

IN THE HIGH COURT OF SOUTH AFRICA

PIETERMARITZBURG

KWAZULU NATAL DIVISION, PIETERMARITZBURG

Case No. AR 545/2016

In the matter between:

Clement Thomas Gumede

Appellant

and

The State

Respondent

Judgment

Lopes J

[1] The appellant in this matter was charged in the regional court at Ingwavuma of one count of rape, in that on the 10th May 2007 and at the Makhonyeni area he unlawfully had sexual intercourse with A M without her consent. The charge sheet further alleged that this had occurred on multiple occasions, and the charge sheet referred to the provisions of s 51(1) of the Criminal Law Amendment Act 1997.

[2] Mr Gumede pleaded not guilty at the outset of the trial and his attorney, Mr Sithole, recorded that Mr Gumede admitted having sexual intercourse with Miss M, but that it was consensual.

[3] The matter was heard before Mr S H Mundree. On the 3rd February 2009 he convicted Mr Gumede as charged, and, finding that there were no substantial and compelling circumstances which would have entitled him to impose a lesser sentence, he sentenced Mr Gumede to life imprisonment.

[4] The matter comes before us by way of leave to appeal against the conviction, granted by the learned magistrate. During the conduct of the trial:

- (a) Miss M gave evidence.
- (b) In her evidence she referred to the presence of her friend, whom she referred to as her sister, one T M, who was present on the day, and who witnessed some of the interchanges between Miss M and Mr Gumede.
- (c) The evidence of Ms M was apparently given on the 29th January 2009. After she had testified and was cross-examined, Mr Gumede testified in chief.
- (d) Due to some administrative or mechanical problem, the evidence of Miss M and the evidence in chief of Mr Gumede are not contained in the record.

[5] Counsel before us were *ad idem* that it was unlikely in the extreme that the record could be reconstructed. Mr Marimuthu, who appeared for Mr Gumede, informed the court that Mr Mundree had left the employment of the state, apparently after charges were preferred against him. Given that the incident had occurred almost 10 years ago on the 10th May 2007 and the witnesses had testified in 2009, counsel were of the view that it would be futile to seek to reconstruct the record. Mr Marimuthu submitted that because of the omissions of the record the conviction fell to be set aside and, because a technical irregularity had occurred, the state could reinstitute the charges.

[6] Mr Marimuthu submitted that although it was unlikely that the evidence of Ms Mahlaba would have in any way assisted Mr Gumede's case, there was always the possibility that there was something in her evidence that would assist him. It is evident from the record that the learned magistrate was alive to the mechanical

problem of the recording. This is evident because the prosecutor referred to the fact that the questions and answers that he had previously posed to Mr Gumede had not been recorded and asked the magistrate whether he should start afresh, and the magistrate instructed him to do so.

[7] We were referred to *S v Chabedi 2005(1) SACR 415 (SCA)* in which Brand JA stated in paragraphs 5 and 6:

‘On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the re-hearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for a proper consideration of the appeal; not that it must be a perfect recording of everything said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand in which event a verbatim record is impossible (see e.g. *S v Collier 1976(2) SA 378 (C) at 379 A-D* and *S v S 1995(2) SACR 420 (T) at 423 b-f*).

The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.’

[8] Mr Paver, who appeared for the state, submitted that:

- (a) The question was whether the remaining evidence was sufficient to show that the sexual intercourse was not consensual.
- (b) Without the evidence of Ms M, the complainant was a single witness to the alleged rape. As Mr Gumede was the only witness for the defence, what this court has to decide is whether the magistrate had analysed the evidence and shown that the appellant was unreliable.

[9] In my view there is no point in referring the matter back to the learned magistrate for reconstruction, because it seems on the facts before us that such a reconstruction will not be able to be made. It is necessary to determine whether the guilt of the appellant has been established.

[10] The learned magistrate in his judgment gave no indication of the credibility of any of the witnesses who testified before him, save that he clearly rejected some of the evidence of Mr Gumede. The magistrate was clearly aware that Ms M was a single witness because he made a point of setting out the evidence of Ms M which corroborated the evidence of the complainant.

[11] In the circumstances what remains is the evidence of the complainant and the contents of the J88 document which was admitted in evidence, and the cross-examination of Mr Gumede. The only part of the J88 document which is supportive of the complainant's version is the indication by the doctor of the diagram of bruising on the complainant's right elbow and her left knee.

[12] In assessing the evidence of Mr Gumede, there are a number of inconsistencies and improbabilities.

- (a) at page 24 lines 13 to 14 of the record Mr Gumede confirms that the first time he saw the complainant was on the day in question. This is confirmed in the evidence of Ms M. When cross-examined Mr Gumede suggested, wholly improbably, that the complainant had fallen in love with him 'in a week'
- (b) Mr Gumede admitted in cross-examination that the complainant had said in front of Ms M that she was not in love with him. Mr Gumede admitted that he had left the complainant's premises after this, but denied that he was unhappy, saying that he was simply not laughing.

He then suggested that the complainant said that he should return to her household in the afternoon.

- (c) In cross examination of Ms M, Mr Gumede's attorney put to her that she had agreed with Mr Gumede that she would phone his brother on his brother's cellphone for an appointment for later in the day. That was denied by Miss M and she also denied that Mr Gumede's brother ever received a call from her. Mr Gumede's brother was not called to testify on this crucial aspect and there was no explanation at the end of Mr Gumede's evidence by his legal representative indicating that Mr Gumede's brother was not available.

[13] The evidence of the complainant was basically as follows:

- (a) On the 9th May 2007 she was at the Khumalo homestead with Ms M and one B and;
- (b) Mr Gumede arrived, introduced himself as Thomas and started proposing love to her;
- (c) She had never seen him prior to that day;
- (d) When her child returned from school Mr Gumede gave the child money and the child went to buy airtime which Mr Gumede then loaded onto the complainant's cellphone. The complainant then had a discussion with Mr Gumede in the presence of Ms M and indicated to Mr Gumede that she did not reciprocate the feelings which were expressed towards her;
- (e) Mr Gumede returned later at approximately 8pm and suggested to Ms M that the complainant had made promises to him. The complainant denied that he had done so, and he left.
- (f) At about 11pm that night the complainant left the house and went to the kitchen which is about 30 metres from the house. Whilst she was in the kitchen she was attacked by Mr Gumede who dragged her and

forced her to walk to his home where he raped her on at least four occasions.

- (g) During the assault upon her the complainant sustained bruising to her arm. The altercation between the complainant and Mr Gumede earlier in the day had involved him pulling her by the arm in order to persuade her to go with him, and he was stopped from doing so by Ms M. Ms M then helped her into the house and shut the door. Mr Gumede tried to open the door forceably, but they locked it.
- (h) When the complainant returned to her place of residence in the early hours of the next morning she told Ms M what had happened, and the police were called and then took the complainant to Bethesda Hospital.

[14] It seems wholly improbable that the complainant would have accepted a proposal of love from a complete stranger whom she had met for the first time on the day in question when he arrived at their homestead. This improbability is increased when considering that the complainant rejected the advances of Mr Gumede and had to be assisted by Ms M in extracting herself from his intentions and being able to go inside. Mr Gumede admits that the complainant initially rejected his advances in the presence of Ms M.

[15] The only reason advanced by Mr Gumede as to why the complainant complained to the police about his conduct (when the intercourse had been consensual), was that she did not want others to know that she had had intercourse with Mr Gumede because that could have got to the ears of her other lovers.

[16] In my view, although the complainant was a single witness, her evidence is corroborated by the bruises recorded on the J88. There is no reason to reject her evidence. The evidence of Mr Gumede on the other hand seems wholly improbable, and I would reject it.

[17] Leave to appeal was granted on Mr Gumede's conviction but refused on the question of sentence. However, Mr Gumede would have an automatic right to appeal against sentence because the sentence imposed upon him was life imprisonment in the Regional court. (See the first proviso to s 309 (1)(a) of the Criminal Procedure Act, 1977.

[18] In his judgment on sentence the learned magistrate did not appear to consider the concept of substantial and compelling circumstances which would have entitled him to have imposed a sentence of less than the minimum prescribed of life imprisonment for a multiple rape. The circumstances of Mr Gumede are that he was 28 years old, unmarried and with a one-year old child. He lived with his parents in the Mkonyeni area and had been educated up to the level of standard 7. He was employed as a cane-cutter earning approximately R25 per day.

[19] The learned magistrate made no effort to ascertain the personal circumstances of Mr Gumede, and his legal representative did not more than request the court to consider his special circumstances. In my view that approach was wholly inadequate on the part of Mr Gumede's legal representative and on the part of the learned magistrate. The sentence which the state wanted the court to impose was the maximum sentence permissible in law. In those circumstances some investigation should have been carried out into the personal circumstances of Mr Gumede. In those circumstances I am of the view that the learned magistrate misdirected himself and this court is at large with regard to sentence.

[20] Alternatively then, this court is also accordingly entitled to invoke its review powers with regard to the sentence imposed upon Mr Gumede. (See s 304 (4) of the Criminal Procedure Act, 1977). The evidence of the multiple rapes is not entirely clear inasmuch as it appears that the complainant attempted to fight off Mr Gumede during the rape process and it was interrupted and started again. This does not

appear to have been a series of separate and distinct rapes committed over a period of time.

[21] In all the circumstances I would be inclined to treat the multiple rapes as one act of rape which was interrupted for brief periods of time when the complainant sought to extricate herself from the clutches of Mr Gumede.

[22] In the premises I would make the following order:

- (a) The conviction of Mr Gumede in the Regional court on one count of rape is confirmed, and his appeal against that conviction is dismissed.
- (b) The sentence of life imprisonment is set aside and replaced with the following:
'The accused is sentenced to twenty (20) years imprisonment.'
- (c) The sentence is antedated to the 3rd February 2009.

Lopes J

I agree.

Hadebe AJ

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Date of hearing:

20 February 2017

Date of Judgment:

7 March 2017