four days later before she suggested to her sister who the supposed perpetrator was.

[36] Whilst on the subject of the doctor, his/her opinion might helpfully have established a clear picture (absent from the complainant's account) of the possible timing of the rape. It would incidentally also have been useful to ask him/her about the discharge. Was it a pus discharge from the complainant's vagina, or was it likely ejaculation. A description of what forensic evidence was collected during the examination might possibly have clarified why according to the prosecutor there was a lack of DNA evidence pointing to the responsible perpetrator? In a situation like this where it is possible that the complainant lay vulnerably exposed for a perhaps inordinate length of time at the scene where she was found, and could have been assailed by just about anyone, the absence of a positive DNA result pointing to the appellant as the perpetrator certainly exculpates him where DNA donor material was indeed collected and available for forensic analysis.

[37] In my view when all the evidence is considered as a whole the inference that the appellant raped the complainant is not the only inference that could reasonably have been drawn in all the circumstances. Even though the appellant's alibi did not check out, a neutral factor as I have indicated above, his denial that he raped (or assaulted the complainant for that matter) appears to me to be reasonably possibly true and he should have been given the benefit of the doubt.

[38] In the result the appeal against the conviction must succeed and the sentence imposed falls away as a necessary consequence.

[39] I issue the following order:

1. The appeal against both conviction and sentence is upheld.

2. The magistrate's finding is substituted with an order that: "The accused is acquitted on the charge of rape".

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE

N NTLAMA

ACTING JUDGE OF THE HIGH COURT

DATE OF APPEAL : 8 June 2018

DATE OF JUDGMENT : 27 June 2018

Appearances:

For the Appellant: Mr. A Giquwa instructed by the Legal Aid Board, King William's Town.

For the Respondent: Ms. C Monis, National Director of Public Prosecutions, Bhisho.