

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal Court Case no: AR No: 251/16
Case no: VRC 433/14

In the matter between:

Ayanda Madlala

Appellant

and

The State

Respondent

Judgment

Lopes, J

[1] The appellant in this matter is Ayanda Madlala, a 29 year old male, who was convicted in the Verulam Regional Court on the 11 September 2015 of having contravened the provisions of s 3 of the Criminal Law (Sexual Offences and Related Matters Amendment Act), 2007 on more than one occasion on the 2nd of September 2014. The learned magistrate found that there were no substantial and compelling circumstances which would have entitled her to impose a lesser sentence than that prescribed in the Criminal Law Amendment Act, 1997, and Mr Madlala was sentenced to undergo life imprisonment.

[2] This matter comes before us by way of the automatic right of appeal available to Mr Madlala in terms of the Judicial Matters Amendment Act, 2013. The appeal was noted on the 20th April 2016.

[3] The state relied upon the evidence of two witnesses. The first of those was the complainant. Her evidence may be summarised as follows:-

- a) On the 2nd of September 2014 she was a student teacher. On the way to deliver some money to her sister in Magwaveni she stopped off at a butchery where she was accustomed to buy drinks and meat.
- b) At the butchery she met Mr Madlala and several other persons who were drinking whisky. Knowing that the complainant consumed alcohol at home with her boyfriend, they offered her some to drink. She declined on the basis that she had classes and practicals the next day.
- c) The owner of the butchery, who knew the complainant, then poured her a glass of beer. She was also offered vodka by Mr Madlala, but declined his offer.
- d) The complainant then received a phone call from her boyfriend who asked her to go to her home to look for some documents for him. The complainant had one sip of the beer which have been poured for her and left for her home. She left behind her electronic tablet, having asked those present to look after it for her.
- e) When the complainant returned to the butchery, Mr Madlala said that he wished to speak to her, addressing her by name. She indicated that she was about to leave and return to the table, and as she sat down her phone rang. It was Mr Madlala on the phone and she asked him how he had got her number. He indicated that he had taken the number whilst she was away. He also said that he had loaded R10 Cell C airtime onto her phone so that they could chat.
- f) The complainant realised that it was then after 5:00pm and her boyfriend was about to return from work. She indicated to those present that she had to go to Hambanathi to collect some files that she needed to sort out. They told her that Mr Madlala was going there, and suggested she get a

lift with him.

- g) She duly accompanied Mr Madlala in his vehicle, having insisted that she sits in the back because she had not previously travelled with him. On the way he stopped at Chelmsford and went into a bottle store, returning with a six pack of Heineken. He then drove on, driving increasingly more fast as they proceeded. It was starting to get dark and the complainant asked Mr Madlala to drop her off near the school that she wished to go to.
- h) Mr Madlala drove faster, and did not stop at stop streets, ensuring that the complainant could not alight from the vehicle. Eventually they arrived at the home of Mr Madlala. He told her to accompany him and she alighted from the vehicle, following him as he went up to the house. She was considering whether to run away or try to escape, when he came back and spoke to her, calling her by name and assuring her that he would take her back. She suggested she would walk home but he insisted that he would rush into the house, obtain what he needed, and return. They climbed back into the vehicle and he drove off, again driving very fast. He indicated that he wished to buy some drink at Steers which was on the way to her home. As they entered the road where Steers is situated, he turned off onto a gravel road driving past the sugar cane and stopping near a river. The complainant was afraid and tried to get out of the vehicle but the doors were locked.
- i) The appellant then produced a firearm in order to compel her to alight from the vehicle and take off her clothing. He then proceeded to rape her. After doing so, he compelled her to get back into the vehicle and he then forced her to perform oral sex on him. Thereafter he again raped her in the motor vehicle.
- j) The complainant's cellphone then rang. The complainant told him that it was her boyfriend, and Mr Madlala said that he was silly and this was not a time for him. The complainant was then forced to exit the motor vehicle, bend over and was penetrated anally by Mr Madlala. As Mr Madlala had

finished, the complainant's cellphone again rang, it was her boyfriend. As she was crying Mr Madlala pointed his firearm at her, told her to stop crying and not to indicate anything out of the ordinary to her boyfriend. She spoke to her boyfriend and said she was on her way home.

- k) Mr Madlala then drove her back to her home, driving very fast. When they arrived at the stop street next to the home of the complainant, Mr Madlala told her not to tell anyone about what had happened because she was grown up enough to know what they were doing. As she alighted from the vehicle there was a vehicle coming in the opposite direction which stopped and Mr Madlala drove off. The persons in the other motor vehicle asked her why Mr Madlala had pointed a firearm at her in the vehicle. They had evidently seen this as they were pulling up opposite his vehicle. One of the two persons in the other vehicle, who had been at school with the complainant, was informed by her that she had been raped by Mr Madlala. One of those persons initially said that she was lying, but then later said it may have been true.
- l) The complainant then went into a nearby house to a woman who was one of her neighbours, and whom she knew. She told her that she had been raped and, coincidentally, during the conversation, Mr Madlala was walking outside the complainant's premises and was seen by both the elderly lady and the complainant.
- m) A certain ex-councillor then arrived at the house and was informed of what had happened by the elderly lady, (who turned out to be Ms Ndlovu). He had also witnessed Mr Madlala outside the house.
- n) As they were about to leave for the police station in the ex-councillor's vehicle, her uncles arrived on the scene. They had previously arranged to meet the complainant at her home in order to resolve an ongoing dispute which she was having with her current boyfriend. The ex-councillor

explained to them what had happened and they all accompanied the complainant to the police station. Thereafter the complainant was taken to Mahatma Gandhi hospital where she was examined by a doctor.

[4] It was suggested to the complainant in cross-examination that she had been in a sexual relationship with Mr Madlala from approximately October of 2013. She emphatically denied that was so. She emphasised that Mr Madlala did not know her in the sense of knowing her name or the details of her family.

[5] It was also suggested to the complainant that she had given Mr Madlala her cellphone number, which she denied. She stated that she knew Mr Madlala (apparently by sight), but they had only ever greeted one another in passing.

[6] The remainder of the cross-examination related to the version of Mr Madlala which was basically that he and the complainant had had consensual sex on the night in question. This was also effectively denied by the complainant.

[7] The complainant also testified that Mr Madlala had phoned her the next day and offered to pay her R5 000.00 in compensation for the damages which she had sustained as a result of what he did to her. She had made an arrangement for him to pay the money in order that the police could arrest Mr Madlala. That is what in fact occurred. The complainant also testified that Mr Madlala's parents, together with his wife, had approached her after his arrest and offered to pay her damages in the form of a cow.

[8] It was suggested to the complainant that her motive for laying a charge against Mr Madlala was that he had caused her to arrive home late, and would have been questioned by her boyfriend had she not alleged that she had been raped.

[9] It was put to the complainant that Mr Madlala had phoned her to apologise because he had got her into trouble by making her late. He denied that he had done so in order to give her money. His parents had made an offer to the complainant because their son had been arrested, and they wished to assist him.

[10] Ms Sibongile Nomusa Ndlovu also testified. She told the court that she was at home on the night of the 2nd of September 2014 when the complainant had knocked and entered her house. She then started crying and alleged that she had been raped. The ex-councillor, Mr Mphemba then arrived at the house and Ms Ndlovu conveyed to him what the complainant had said. Ms Ndlovu then saw Mr Madlala outside the premises and the complainant confirmed that he was the person who had raped her. That was the state case.

[11] Two witnesses testified for the defence, namely Mr Madlala and his friend Mr Ngubane. The evidence of Mr Madlala included the following:-

- a) On the day in question he was at Magwaveni in BB's butchery when the complainant arrived. She was happy to see him because they had previously been in a love relationship, and she questioned him as to why he had desisted from contacting her. He explained that he had lost her cellphone number.
- b) Mr Madlala denied having loaded any Cell C airtime onto the complainant's phone and averred that she had given him her number. They had then agreed that she would go and spend the night at his home. They had then left the butchery, and on the way to his home stopped off at the Fair Breeze Hotel, where he had purchased a six pack of Heineken beer. The complainant had accompanied him into the bottle store. They did not go anywhere near the Chelmsford Hotel.
- c) They had driven to his home where they had gone into an outhouse in which he lived. In the outhouse they had started having sexual intercourse, but had stopped because Mr Madlala was unhappy with the passionate noises which the complainant was making. They had then left his home and gone to Steers Tavern. However the gate was closed and Mr Madlala was unable to drive into the premises, so he stopped on the road. The complainant wanted to get out of the vehicle and consume her liquor. Mr Madlala indicated that the tavern would not allow her to do so

and he did not want to be seen drinking on the road. At the suggestion of the complainant they had then driven to the place described by the complainant in her evidence. The complainant then started performing oral sex on him in the vehicle. Thereafter they started having sexual intercourse in the motor vehicle. The complainant's cellphone rang and Mr Madlala expressed irritation at the interruption. Because Mr Madlala was unable to satisfy himself they had then alighted from the vehicle where he penetrated her anally with her consent.

- d) He then took her home in his vehicle because the complainant indicated that she needed to return to her house because she had the key to the house, and her boyfriend would have not been able to enter without it. Mr Madlala had driven very fast at the request of the complainant. When they arrived near her home the complainant indicated to Mr Madlala that she wished him to give her money. He indicated he had none because he had probably inadvertently left his wallet at his home. In fact his wallet was in his back pocket but the complainant did not detect it. When she alighted the complainant ran off, apparently irritated with Mr Madlala.
- e) Mr Madlala waited for her for approximately 15 minutes and went into a home of a friend of his who lived nearby. His friend had also been present at the butchery. He told his friend that he had been waiting for the complainant. They then decided to walk to the butchery. On the way his friend pointed out to Mr Madlala where the complainant lived. He then saw Ms Ndlovu and Mr Mphemba. He did not see the complainant again that night.

[12] Mr Madlala stated in cross-examination that he had phoned the complainant the next day and asked her why she had made a fool of him by making him wait outside the house. She said that he had placed her in a difficult position, but did not explain to him that she had opened a charge against him. The only time the matter of damages and money had been raised was when his parents went to offer her the payment of a cow for damages after Mr Madlala had been incarcerated in Westville

prison. He admitted having apologised to her telephonically but said that he only did so because she had alleged that he created a problem for her.

[13] Mr Ngubane testified that he had been employed together with Mr Madlala during the period from 2012 until the end of 2013. During that time he had met Mr Madlala's girlfriend whose name was Nombuso (the complainant). He had seen them kissing on a number of occasions. Mr Ngubane also testified as to a relationship which he had had with the complainant but it is neither necessary nor desirable to deal with that aspect.

[14] Mr *Matthews*, who appeared for Mr Madlala criticised the state evidence. He pointed in particular to the following:

- a) None of the persons who were present at the butchery, and who were known to the complainant, were called to give evidence.
- b) None of the persons who the complainant alleged had seen the firearm carried by Mr Madlala were called to give evidence, in spite of the fact that at least one of them was known to the complainant, having been a former school pupil.
- c) The evidence of Ms Ndlovu, even if true, provided no corroboration for the complainant's evidence of the actual commission of the crime. In this regard Mr *Matthews* emphasised the need for corroboration of a single witness's evidence. Even the fact that the complainant had been crying or clearly upset in the eyes of Ms Ndlovu, was no corroboration for the allegations of a lack of consent on the part of the complainant.

[15] When pressed on the improbability that the complainant would have agreed to go and spend the night at the home of Mr Madlala, when:-

- a) she was in a relationship with her boyfriend, with whom she was living; and

- b) she had made an arrangement to meet her uncles at her home that evening in order to help resolve a dispute with her boyfriend;

Mr *Matthews* submitted that if one considered the amount of alcohol which Mr Madlala alleged the complainant had consumed (more than three double whiskies and approximately five cans of beer) it could come as no surprise that she may have behaved in a manner which was inconsistent with her normal mode of behaviour or in a manner which was improbable.

[16] Mr *Matthews* emphasised the fact that whatever the credibility accorded to the complainant, and however much her evidence maybe regarded as probable, the court was required to assess the evidence of Mr Madlala, and in the event that it was found to be reasonably possibly true, he had to be acquitted. In this regard the evidence of Mr Madlala followed very closely to that of the complainant with regard to a large portion of the time which they spent together. The essential deviation was the question of consent. No firearm had been found in the possession of Mr Madlala when he was arrested.

[17] It is indeed unfortunate that the prosecutor in the court a quo did not deal with the missing witnesses referred to above. Had he done so, or had he explained why they could not be found, or indeed had he even made them available to the defence, the trial may have had a more certain result. Indeed, it is puzzling why the learned magistrate did not seek to enquire from the state as to whether the witnesses were going to be called or not. This could have provided the learned magistrate with the opportunity to ensure that they were called, if they were available. The learned magistrate would have had the power to do this because, in my view, the evidence of

those witnesses may well have been essential to a just decision in this case.

See: s 167 of the Criminal Procedure Act, 1977.

[18] The failure of the state to ensure that these issues before the court were properly ventilated leaves one with what may be described as ‘a sense of disquiet’. Had the learned magistrate been alerted to the reasons for the non-appearance of those witnesses, or enquired herself in order to ascertain why that was the case, the result of the case would have been preferable, whichever way it went.

[19] In all circumstances, and notwithstanding what I would regard as a seemingly coherent and probable version of events as testified to by the complainant, it would be unsafe to convict Mr Madlala, given that his evidence should be viewed as reasonably possibly true.

[20] Mr Nel/ who appeared for the state, submitted that he had explored the record three times, but had been unable to come to the conclusion that the evidence of Mr Madlala could be dismissed as false. He considered that the appeal should succeed and that the conviction and sentence could not stand.

[21] In all the circumstances I make the following order:

- a) The appeals against both conviction and sentence succeed.
- b) The order of the learned magistrate is set aside and replaced with the following;
“The accused is found not guilty”

G. Lopes J

I agree.

T. Poyo-Dlwati J

I agree.

P. Koen J

Date of hearing: 21st April 2017

Date of Judgment: 5th May 2017

Counsel for the Appellant: Mr S *Matthews* (Instructed by Vasantha Naidoo and Associates)

Counsel for the Respondent: Mr C *Nel* (Office of the Attorney General)