

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



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.: A185/2016

In the appeal between:-

MANDLA VICTOR MAKAKUDI

Appellant

and

THE STATE

Respondent

CORAM: MUSI, AJP *et* RAMPAL, J *et* SNELLENBURG, AJ

HEARD ON: 15 MAY 2017

JUDGMENT BY: MUSI, AJP

DELIVERED ON:

25 MAY 2017

- [1] The appellant was convicted of rape and sentenced to 8 years' imprisonment, by a single judge of this division. He now appeals against the conviction, with the leave of the trial court. Although the trial court granted leave to appeal against conviction and sentence, Ms Smit, on behalf of the appellant, informed us that the appeal is aimed against the conviction only. She further informed us that the appellant applied for leave to appeal against the conviction only. It is not clear why the trial court granted leave to appeal against conviction and sentence. The grounds of appeal as well as the heads of argument of both the appellant and the respondent were limited to the conviction only. My conclusion with regard to the conviction takes care of this controversy.
- [2] The complainant testified that on 15 December 2012, between 13:00 and 14:00, she, her younger sister and their friend went to her elder sister's house at Lusaka, Phuthaditjhaba, to attend a party. They consumed alcohol at the party. At approximately 20:00 she and her younger sister left the party en route to their parental home. She walked in front of her sister. While she was walking, the appellant and an unknown male approached her and grabbed her. The one was on her left and the other on her right. She thought that they were taking her home. She requested them to leave her, but they refused. When they grabbed her, her sister decided to go to a tavern called M.'s tavern (tavern). The complainant screamed, but nobody came to her rescue.
- [3] They took her to the appellant's house. He unlocked the door, they took her to a bedroom where they undressed her and pushed her on a bed. She cried. The appellant had sexual intercourse with her and thereafter his friend also had sexual intercourse with her. After they had sexual intercourse with her they instructed her to get dressed. After she dressed they grabbed her and they left the appellant's house. After walking for a while, she sat down and refused to

walk any further. She screamed for help to no avail. The other person slapped her and ordered her to stand up. She refused.

- [4] An unknown male person arrived at the scene, as a result of which the appellant and his friend ran away. She went home. Her mother asked her why her jeans were dirty and she informed her that she was raped.
- [5] She went to police the next day to report the matter. She was examined by a medical doctor, on 16 December 2012, who noted that her labia minora, labia majora, posterior fourchette and fossa navicularis were bruised. She also presented a fresh tear at the 6 o'clock position of the vagina. The content of the medical report was admitted. The doctor did not testify. The content of a DNA report was also admitted. In terms of the latter report the appellant's DNA was found on a cervical swab that was taken from the complainant. The other person's DNA did not match that on the cervical swab.
- [6] A few days after the incident the police brought the appellant and his friend to her, and she pointed them out whilst they were sitting in a police vehicle.
- [7] The complainant's mother testified that on 15 December 2012 she was at home when her daughter arrived. Her daughter informed her that she was raped by two men. This witness' testimony was totally incoherent. She could not give coherent answers during her evidence-in-chief as well as during cross-examination.
- [8] Sergeant Mofoke testified that on 19 December 2012 he arrested the appellant and the other person at their respective parental homes. He took them to the complainant's home where she identified both as the persons who raped her. He arrested both of them for rape.
- [9] The appellant testified that he had sexual intercourse with the complainant during 2012, prior to the date of the alleged rape. He testified that on 15 December 2012

he was on his way to the tavern when he met the complainant and her two friends. The complainant asked him to buy her three beers. He told her that there is nothing for free and that he will give her R50 in exchange for sexual intercourse. She left her friends and they walked together to his parental home. They went to his mother's bedroom where he had sexual intercourse with her where after he gave her R50. He promised to meet her at the tavern later that same evening. She did not believe him. He gave her his cellular phone in order to reassure her that he would indeed meet her at the tavern. She left. He later went to the tavern but she was not there. He drank the whole night at the tavern. The following morning he went to his brother's house at Bluegum Bush. He denied that he was ever involved in a romantic relationship with the complainant.

- [10] The trial court rejected the appellant's version and by implication accepted the complainant's version. The trial court however did not make any finding with regard to whether the complainant was raped by the other person.
- [11] A Court of Appeal does not overturn a trial court's factual findings unless they are shown to be tainted by material misdirection or are shown by the record to be wrong. See **S v Naidoo** 2003 (1) SACR 347 (SCA) at [26] and **Rex v Dhlumayo** 1948 (2) SA 677 (AD) at 702 to 703.
- [12] The trial court made credibility findings in favor of the complainant without a proper assessment of her testimony and without giving proper reasons for such findings. The trial court said the following:

"the court has to decide whether the witness was truthful and accurate, the quality of the testimony of the witness (sic). It might be that the incident happened to years ago, there the complainant was not logic in her testimony, but she insisted that she was raped on 15 December 2012 and insisted that it was by 2 men (sic)... The court is of the view that even though the complainant could not logically recall some events, the consistency on the retailing of the incidence, what happened of the night of 15 December 2012, remains truthful (sic)."

[13] The trial court did not consider the nature of the inconsistencies, discrepancies and contradictions in the complainant's testimony. It also did not consider the impact of the inconsistencies, discrepancies and contradictions on the credibility of the complainant. There was also no proper assessment done of the credibility and reliability of the complainant's testimony in light of the totality of the evidence.

[14] The complainant admitted that she consumed alcohol on the day. The appellant alleged that she was under the influence of alcohol when they met. The trial court did not deal with this aspect.

[15] The trial court attached undue weight to neutral evidentially material. The trial court said the following in relation to the DNA evidence and the medical examination:

“In this matter the DNA result obtained, in my view, and the vaginal injuries is corroborated and the fact that the complainant was able to identify the accused against the accused bare denial cannot stand and I therefore reject it (sic).”

[16] It was not in dispute that the complainant and the appellant knew each other. Likewise it was not in dispute that the appellant had sexual intercourse with the complainant on 15 December 2012. The appellant's version was not a bare denial. The only dispute was whether he had consensual sexual intercourse with the complainant. The doctor's opinion is also inconclusive. The doctor said the following:

“Above features indicated sexual intercourse. Sexual assault can't be ruled out since patient has delivered before and is sexually active.”

[17] Every accused person has the right to a fair trial which includes the right to be presumed innocent. See section 35(3)(h) of the Constitution of the Republic of South Africa, 1996. The presumption of innocence means that everyone charged

with a crime must be presumed innocent until proven guilty. This presumption is deeply embedded in our criminal justice system. The presumption may be rebutted by presenting evidence that proves beyond reasonable doubt that the accused has committed the crime. The proof beyond reasonable doubt standard is the lowest permissible standard to rebut the presumption of innocence. Anything below reasonable doubt is totally insufficient to displace the presumption. Proof beyond reasonable doubt is however not proof that overcomes every possible doubt.

- [18] If after an assessment of all the evidence it cannot be said that the state has proved beyond reasonable doubt that the accused has committed the crime then the accused should be acquitted. Similarly if on a conspectus of all the evidence it is clear that the accused's version is reasonably possibly true then the accused should be acquitted. The state therefore carries the burden to prove beyond reasonable doubt that the accused committed the offence. If there is any doubt about the guilt of the accused he or she must get the benefit of that doubt.
- [19] The complainant was in my view an unsatisfactory witness. It is clear that her faculties were impaired by the alcohol that she consumed. She testified that the appellant and his friend grabbed her in the street and "walked with her to a strange street". She initially thought it is the street in which her parental home was situated. She only realized that it is not the street in which she lives because she saw the streetlights. Why she could not see that they were walking in a street other than the street in which she lives was not explained. It was also not explained why she thought that the appellant and his friend wanted to take her home.
- [20] Initially she testified that her sister was walking behind her when she was grabbed by the appellant and his friend. When she was asked why her sister could not see that she was being accosted, she said that her sister went to the tavern. Later she testified that her sister told her the following day that she did not

see what happened between her and the appellant. It was put to her that in her affidavit she stated that she was alone when she was grabbed by the appellant. She could not explain this discrepancy. It was also put to her that it is strange that her sister would abandon her in the street without saying a word. When she was asked whether she screamed while she was with her sister she stated that her sister turned back and went away.

[21] During cross-examination it was put to her that she was with her sister and another lady when the appellant met them. She initially conceded that they were three persons when they met him. When she was asked whether she confirms that they were three she said the following: "we were three but I did not see a third person, I only saw my sibling."

[22] It was put to her that the appellant alleges that they had sexual intercourse prior to 15 December 2012, she initially denied it but when she was pressed in cross-examination she conceded that they had sexual intercourse on one occasion only. Towards the end of her cross-examination she was again asked about the previous sexual encounter with the appellant and she testified that she cannot remember or she had forgotten. During re-examination she categorically stated that she did not have sexual intercourse with the appellant before 15 December 2012.

[23] She did not inform the police that the appellant gave her his cellular phone. It was only during cross-examination that she made mention of the cellular phone. She however said that the appellant gave her the cellular phone in order for her to withdraw the matter. She then testified as follows:

"did you take the cellphone? --- Yes

why would you now take the cell phone Miss if you had no intention of not opening a case?--- It was a cheap cellphone, it was not an expensive one.

So why would you take the cell phone on your own version of the person who have raped you, or asked you not to make a case, why would you take the cell phone? --- He forced me.

He forced you to take something? --- He put it inside my hand I was reluctant.

Why did you not just drop it? --- I was afraid.”

[24] The complainant’s testimony in relation to the reason why and under what circumstances she took the cellphone is improbable. She did not proffer any reason why she did not tell the police that the appellant gave her the cellphone in order for her to withdraw the charge against him.

[25] The complainant’s mother’s evidence was of no assistance. An extract from her testimony during cross- examination illustrates this conclusion.

“Ma’am can you remember the time when M arrived there at the house, was it late at night, early at night, when was it, can you recall? --- Sometimes she went to school, there went to school the children, when they arrived I do not know what time it was but it was at night that she comes.

Just listen to the question Miss. You told the pulleys your story, is that correct, you gave them a version and then rolled it down? --- Yes

And in that version did you tell the police that she arrived at midnight, is that correct? --- They were coming from the walk stall, they were walking in the night. They said that they must not walk in the night, they said they must walk during the day.

Just listen to the question. Did you tell the police that when M, the night that she was raped, when she came to the house and knocked on the door whatever, when she arrived there it was midnight, 12 o’ clock?--- She came back from work it was still early when she went away party.

I am not asking when she went to the party, I am asking when she came back?--- When she took the children to the party sometimes I sent the other woman to go and look for her...”

Nothing more needs to be said about this witness’ testimony.

[26] The appellant’s testimony on the other hand is also replete with inconsistencies and improbabilities. His testimony that he had sexual intercourse with the

complainant on a previous occasion without any prior agreement or without saying anything to her other than her saying that they must go somewhere, is improbable. He did not give any consideration for the sexual intercourse on that occasion. On 15 December 2012 he gave her R50. She did not lodge a rape complaint on the previous occasion but she does so on the occasion that he gave her consideration for the sexual act.

[27] He gave her his cellular phone as assurance that he would meet her at the tavern. He did not meet her at the tavern, but strangely, he does not go and look for her or his cellular phone the following day.

[28] The complainant testified that she and the appellant were involved in a romantic relationship two years prior to 15 December 2012. Her testimony was not disputed. The appellant testified that there was never any romantic relationship between him and the complainant, they only had sexual intercourse on two occasions during 2012.

[29] In S v M 2006 (1) SACR 135 (SCA) at paragraph 189 it was said that:

“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.”

After assessing all the evidence, including the fact that the complainant was a single witness, it is clear that it cannot be said that reasonable doubt about the appellant’s guilt had been excluded. He should have been acquitted. The appeal should succeed.

[30] I therefore make the following order:

- (i) The appeal is upheld.
- (ii) The conviction and sentence are set aside.

C.J. MUSI, AJP

I agree.

M.H. RAMPAL, J

I agree.

N. SNELLENBURG, AJ

On behalf of Applicant:

Ms. L. Smit
Instructed by
Legal Aid SA
BLOEMFONTEIN

On behalf of Respondent:

Adv. D. W. Bontes
Instructed by
Director Public Prosecutions

BLOEMFONTEIN