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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO: CA&R 72/14

**Date Heard: 16 October 2015
Delivered On: 24 March 2016**

In the matter between:

AYANDA NOHAJI

Appellant

And

THE STATE

Respondent

JUDGMENT

MAKAULA J:

A. Introduction:

[1] This is an appeal against a conviction and sentence by the regional court for the Eastern Cape Division sitting at Mthatha. The appeal is before us with the leave of this court on petition. The appellant was convicted of rape and sentenced to undergo 20 years imprisonment, two years of which was conditionally suspended for a period of five years. I should mention upfront that when the matter was argued before us, Mr Pangwa for the appellant, correctly in my view, abandoned the appeal against sentence.

[2] The grounds of appeal are as follows:

- “1. The Learned Magistrate erred and misdirected Herself to find that the State has discharged its onus beyond reasonable doubt in the said matter.
2. The Learned Magistrate erred in rejecting the version of the appellant which was never contradicted by the state and which is probably true. (sic)
3. The Learned Magistrate erred in finding that the evidence of the second state witness was corroborating the evidence of the complainant for the (sic) of the appellant.
4. The Learned Magistrate ought to have found that the evidence of the State was one of a single witness as a result thereof a cautionary rule applied.
5. The Learned Magistrate erred and misdirected Herself in finding that the conclusion in J88 form was corroborating the evidence of the complainant.

6. The Learned Magistrate erred and misdirected Herself in impeding the appellant from launching application in terms of Section 174 of the Criminal Procedure Act of 1977.”
(sic)

[3] I shall not deal with the grounds in respect of sentence for the reason aforesaid.

B. The facts:

[4] The magistrate relied on the evidence of two witnesses and the medical report in convicting the appellant. The complainant is [L.....] [N.....] who testified that on 9 September 2013 she was at her home at [L.....]. She is married with one child. The complainant testified that it was about 23h00 that the appellant came inside her house through a window. The complainant testified that whilst the appellant was entering through the window she had an opportunity of phoning her husband and informing him that the appellant was breaking into her house. On entering, the appellant demanded money from her. She told him that she did not have money. The appellant then ordered her to undress telling her that he wanted to have sex with her as he had long been longing for her. She refused.

[5] The appellant held her by her neck and forcefully removed her panty and had sexual intercourse with her without her consent. During the sexual intercourse the appellant ordered her not to scream lest he would kill her. The appellant had sexual

intercourse with her several times until about 3h00. At about that time her child started to cry. The appellant asked why was the child crying. She told the Appellant that the child probably wanted to relieve himself. The appellant then ordered the complainant to take the child outside, which she did. She managed to escape to [N.....'s] house leaving the child behind.

[6] She informed [N.....] of what had happened. [N.....] suggested that they should go to another man's house to report because she was afraid to go to complainant's house alone. As they were still inside [N.....'s] house, they saw the appellant walking past the house.

[8] She and [N.....] went to her house to fetch the child. Under cross-examination she testified that she could not scream nor do anything because the appellant threatened to kill her. She was afraid of the appellant. She testified as follows:

"I told him, and I wanted to fight back, beat him but he said he would kill me if I fought . . .he kept on putting his hand into his pocket, and it was as if he was going to take something out, but I did not see what it was."

[9] She denied the version of the appellant as put to her. She admitted that she was surprised by the conduct of the appellant of remaining inside the house when he knew that he had raped her. Other than that nothing turns on her cross-examination.

[10] The next witness called was [N.....] [T.....] (*[N.....]*) who testified that she knew both appellant and the complainant because they stayed in the same locality. She testified that on the day in question, early in the morning, she heard a hard knock on her door. After the person identified herself she asked a child to go and open the door for her. It was the complainant. The complainant stayed about three houses away from her house. The complainant *'was crying, hysterical and also rubbing her hands against each other holding her skirt'*. She reported that the appellant was at her house and had raped her.

[11] They left her house and on the way to complainant's house she suggested that they should go and report to a certain homestead where there was a man. As they were going to that homestead, she saw the appellant leaving the complainant's house. She instructed her children to go and fetch complainant's child who had remained alone in complainant's house. Nothing turns on the cross-examination of this witness.

[12] The medical certificate was handed up by consent. The doctor who examined the complainant made the following clinical findings:

“Vaginal examination: tears on the vaginal opening at 6 O'clock, yellowing vaginal discharge, no bleeding observed.”

The conclusions were:

“Penetration with a blunt object probable.”

[13] Mr Pangwa, appearing on behalf of the appellant in the court *a quo*, made an application in terms of Section 174 of the Criminal Procedure Act 51 of 1977 (*the Act*) which in my view was correctly refused by the magistrate.

[14] The appellant testified that he knew the complainant very well as they were staying in the same locality. He testified that on 9 September 2013 he met with the complainant. At the time he was hitch-hiking to [L.....] village. He asked where she was going and she told him that she was going to the shop. He asked the complaint to buy him a lose cigarette. She came back with the cigarette. They chatted. During their conversation the complainant said to him *‘people were talking about us, saying that we are just handsome, and yet we don’t have girlfriends or partners.’* On hearing that, he decided to propose love to her. They exchanged cellphone numbers.

[15] The appellant went to [L.....] village and came back. He attended a party that was hosted in a certain homestead. The complainant phoned to say she had accepted his love proposal. She further invited him to her house. He turned down the invitation. She again phoned later on in the evening asking whether he was coming to visit her. He told her that he was not coming. At about 23h00 the complainant again phoned him

inviting him to her house. It is then that he decided to go to complainant's house because the complainant was pestering him.

[16] On arrival at complainant's place, the complainant opened for him and he got inside the house. The complainant invited him to her bed. He complied and they started kissing and caressing each other. That led to them having sexual intercourse. He had sexual intercourse with her for about three times in intervals. In between the sexual intervals, they would converse. He eventually fell asleep. He woke up on hearing the child cry. It was in the early hours of the morning round about 4h00. He enquired as to why the child was crying. She told him perhaps the child was hungry. She tried to feed the child but the child continued to cry. She then went outside with the child saying that the child wanted to relieve himself. He remained sleeping on the bed. Whilst still asleep he heard the child crying outside. He went to investigate and discovered that the child was alone and the complainant was not there. He took the child inside the house. Because it was already in the morning he decided to go to his home leaving the child alone.

[17] As he was walking home he heard people talking in a certain homestead. When he got to his home, he saw people standing in front of a certain house talking to his aunt. He did not hear what they were talking about. He went to the toilet. Whilst in the toilet, he heard her aunt talking to those people saying the appellant had been involved in a rape incident. He testified that he left his home the following morning because he

learnt that the complainant's husband was coming back from Johannesburg to kill him. He did not report at his home that he was leaving. He was arrested two months thereafter.

[18] Under cross-examination the appellant conceded that he did not tell anybody about the fact the complainant had approached him and that they were in love. He further testified that he did not tell people that it was the complainant who had phoned him. He said that there was proof on his phone that he had been phoned by the complainant. But he did not show anybody. He further testified that he did not think of going to the police to report the threats by the complainant's husband. He denied that he raped the complainant. The sexual intercourse with her was consensual. The appellant did not call any witnesses.

[19] Mr Pangwa, for the appellant, argued inter alia in his heads of argument that the magistrate erred in finding that the injuries reflected on the medical report (J88) corroborated the evidence of the complainant in that sexual intercourse was not consensual. He argued *'the tear could have been caused by the length of the time between having and not having sexual intercourse by the complainant which is the period between January 2013 and September 2013, meaning that the vagina might be narrowed during the said period that is why after a long period of time there was a tear on the vaginal opening.'* (Sic) He further argued that the size of the penis of the appellant may also cause such a tear. Mr Pangwa even argued as follows in his heads:

“The explanation from the doctor to explain how the labia looks like after sexual intercourse and what caused same to be reddish was necessary.” (Sic)

[20] He further criticized the medical report stating that there was no tear on the posterior foschette and that was not explained by the doctor. The argument by Mr Pangwa was that there should have been a tear on the posterior foschette. Mr Pangwa referred us to *S v MM*¹ where Wallies JA said:

“It means that there is no opportunity for the doctor to explain the frequently subtle complexities and nuances of the report, to clarify points of uncertainty and to amplify upon its implications and the reasons for any opinions expressed in the report. There may be the difference between a conviction and acquittal or perhaps a conviction on a lesser charge. Depending on the areas of where there is lack of clarity, the lack of clarification either benefit or prejudice an accused. Neither result is desirable. Magistrate and Judges who confronted with these reports without explanation do not have the requisite medical knowledge to flash out their full implications.”

[21] I agree with the statement expressed by the Honourable Judge.

[22] The facts in *S v MM (supra)* fly in the face of the argument of Mr Pangwa for the reason that it is only in cases where there is uncertainty and clarification is needed where a doctor needs to be called. In the instant matter there was absolutely no need to call the doctor because sexual intercourse is not in issue. Furthermore, the doctor did not formulate an opinion as to how injuries were sustained. He/she merely recorded

¹ 2012 (2) SACR 18

what he/she observed when examining the complainant. The submissions made by Mr Pangwa in paragraph 19 above are outrageous and opinionated. All the J88 report says is that penetration had occurred, a fact which is not disputed by the appellant. However, I agree with his submission that the magistrate erred in finding that the J88 report corroborated the evidence of the complainant.

[23] Mr Pangwa argued that the complainant is a single witness and the evidence of [N.....] does not in any way corroborate her evidence with regards to the rape itself. It is correct that the evidence of [N.....] does not prove that the appellant raped the complainant.

[24] The evidence of [N.....] is significant because it confirms that the complainant went to her house, that she saw the appellant leaving the house of the complainant and further that the complainant had left her 2 year old child alone at 3h00. The evidence of [N.....] in other words corroborates the complainant in this regard.

[25] Nothing turns on Mr Pangwa's argument regarding how he expected the minor child to react or on the Appellant's failure to call the police or her neighbours.

[26] It is inconceivable that the complainant for no apparent reason, can seduce and invite the appellant to her home only to leave him lying on the bed and lie about what

had happened to her to [N.....]. The report by the complainant to [N.....] at around 3h00 that she had been raped by the appellant and the sudden emerging of the appellant from complainant's home, is too strange a coincidence. It is further strange for the complainant to suddenly leave a person who she desperately wanted to make love to at 03h00. It is much so, for the appellant, who had a pleasurable night with the complainant, to just leave her house without ascertaining where she was and why she left the child alone at around 03h00 to leave her house and the child alone. At that stage, the appellant did not know where the complainant was. It would, under the circumstances, have been, reasonable for the appellant to at least have phoned the complainant and verify where she was before leaving the child alone. I am unable to find fault with the reasoning of the magistrate in arriving at the conclusion she did. The magistrate concluded that the complainant was a credible witness. In fact the magistrate commented as follows about how the complainant gave her evidence:

“The witness called by the state was impressive, and her evidence was beyond reproach. I really could not find fault in her evidence, because her evidence there was consistency of her evidence with of the witness to whom she reported.” (Sic)

[27] In *R v Dlumayo*² the court held:

“The court of appeal must bear in mind that the trial court saw the witnesses in person and could assess their demeanour. If there was no misdirection of facts by the trial court, the point of departure is that its

² 1948 (2) SA 677 (A)

conclusion was correct. The court of appeal will only reject the trial court's assessment of the evidence if it is convinced that the assessment is wrong."

[28] I am unable to find any misdirection on the part of the magistrate. There is no justification to interfere with her credibility findings. She correctly found that the state had discharged the onus resting upon it to establish the guilt of the Appellant beyond a reasonable doubt.

Consequently, I make the following order.

(a) The appeal is dismissed.

M MAKAULA
JUDGE OF THE HIGH COURT

I agree and it is so ordered.

F DAWOOD

JUDGE OF THE HIGH COURT

Appearances:

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