



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.: A221/2016

In the appeal between:-

WALTER VAN LANGEBERG

Appellant

and

THE STATE

Respondent

CORAM: MUSI, AJP *et* VAN ZYL, J

HEARD ON: 6 MARCH 2017

JUDGMENT BY: MUSI, AJP

DELIVERED ON: 16 MARCH 2017

- [1] The appellant was convicted by the regional magistrate Bloemfontein, on one count of rape and one count of assault. He was sentenced to life imprisonment for rape and to 3 years' imprisonment for assault. Both convictions arose out of a single incident. He now appeals against both the convictions and sentences.
- [2] The complainant, a 40 year old lady, testified that on 14 March 2009 she went to Pelonomie Hospital, Bloemfontein to visit her niece's child. At approximately 20h30 she walked from the hospital to Twin City where she boarded a Toyota Hi-ace Siyaya minibus taxi which was driven by the appellant. She told the appellant that she is going to Bergman Square. She was the only passenger. The appellant drove in the direction of Bergman Square and he started fondling her breasts. She asked him what he is doing; he just remained quiet. He then put his hand in her trousers and started touching her vagina. She again asked him what he was doing and he said she can see what he is doing. He took his hand from her trousers and started fondling her breasts again. When the taxi reached her destination the appellant accelerated. She tried to open the door but the appellant locked it whilst driving.
- [3] The appellant drove to small holdings where he stopped the vehicle. She was seated in the front passenger seat. The appellant moved over to her side, and unbuttoned her trousers and pulled it down, to above her knees. He then got on top of her and had sexual intercourse with. She tried to push him from her, without success. She opened the door and fell out of the car. It was raining on that particular day and the surface on which she fell was muddy. She stood up and ran in the direction of houses that she saw at a distance. The appellant chased her, got hold of her and took her back to the vehicle. He pushed her against the vehicle and he hit her once with his clenched fist behind her left ear. He instructed her to get into the car so that he could take her home. She got into the vehicle because she did not know where she was or where to go.
- [4] The appellant said that he is not satisfied. She requested him to take her home. Whilst they were driving back he requested her to play with his penis, she

obliged. He also touched her vagina and inserted his finger in it. The appellant drove to her house, she got out of the taxi. When he drove away she took the registration number of the vehicle. She went to her neighbour, P., and told her and M. what happened to her. The police were called; they arrived and took her to the police station where a statement was taken. She later went with a police officer to the taxi rank where she pointed out the appellant.

- [5] Ms Lenkoe testified that she is a forensic nurse stationed at Tsepong Crisis Centre. On 15 March 2009, she examined the complainant. She did not present any genital injuries. She saw a bruise at the back of the complainant's ear. During cross examination she was asked whether the complainant presented any other injuries except the bruise behind her ear; she answered that she did not see any other injuries.
- [6] The appellant testified that on that particular evening he was on his way to Bergman Square to see his driver. He saw the complainant standing in the rain and decided to give her a lift. He stopped at a tuckshop where he bought cold drinks and airtime. He went back to the vehicle and she showed him keys and said that they can go and drink the cold drinks at her sister's house. She asked him whether he has any condoms in the vehicle. He went back to the tuckshop to buy condoms because he did not have any in his vehicle. He drove to Sand City where he stopped the vehicle, got out and climbed into the passenger's seat. The complainant undressed herself and he had sexual intercourse with her. He had money in his shirt's pocket; she removed the money and put it between her breasts. He tried to remove it and a struggle ensued. After he retrieved the money he went back to the driver's seat and drove the vehicle. The complainant asked him for money and he gave her R50.
- [7] It is trite that the State bears the onus to prove the guilt of the appellant beyond reasonable doubt. The state must prove each and every element of the offence. There is no duty on the appellant to prove his innocence. Where, after

considering all the evidence of the case, there is doubt as to the guilt of the appellant he must get the benefit of such doubt.

- [8] Mr Simpson on behalf of the respondent argued that the trial court's conclusion in relation to both conviction and sentence is without blemish. The heads of argument on behalf of the appellant were drawn by Mr Tshabalala but Mr Van der Merwe appeared before us on his behalf. He contended that the appellant should have been found guilty of one rape.
- [9] The regional magistrate found that the complainant's evidence is more credible than the appellant's evidence. I disagree. The appellant's case is improbable but so too is the respondent's case. The regional magistrate, in trying to portray the respondent's case in a very good light even went so far as to take judicial notice of matters medical. He did not discuss the elephant in the room. He made unsustainable assumptions. He ignored glaring contradictions in the respondent's case and accepted the respondent's case without any reservation. He accepted the complainant's version in its totality.
- [10] The regional magistrate indeed pointed out some incongruities in the complainant's version. He said the following:

"Kortliks gaan ek die volgende net uitlig, die eerste een was gewees oor die hoeveelheid sitplekke, sy het gesê daar is drie, daar is net in werklikheid twee. Die ander aspek het gegaan oor of beskuldigde toe hy die knoppie afgedruk het eers bestuur het, later het sy gesê dat hy eers bestuur het en toe dat die voertuig reeds stilgestaan het. 'n Ander aspek wat ek in haar getuienis ook uitgelig het was die vraag waar beskuldigde was toe hy haar broek sou afgetrek het langs haar of voor haar, sy het verskillend daaroor getuig, en laastens die vraag of wat die posisie met betrekking tot die sitplek was, in getuienis in hoof het sy gesê nee dit was nie afgeslaan nie en in kruisondervraging gesê het ja, die feitlike situasie is dit kan in elk geval nie platslaan nie. Nou dit is die meeste kritiek was ek kan inbring teen die klaagster se getuienis."

[11] Unfortunately that is not the sum total of the criticism that one can level at the complainant's version. There are many contradictions and improbabilities which I will presently point out. The regional magistrate found that the complainant's evidence is corroborated in that the form J 88 shows that "haar hele lyf seer was". That is incorrect. In fact, the only injury on the form J 88 is the bruise behind her ear. He went further to try and explain the absence of any injuries. He took judicial notice of the fact that the complainant's skin colour and the relative short duration of the examination relative to the time that the injuries were sustained explained why the complainant did not present any injuries. He said:

"'n Ander aspek wat ons deeglik hier moet verreken is die kort tydsverloop, ook die velkleur van die klaagster relatief donker, aan die anderkant so 'n kort tydsverloop dat sy nog nie kans gehad het om behoorlik gekneus en donker te raak nie teen die tyd was alreeds by die ondersoek was.(sic)"

[12] The respondent did not call P. or M. to testify. No reason was given why these very important witnesses were not called to testify. They could have corroborated the complainant's version as to her physical and emotional state when she informed them about the incident. They could have corroborated her evidence as to the state of her clothing when she arrived there. The police officer or officers who found the complainant at P.'s house were also not called to testify. The regional magistrate did not criticize the respondent for not calling any of those witnesses. He did not have regard to the fact that, depending on the circumstances of the case, a negative inference can be made against a party who does not call an available witness. See **S v Teixeira** 1980 (3) SA 755 (AD) at 763F to 764C. In my view the regional magistrate should at least have referred to the reason why these potential witnesses were not called and the import of such failure. In the absence of any explanation the only reasonable inference to make is that these witnesses would have contradicted the complainant's evidence. She could therefore not be classified as a single witness whose evidence should be accepted without reservation.

[13] The complainant also embellished her testimony. When she was asked during cross-examination how the appellant could have sexual intercourse with her on the front seat while she was sitting with her trousers at her knees; she could not give a satisfactory answer. She then said that he reclined the seat. An inspection *in loco* was held and it was found that that make and model vehicle's seat cannot recline.

[14] In the absence of any corroborating evidence the regional magistrate made a very prejudicial assumption without any factual basis. He assumed that the sooner a complaint is laid the more veracity there is to the allegations. He put it thus:

“Ek wil van die veronderstelling uitgaan hoe vinniger die klagte gemaak word hoe minder is die kans dat dit gekook kan wees, met ander woorde hoe meer spontaan begin 'n klagte raak.”

Does this mean that the longer a complainant takes to report a rape the more the chance is that she/he is not truthful?

[15] The complainant testified as if she had no prior knowledge of the appellant. During cross-examination, however, it transpired that she had used the appellant's taxi on numerous occasions to commute to and from work. The regional magistrate found that the complainant made interpretative mistakes which are excusable because of the passage of time. He unfortunately does not explain or give examples of what he means by interpretative mistakes.

[16] The appellant, as the regional magistrate correctly points out, was also not a model witness. The regional magistrate correctly pointed out that it is improbable that the complainant who had no previous history with the appellant would act in the manner that she did. He also pointed out that it is improbable that the complainant who wanted to have sexual intercourse with the appellant would make such a serious allegation against him. The regional magistrate misdirected

himself with regard to the injury sustained by the complainant. The appellant gave a plausible explanation. The appellant's version is that he wrestled with the complainant in order to get his money back and that she could have sustained the injury during this process.

- [17] The appellant was initially represented by Mr Kramer. He contradicted what Mr Kramer put to the complainant. The regional magistrate found that the contradictions were as a result of the fact that the appellant forgot what his instructions were to his legal representative.
- [18] On the totality of the evidence before the regional magistrate, bearing in mind the incidence of the onus, he could not come to the conclusion that the State proved its case beyond a reasonable doubt. The regional magistrate did not consider that the State had to prove the guilt of the appellant beyond reasonable doubt. By purely looking at the two versions in isolation and finding that the one is more probable than the other is to unconsciously place a burden on an accused. The proper manner is to look at all the evidence and then to ask whether the guilt of the accused has been proved beyond reasonable doubt.
- [18] In **S v Janse van Rensburg** 2009 (2) SACR 216 (C) at para 8 it was said:

“Logic dictates that, where there are two conflicting versions or two mutually destructive stories, both cannot be true. Only one can be true. Consequently the other must be false. However, the dictates of logic do not displace the standard of proof required either in a civil or criminal matter. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and in the process measured against the probabilities. In the final analysis the court must determine whether the State has mustered the requisite threshold – in this case proof beyond reasonable doubt. (See: **S v Saban & 'n Ander** 1992 (1) SACR 199 (A) at 203j to 204a-b; **S v Van der Meyden** 1999 (1) SACR 447 (W) at 449g-j – 450a-b and **S v Trainor** 2003 (1) SACR 35 (SCA) at para [9].)”

[19] It is trite that in assessing two conflicting versions all the evidence should be considered and none should be ignored. In **S v M** 2006 (1) SACR 135 (SCA) at paragraph 189 Cameron JA, as he then was, stated the proper approach to adopt succinctly as follows:

“The point is that the totality of the evidence must be measured, not in isolation, but by assessing properly whether in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides the balance weighs so heavily in favour of the state that any reasonable doubt about the accused’s guilt is excluded.”

[20] Having considered all the evidence in this matter and the absence of a reason why some of the available witnesses were not called I have doubt as to the guilt of the accused. In my view it cannot be said that the State proved the appellant’s guilt beyond reasonable doubt.

[21] I accordingly make the following order:

- (i) The appeal is upheld.
- (ii) The convictions and sentences are set aside.

C.J. MUSI, AJP

I agree.

C. VAN ZYL, J

On behalf of Appellant:

Mr. P van der Merwe
Instructed by
Legal Aid SA
BLOEMFONTEIN

On behalf of Respondent:

Adv. A. Simpson
Instructed by
Director Public Prosecutions
BLOEMFONTEIN