



**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 number: 46/2016

In the matter between:

THE STATE

and

JOHANNES MOLITI PHEPENG MOLOSI

Accused

CORAM: BOKWA, AJ

HEARD ON: 31 OCTOBER 2016

JUDGMENT BY: BOKWA, AJ

DELIVERED ON: 16 JANUARY 2017

A INTRODUCTION:

[1] Accused, Mr Johannes Moliti Phepeng Molosi, faces the following counts:

COUNT 1

1.1 Housebreaking with intent to rape and rape (contravening the provisions of Section 3 read with Sections 1, 55, 57, 58, 59, 60 and 61 of Act 32 of 2007) and further read with Section 51(1) of Act 105 of 1997.

COUNT 2

1.2 Rape (contravening the provision of Section 3 read with Sections 1, 57, 58, 59, 60 and 61 of Act 32 of 2007) and further read with Section 51 (1) of Act 105 of 1997.

COUNT 3

1.3 Robbery.

COUNT 4

1.4 Rape (contravening the provisions of Section 3 read with Sections 1, 57, 58, 59, 60 and 61 of Act 32 of 2007) and further read with Section 51 (1) of Act 105 of 1997, that the

accused committed acts of sexual penetrations with the complainant Me S. A. M..

COUNT 5

1.5 Robbery.

- [2] The accused pleaded not guilty to all counts and gave a plea explanation as contemplated in Section 115(1) of the CPA 51 of 1977 hereinafter called the Criminal Procedure Act. His plea explanation in respect of count 1, was that the sexual intercourse was with the consent of the complainant, L. M. R.. In respect of count 2, his explanation was similar that the sexual intercourse was with consent of the complainant, Me D. K.. Regarding count 3, he denied that he robbed the complainant in count 2. On count 4, his explanation was that the sexual intercourse on 7th November 2015, was with the consent of the complainant Me S. A. M.. In respect of count 5 he specifically denied the robbery of the complainant in count 4.
- [3] Initially Advocate L M Tshabalala represented the accused. On the 2nd day of the trial his mandate was ended. Mr Nel came on record. Advocate Hoffman appeared on behalf of the state.
- [4] The court informed the accused of the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 and the impact thereof, which the accused understood.

[5] A number of exhibits were handed in by consent and were marked in the following order:

- 5.1 Exhibit "A" - Photo plan with key photographs of the Tourism Centre, Bloemfontein.
- 5.2 Exhibit "B" - Photo plan, photographs and key plan Loch Logan Park.
- 5.3 Exhibit "C" - Photographs and key photo plan of the area near Tourism Centre and KFC.
- 5.4 Exhibit "D" - Photographs and key to sketch plan in respect of count 1.
- 5.5 Exhibit "E" - J88 in respect of count 2 (the rape of D. K.).
- 5.6 Exhibit "F" - J88 in respect of count 1 (the rape of L. M. R.).
- 5.7 Exhibit "G" - Affidavit of F. B. C..
- 5.8 Exhibit "H" - Birth certificate of the complainant in count 1.
- 5.9 Exhibit "I" - J88 in respect of count 4 (rape of S. A. M.).

5.10 Exhibit “J” - Statement of S. A. M.
(complainant in count 4)

SUMMARY OF ORAL EVIDENCE

- [6] **Godfrey Motsamai Montoeli** was the first state witness. He was the security officer on duty at the Tourism Centre on 7th December 2015. On that morning at around 5 am he came into the area near the devils fork fence surrounding the Tourism Centre. He heard a voice of a female person screaming. He went to investigate and saw a male person running away as he approached. He was unable to identify the person. He noticed a lady who was in distress. The area is in an open space with small shrubs. The lady reported to him that she had been raped by the unknown man who just ran away. Her clothes were covered with sand, dust and grass. He accompanied her to the Park Road Police Station where a rape case was opened. Photo's no 2, 3, 4 and 5 on point A and B of the sketch plan depicts the vicinity of where the rape incident took place in annexure “A”.
- [7] His evidence related to count 4 and 5 (the rape and robbery of S. A. M.).
- [8] **D. K.** was the second state witness. On 2nd February 2014 she was walking from Brandwag to the taxi rank towards town. She took a short cut and went through Loch Logan Park. She

passed the Protea Hotel in Charles Street at about 07:00. An unknown person approached her from the opposite direction. Initially she thought that the unknown person was a car guard. As she entered the Loch Logan Park gardens gate, the unknown person followed her. They both went through the first gate. When she opened the second gate she realized it was locked. She turned back and saw the accused behind her. He had a knife in his hand. The accused uttered the following words.

"I am going to show you that you are not clever. I am going to rape you today."

- [9] He instructed her to pull off her pants, which she did. He raped her by penetrating her with his penis from behind. She was frozen with fear and only hoped to get out of that ordeal alive which she estimated to have lasted for 5 minutes. When the accused penetrated her virginally, he was not wearing a condom and proceeded to rob her R100.00 and her Blackberry phone. She was able to clearly identify him as his face reflected on the window of the ticket sale office. She pleaded with him to give back the sim card which he obliged by throwing it on the floor and taking the cell phone as he ran away.
- [10] She first reported the rape to a couple who were seated in a car near Loch Logan Park. This couple took her to the police station where she formally reported the rape incident. She was taken to hospital for medical examination and counselling. The rape incident took place at photo 1 in exhibit "B". She testified that she

is currently studying electrical engineering and still feel traumatized by the incident.

- [11] Under cross examination a version was put to her that the accused had approached her and asked for sex services to which she replied in the affirmative and requested R50.00 to provide such sexual favours. She denied that version vehemently.
- [12] **S. A. M.** was the third state witness. On 7th December 2015, she was walking alone towards KFC near Small Street. An unknown male person approached her and asked if he could walk her halfway. Suddenly the person asked her for her cell phone. As she was busy conversing with him, the cell phone rang. It was in her jean pocket. A second unknown person, presumably in the company of the accused, suddenly emerged and grabbed the phone from her. The accused pushed her, past the KFC in Small Street towards the bushes. There, he assaulted her. He pushed her on the ground. She fell on her back. He asked her to undress and he proceeded to rape her.
- [13] When he was done, he searched her jeans and removed a wallet containing R1 100.00. He took this cash. He also took out a bank card of the complainant and gave it to two unknown persons who also arrived there, requesting them to withdraw money from the account of the complainant. The complainant was forced to give her bank pin.

- [14] The two unknown persons left for the bank. The accused proceeded to rape the complainant for the second time. This rape was interrupted when the two unknown male persons returned, informing the accused that they could not get the cash out of the complainant's bank. They gave her her card back. A security guard appeared and the three assailants ran away. She reported the rape incident to the security guard and was taken to Park Road Police station. She was able to identify her assailant because of the long time she spent with him throughout her ordeal.
- [15] Under cross examination, a version was put to her by counsel for the accused that she had asked money from the accused to buy KFC, in return for a sexual favour. This she denied vehemently.
- [16] **L. M. R.** was the fourth state witness. She is the complainant in count 1. She was born on [...] 2000 and was thirteen years at the time of the commission of the offence. She is currently in grade 10 and lives in K. in the location called D. H.. On 22nd June 2013 she was at home with her younger sister and they went to bed at 19H30 in the evening. The two were alone at home since their mother was in Cape Town. She heard something scratching the window and woke up to investigate. A few minutes later she saw a man in the kitchen. He pushed her against the fridge, threw her on the bed and demanded sex whilst holding a knife.
- [17] Her assailant proceeded to raped her. When he was finished, he put his clothes on and left her house. Before he left he warned

her that her friends were next. The first report was to her neighbour S..

- [18] S. accompanied her to her house to inspect the conditions. The police were convened and took her to the clinic where she received medical assistance and counselling. She was able to identify her assailant because during the rape incident there was sufficient light from the bulb which illuminated the room. The person was speaking Afrikaans to her and took a long time raping her. Exhibit "D" is the sketch plan with photo's no 1, 2, 3 and 4 showing the inside of the premises after the rape incident.
- [19] Under cross examination it was put to her that the accused was her boyfriend for three months prior to the incident and that they had had sexual intercourse before. She denied that she ever had any contact with the accused prior to the incident. It was put to her that they were at Baby's house before this incident and they drank beer with the accused and subsequently left for her house where they had sexual intercourse. She denied this vehemently.
- [20] **P. J.**, also known as S. was the fifth state witness. He lives next door to the complainant. On 22nd June 2013 in the morning, the complainant came into his house crying between 4 and 5 in the morning and also informed him that an unknown person had raped her and had fled away. He accompanied the complainant to her house and found clothing items strewn all over the house. He phoned the police and the incident was reported. The evidence was relevant for count 1.

- [21] **Phokoane Neria Mosala** was the sixth state witness. She is a forensic nurse attached to the Tshepong National District Hospital in Bloemfontein. She completed the J88 on 2nd February 2014 marked as Exhibit “E”. Her work experience is on record and it was clear that she was well qualified in that field. She examined D. K. on 2nd February 2014, the complainant in count 2 and 3. She confirmed the correctness of the J88 report and its clinical findings. Her evidence regarding the Gynaecological examination was that there were abrasions at 4 – 8 o'clock positions on the Fossa Navicularis. Her conclusions was that abrasions at 4-8 o'clock positions indicated the probability of forceful penetration.
- [22] **Nomsa Liza Aaron** was the seventh state witness. Her evidence was relevant to count 1 the rape of L. M. R.. She is a professional nurse qualified within the forensic field stationed at Thembeni Clinic at K.. On 22nd June 2013 she was on duty and she examined the complainant. She completed her findings in the J88 form and also confirmed the correctness thereof. It was admitted as exhibit “F”. Her evidence and findings corroborated the version of the complainant that she was raped on the day in question.
- [23] **F. B. C.** was the eight state witness. He lives in K. and knew the accused from K. where the accused use to stay. He had met the accused the first time in 2012 in Fauresmith prison where they were both held in custody. After he was released he met the accused a number of times. The accused confided in him that he had raped a girl in D. H.. After this confession, he felt bad because he knew the complainant and her mother. Although he

undertook to the accused to keep that secret, his conscience crashed him with the result that he told the complainant's mother about that confession.

- [24] The state closed its case. The accused gave his testimony in brief that the complainant in count 1 was his girlfriend and they had had a love affair three months prior to the incident which also included a sexual encounter, at least two months before the alleged rape incident. On the day in question he was with the complainant at Baby's house where they drank beer. Subsequent thereto they left for the complainant's house where they first watched TV and later had sexual intercourse with consent. He woke up the following day at 6 am and left the complainants house.
- [25] The complainant informed him that she was 16 year of age and as a result, he felt comfortable to have sexual relations with her.
- [26] In respect of count 2 and 3 he testified that he met the complainant in the street of the Zoo. The complainant asked for a taxi fare of R100.00 and he only had R50.00 which he gave to her. As a favour he asked for sex. She agreed. They proceeded to have sexual intercourse near the Zoo by consent.
- [27] Regarding count 4 and 5, the rape and robbery of S. A. M., similarly to his version in respect of the first two complainants, his evidence was that the sexual intercourse was with her consent. On the day in question he was selling dagga, sweets and cigarettes. The complainant came to purchase cigarettes and

dagga from him. The complainant also asked for money for food. In return the accused asked her for sex. She agreed and a sexual encounter took place. He was surprised to be arrested a week later.

- [28] Under cross examination he stuck to his version. The accused closed his case.

COMMON KNOWLEDGE AND UNDISPUTED FACTS:

- [29] It is uncontested that the accused had sexual intercourse with all three complainants on the dates specified on the charge sheet.

POINTS OF DISPUTE:

- [30] The accused denies that he raped the complainants. He avers that the sexual intercourse in all these three incidents was with the consent of the three complainants. The complainants dispute his version. They alleged that they were raped.
- [31] It is a well-established principle of law that for the state to secure a conviction it must prove the guilt of accused person and all the elements of the charge beyond reasonable doubt. It is of vital importance for the state to adduce cogent evidence linking the accused to the commission of the offence and proving lack of consent by the complainants.

ANALYSIS OF STATE'S CASE AND THE LAW:

[32] It is trite that in order for a conviction to result, the state must have discharged its duty of proving its case beyond reasonable doubt.

[33] In **S v Chabalala** 2003 (1) SACR 134 (SCA) at 139 (i) – 140(a) the Court had this to say:

“The approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on the 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.”

[34] All the state witnesses which testified impressed the court. I find that their evidence was honest and truthful in material respects. They did not try to falsely implicate the accused. They answered all questions without hesitation in both the examination in chief, cross examination and re-examination. There were no material contradictions in their testimonies.

[35] The only question that must be decided is whether the sexual intercourse in respect of the three counts of rape was with the consent of the complainants.

[36] It is clear that all the rape incidents had the same ***modus operandi*** of violence especially the assault with a knife, which was a common trend in all three incidents.

- [37] The complainant in respect of count 1, was 13 years of age during the commission of this incident. In law, she was unable to give consent for such acts. Her evidence is also corroborated by the J88 report regarding injuries.
- [38] Regarding the rape incident in count 2, it is inconceivable that the complainant could consent to sex on the version of the accused. The two versions are mutually destructive. In my view, the complainant's version is more probable about what precisely took place on the day in question. As I see it the sexual incident was without her consent. Furthermore, her version is corroborated by the J88 report and its findings.
- [39] Regarding count 4 the accused rides a dead horse by the version he preferred. A request for money in return for a sexual favour. A stranger can never give consent to sexual intercourse in the absence of a pre-existing relationship as opposed to what the accused wants us to believe. The complainant in count 4 was credible.
- [40] It is my view that the version of the accused is completely untenable about how the consent to sexual intercourse was obtained in the three incidents. In these circumstances, the accused's version must be rejected because it falls significantly short as probable in the circumstances.
- [41] Having regard to the evidence that has been adduced and the analysis set out above I am satisfied that the state succeeded in proving the guilt of the accused beyond reasonable doubt.

[42] In the result, I make the following finding:

42.1 That the accused is guilty of count 1, the house breaking with the intend to rape and the rape of L. M. R..

42.2 That the accused is guilty of count 2, the rape of D. K..

42.3 That the accused is guilty of count 3, the robbery of D. K..

42.4 That the accused is guilty of count 4, that the accused committed acts of sexual penetrations with the complainant Me S. A. M. and without her consent.

42.5 That the accused is guilty of robbery of Me S. A. M..

[43] I, therefore find the accused guilty of rape in contravention of the provisions of section 3 read with sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act 32 of 2007, read with sections 256, 257 and 281 of the CPA 51 of 1977, and further read with section 51(1) of Act 105 of 1997 in respect of each count.

I.R.O BOKWA, AJ

On behalf of the State: Adv. Hoffman

Instructed by: Director of Public Prosecutions Free State

On behalf of accused: Adv. Nel

Instructed by: Justice Centre South Africa