



**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

Appeal No.: A188/2016

In the appeal between:

MOEKETSI JOHN MOERANE

First Appellant

MOKHOEPHA FRANK MPHANYA

Second Appellant

and

THE STATE

Respondent

CORAM:

REINDERS, J *et* NICHOLSON, AJ

JUDGEMENT:

REINDERS, J

HEARD ON:

6 FEBRUARY 2017

DELIVERED ON:

28 FEBRUARY 2017

[1] The Appellants, who were legally represented, appeared before the Regional Court at Phuthaditjaba on a charge of rape, it being alleged that on or about 28 July 2012 they

unlawfully and intentionally committed an act of sexual penetration with Mothankie Thomas by penetrating her vagina with their penises without her consent.

- [2] The Appellants pleaded not guilty and tendered no plea explanation. On 7 May 2013 they were convicted as charged and sentenced to imprisonment for life. Appellants now exercise their automatic right of appeal against both the conviction and sentence.
- [3] In argument by Ms Smith on behalf of the Appellants and on the papers before us (drafted by Mr S.S. Kambi) it was contended that the trial court erred in finding that there was proof beyond reasonable doubt that the Appellants raped the complainant and by rejecting the Appellants' versions as false beyond reasonable doubt. It is further contended for the Appellants that the trial court misdirected itself by not approaching the evidence of the complainant with caution, and that the sentence of life imprisonment was shockingly inappropriate and harsh.
- [4] Ms Moroka on behalf of the State, supported both the conviction and the sentence on the papers and in argument before us. She contended that the trial court did not misdirect itself in any way.
- [5] The State's version, as accepted by the trial court, was to the effect that on 28 July 2012 the complainant left her home at past 20h00 (I will return to this aspect later again). Upon her arrival at a tavern in a shopping complex she met with the

First Appellant, who is her [n.] and well known to her. He told her that they should leave the tavern together as they are [n.]s. One T., an acquaintance of hers, joined her and offered her an alcoholic drink. She did not finish drinking it as she heard people screaming outside. Upon her arrival outside she was advised that First Appellant had stabbed somebody. T. suggested that they should leave. Not far from the tavern First Appellant joined them, whereupon T. stayed behind and made no attempt to prohibit the First Appellant from leaving with the complainant.

Along the way they met with Second Appellant, one T. and one S.. First Appellant had a knife in his possession and along the way instructed her to turn left at a corner. She informed him that it was not the direction to their homes. When she objected, he told her to keep quiet and that he “wants to show me I am not clever because I think I am clever.” They proceeded to the house of one of First Appellant’s friends, one P. where they arrived at 03h30. P. was at his house and the party of the two Appellants, T., S. and the complainant started drinking. She drank only half a glass of beer as it was not her intention to drink.

First Appellant instructed her to go to the bedroom. She was stubborn and tried to fight back, but was afraid as he had a knife. Hereafter he raped her, and upon completion called Second Appellant to the room. As she was resisting the Second Appellant a fight ensued and she sustained a 2cm injury below her left eye. Second Appellant hereafter raped her. Hereupon first appellant instructed P. to provide her with

water in another bedroom. She only washed her face. She pleaded with P. to help her escape, and on her own accord she escaped through the window of the bedroom. As she ran up the street, First Appellant emerged and she informed him that she was going to the police. Along the way she met with two police officers in a vehicle and they took her to the police station. The police accompanied her to P.'s residence and on their way there they met up with P. and S.. They found no one at P.'s house.

The complainant was taken to Elizabeth Ross Hospital where she underwent a clinical examination. Findings were recorded by the medical practitioner, Dr MP Setlaba (hereafter "the doctor"). This document (hereafter the "J88") was handed in as Exhibit "B" and recorded a laceration of +-3cm on the right cheek and an abrasion on the inner lip. It is evident from the J88 that a gynaecological examination was conducted, indicating no swelling, fresh tears or bruising of the vagina but a whitish discharge. The conclusion was reflected as: "as above". The prosecution did not call the doctor as a witness.

- [6] During cross examination the complainant testified that First Appellant might not have said that she thinks she is clever, but he used to tell ladies in their village that they think they are clever. He never said that to her directly because she was always at work. She admitted that she was not forced to drink liquor at P.'s house. Although she fought off both Appellants and sustained injuries under her eye and inner lip, she did not sustain any injuries to her genitalia but only "emotional pain". She admitted that, when the Appellants, T. and S. left the

tavern, they were also accompanied by two ladies called N. and T. (hereafter “the two ladies”). She can recall that when the police emerged, one of the girls ran to the police. She was prevented from also running to the police for assistance as First Appellant was guarding her by walking behind her. She admitted that she did not mention that she and S. stopped at the latter’s uncle to buy some liquor on the way to P.’s house. The complainant denied that she had an agreement with First Appellant to leave the tavern together, indicating that she did not answer him when he told her that they should leave together.

- [7] The state called Warrant Officer Thabo Steven Lepondo who testified that he arrested the two appellants on 28 July 2012 between 09:00 and 10:00 that morning. According to him, the First Appellant gave chase as he attempted to arrest him. He denied firing any shots.
- [8] Both Appellants testified in implication of their defence and Mr Thabiso Makoena was called as a witness by First Appellant. In brief, First Appellant denied that he had sexual intercourse with the complainant either by consent or without consent. According to him, the complainant was involved in a fight with some ladies at the complex and he observed the injuries to her face. It was not disputed that they met with the complainant on the night in question and left for P.’s house where they consumed liquor. According to him the complainant left with the group, and she went home the following morning as she indicated she had to go to Johannesburg.

[9] Mr Thabiso Mokoena was called by the First Appellant as a witness. His evidence entailed that complainant had a fight with a group of girls and sustained the injuries depicted in the J88. He did not see a knife in the possession of the First Appellant. He also went to P.'s place.

[10] The upshot of the Second Appellant's testimony was that he saw the complainant fighting at the shopping complex and that he saw that she had sustained injuries on the left side of her face. The group left the tavern together, whilst the two ladies ran back when the police emerged, the complainant followed the appellants. It was an agreement between complainant, himself and his co-accused that they would leave the tavern together. The appellant was asked why the complainant would falsely implicate him, and he answered that he does not know where she gets the guts to do so, evil spirits got hold of her. He denied that he assaulted or raped the complainant.

[11] It is trite that factual findings of the trial court and its acceptance of oral evidence are presumed to be correct unless and until they are demonstrably or, on adequate grounds, shown to be wrong.

See *S v Francis and Others* 1991(1) SACR 198 (A).

[12] On returning the guilty verdict the trial court effectively rejected, as not reasonably possibly true, the Appellants' versions.

[13] The doctor who supposedly examined the complainant, was not called to testify *viva voce* regarding the medical findings. The magistrate was therefore left to speculate what the report meant. The only injuries it shows are a laceration on the left side of the complainant's face and an injury to the upper lip. The court was deprived of the privilege of hearing the expert's opinion on whether the laceration could have been caused by a clenched fist or otherwise. Be that as it may, the laceration could very well have been caused in the fashion described by the Appellants, namely that the complainant was involved in a fight with other ladies. The said injuries themselves, in no way prove a rape but are certainly more attributable to a fight than a rape. Nowhere in the J88 does the doctor conclude that the complainant might have been raped, let alone that the complainant had in fact been raped.

[14] No mention was made by the magistrate of the fact that the findings by the doctor who examined the complainant did not corroborate the complainant's version that she was raped. Even though she testified that fights and even injuries preceded the rape, she could not explain how no swelling, bruising or bleeding was noted on her private parts. One would have expected the doctor to have noted that complainant averred that she had been raped and record specific clinical notes to that effect. The upshot hereof is that the medical evidence did not corroborate or support the complainant's version and was at best, neutral evidence. If any, it proffered support for the Appellants' versions. A further worrying aspect is that the J88 is dated the 28th July 2012 which counters the complainants' evidence.

[15] It is clear from the recorded evidence that the complainant was a single witness as to the alleged rape. The cautionary rule was, as such, applicable to her evidence in that regard as correctly submitted for the Appellants.

[16] An application of the cautionary rule to the evidence of a single witness in essence requires the court to satisfy itself that despite the defects, shortcomings and contradictions in such evidence the truth has been told and that the complainant's evidence is trustworthy.

See: *S v Sauls* 1981 (3) SA 180 (A).

[17] No mention was made by the trial court that the complainant was a single witness and that he applied the cautionary rule in respect of her evidence. The only remark by the learned magistrate is encapsulated in one sentence that reads as follow:

"I am of the view that the complainant testified to this honourable court well, she was clear and satisfactory in every material respect, yes I know that there were discrepancies or bits of her evidence that did not make sense yet these bits were not of such nature which discredited her, I was in fact impressed by her evidence as being clear and satisfactory in every material respect."

[18] The magistrate did not deal with the specifics of the discrepancies and shortcomings of the complainant's evidence to enable me to follow his precise reasoning. On a reading of the record, I am not so sure that he is correct in this finding and/or that he could find any corroboration for the

complainant's evidence. It seriously concerned me that complainant mentioned for the first time in cross examination that on the way from the tavern they went to S.'s uncle's place to buy liquor. This happened at the time when she was already, if her version is to be believed, forced against her will to accompany the Appellants. This coupled with her version that the two other ladies who initially accompanied the party were allowed earlier to run away. Having testified in chief, the prosecutor referred her to the doctor's report. It was put to her that according to the doctor she had an injury on the inner lip. Her response was as follows:

"I remember now, that is the time when accused two was assaulting me with a clenched fist and I bit my lip."

It is difficult to fathom why she needed to be reminded of the injuries she sustained during the ordeal. In evidence in chief (as correctly found by the magistrate) she testified that she left her house on the 28th July 2012 at 20:00. She was raped in the early hours of the following morning. If this evidence is correct, the doctor could not have brought out a report dated the 28th July 2012 indicating the starting time of the medical examination as being 23:00. This evidence might merely be a slip of the tongue. However it remains her testimony under oath and the magistrate wrongly accepted this to be correct. This aspect casts serious doubt on the magistrate's conclusions regarding her reliability.

[19] According to the complainant's evidence there were various other witnesses who could have corroborated her version. None of them were called to testify. Nor was the investigating

officer called to explain what happened to the witnesses. The end result is that, objectively speaking, the medical evidence did not support the complainant about the rape, nor did any other witness. There were serious concerns about the evidence itself of the complainant. No evidence about any first report of the rape was tendered. So seen, there was no corroboration for the complainants' evidence or testimony.

[20] Both Appellants' versions were rejected as the court *a quo* was of the view that they could not satisfactorily explain why complainant would falsely incriminate them. Our courts have often warned against such an approach. To approach the matter on this basis is to expect of an accused to give an explanation which might not fall within his personal knowledge. He might think that the witness falsely implicated him for totally the wrong reason, leading to the rejection of his version, whilst the witness might have had a completely different reason unknown to the accused. It is dangerous to place such an onus on an accused.

See: *S v Lesito* 1996 (2) SACR 682 (O) at 687i-j.

[21] I therefore come to the conclusion that the appeal of both Appellants against their convictions should succeed as the State did not cross the minimum threshold of standard of proof of the accused's guilt, which is proof beyond a reasonable doubt.

[22] I would therefore make the following orders:

1. The appeal of both Appellants succeeds.
2. The conviction and sentence in respect of First Appellant and Second Appellant are set aside.

C. REINDERS, J

I concur and it is so ordered.

C. NICHOLSON, AJ

On behalf of the Appellants:

Adv. L. Smith
Instructed by:
Justice Centre
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On behalf of the Respondent:

Ms. Moroko
Instructed by:
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