



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

(1) **REPORTABLE: YES / NO**  
(2) **OF INTEREST TO OTHER JUDGES: YES / NO**  
(3) **REVISED**

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**DATE**

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**SIGNATURE**

CASE NUMBER: A672/14

DATE: 12 March 2015

**MICHAEL SPARKS**

*APPELLANT*

V

**THE STATE**

*RESPONDENT*

\_\_\_\_\_  
**JUDGMENT**

\_\_\_\_\_  
**MABUSE J:**

1. This is an appeal against both conviction and sentence, leave so to appeal having been granted by the Trial Court on 5 September 2013.

2. Mr. Michael Sparks, the appellant in *casu*, appeared before the Regional Court Magistrate in Bloemhof where he was charged with the offence of rape. The particulars of the charge against the appellant in the court *a quo* were set out as follows in the charge sheet:

*“That the accused is guilty of the crime of contravening the provisions of sections 3 read with section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007. Rape (read with the provisions of sections 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997), as amended.*

*In that on or about 5 May 2012 and at or near Coverdale, Bloemhof, in the Regional Division of North West the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit R[...] K[...] by inserting his penis into or beyond her genital organ without the consent of the said complainant. Section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended is applicable in that the complainant sustained serious bodily injuries.”*

[3] The appellant, who enjoyed legal representation during the entire trial, pleaded not guilty to the charge and chose to make no plea explanation. Despite his plea of not guilty to the charge, the appellant was convicted thereof and upon conviction was sentenced to life imprisonment. After the state had lead the evidence of its witnesses and the appellant had closed his case without

tendering or leading any evidence, the Court *a quo* was satisfied that the appellant had committed the offence he had been charged with.

[4] The charge against the appellant in the Court *a quo* had its genesis in the following circumstances or set of facts. On 5 May 2012 around 20h00, Miss R[...] K[...], the complainant, was sitting alone at a tavern in Coverdale when the appellant, who was in the street outside the same tavern, called her and made enquiries from her about his cell phone. He beckoned her to come outside in the street and the complainant obliged. When she joined him, he asked her where his cell phone was and the complainant answered that it was in the possession of her niece, one R[...] .

[5] The appellant told her that he could not hear properly and proposed that they move to a certain corner where their discussion would continue. Both of them walked up to that corner and once they had arrived there the appellant lifted her up and carried her to a bushy area where a struggle between the two of them ensued. Again he asked her about his cell phone and again she told him that R[...] had his cell phone and that he could summons the Police if he did not believe her.

[6] The appellant slapped her. She slapped him back in the face in revenge. He then dragged her by her legs on the ground. While she was lying on the ground the appellant came on top of her. She was scared. She asked him what he was doing and told him that that was no way of looking for his cell

phone. One more time she asked him to call the police. While she was still lying on the ground the appellant pressed her down with his knee and closed her mouth with his one hand. He pulled her panty off whereupon she asked him why he did so. He stood her up and when she tried to flee he head butted her on her forehead as a consequence of which she fell. He pulled out his penis and pressed it against her nose telling her to smell it.

[7] With his penis erect, the appellant then lay on top of her. She screamed harder and while they were still in that position two males arrived at the spot. When these two males arrived there, they asked him what he was doing and he said that the complainant did not want to give him his cell phone. Still the complainant said that he should call the police. One of those men was Thapelo. The complainant then rose from the ground and went to stand behind Thapelo.

[8] These two men left in order to call the Police. When they left they wanted to take the complainant with them but the appellant refused. As they were leaving the appellant grabbed the complainant, slapped her and then Thapelo told him to stop. He threw the complainant on the ground and one more time produced his penis. At this stage the complainant told him that he would never have any sexual intercourse with her. The police then arrived at the scene. When the police arrived he was trying to have sexual intercourse with her. The appellant did not insert his private part into her private part.

[9] While the appellant was driven away in the police van she was driven to the hospital in Christiana where she was examined by one Dr. Sunday Steven Morakeyo.

[10] Thapelo Mogamisi testified and told the Court that while he was in the company of a friend of his he fell upon the appellant and the complainant. He was attracted to the spot where he found them by the screams that came from there. He saw how one person was pressing another on the ground. The person who was pressing another on the ground arose from the complainant and approached him. He realised at this stage that it was the appellant. He asked him what he was doing. The appellant did not respond. Thapelo saw the police van. He stopped it and made a report to them. That is the reason why the police arrived at the scene.

[11] After placing his qualifications on record, doctor Morakeyo confirmed that on 5 May 2012 and at Christiana Hospital he examined the complainant and having done so completed a medico-legal examination report, otherwise known as J88, about his examination and findings on the complainant. He told the Court that when he examined her the complainant was traumatised, emotionally distressed, in pain and had some fresh bruises on both her upper arms, forearms and both sides. Although he mentioned other bruises, for purposes of this appeal and the case in the Court *a quo* he concluded that the complainant had been “probably sexually assaulted”.

[12] At the close of the state case the appellant's legal representative tried unsuccessfully to secure his acquittal in terms of s 174 of the Criminal Procedure Act 51 of 1977 ("the CPA"). When that failed he closed the appellant's case without leading any evidence either by the appellant or the appellant's witnesses.

[13] The Court *a quo* was correct in observing that in criminal matters, it was the duty of the State to prove its case beyond reasonable doubt. It was alive to the fact that the State relied on the evidence of a single witness and for that reason it had to approach such evidence with caution. It could only convict on the strength of such evidence of a single witness if it was clear and satisfactory in all material respects.

[14] During cross examination by Mr. Bornman who appeared for the appellant in the Court *a quo* the complainant was adamant that the appellant never penetrated the private parts with his penis or any other object or body part for that matter. She told the Court that she would have known if the appellant had penetrated her and furnished a valid reason why she said so. When it was put to her during cross-examination and the appellant would deny having raped her she confirmed that and told the Court that she knew that the rape did not take place.

[15] It was clear during the trial in the Court *a quo* that the evidence of the state witnesses was inconsistent. The state took up the issue of discrepancy

between the complainant and the doctor's evidence with the complainant.

When she was told that the doctor had seen the injuries on her private parts she told the Court that she did not know where the injuries came from. By this she meant that she did not sustain those injuries at the hands of the appellant.

[16] The Court *a quo* expressed its observation as follows:

*"Now here the only problem which well very (indistinct) is the issue that the complainant claimed that there was no actual penetration."*

The magistrate, while accepting that the complainant had testified that she had not been penetrated, convicted the appellant on the basis of the evidence of the doctor. This is what is stated in the judgment:

*"Indeed and according to this evidence before the evidence is overwhelming that although the doctor, although the complainant stated herself there was no penetration but the doctor found penetration."*

[17] The Court *a quo* furnished no reasons whatsoever why it preferred the evidence of the doctor to that of the complainant. The doctor's findings were that the complainant had *"probably been sexually assaulted"*. He did not find evidence of penetration otherwise he would have recorded it as such accordingly. It is in our unanimous view that there was no evidence at the close of the state case upon which a reasonable man acting carefully might have convicted the appellant of rape as charged.

[18] Quite correctly, the magistrate pointed out that the state bore the *onus* to prove its case beyond reasonable doubt. The fact that the appellant chose not to testify did not *per se* mean that the state had discharged its *onus*. It did not follow therefore that because the evidence of the state stood uncontradicted, the case against the appellant had been proved:

*“Similarly, the circumstances that evidence is uncontradicted is no justification for shutting one’s eyes to the fact, if it be a fact, that it is vague and contradictory to serve as proof of a question in issue.”* See **Shenker Brothers v Bester 1952(3) S A 664 [A.D.] at 570G.**

In **State v Frances 1991(1) SACR 198 A at page 203 G** this is what Smallberger JA, as he then was, had to say:

*“It was therefore incumbent upon a trial Court to properly evaluate the evidence of D in the light of its alleged deficiencies, and the criticisms voiced against it, in order to determine whether it measured up with the standard required for its acceptability. If it did not measure up to such standard, it would not avail the state in the discharge of onus of proof upon it that the accused no. 5 failed to testify. While an accused person’s failure to testify may in appropriate circumstances be a factor in deciding whether his guilt has been proved beyond all reasonable doubt, this is only so where the state has prima facie discharged the onus upon it. A failure to testify will not remedy a deficiency in the state case such as the absence of apparently credible implication of the accused.”*

**(S v Masia 1962(2) SA 51A at 546 E-F).**

[19] There is incontrovertible evidence thought that the conduct of the appellant on that particular evening amounted to an attempt to rape the complainant. The complainant has testified about it and Mr. Moeng has also conceded that on the facts of this case, if anything, the appellant should have been convicted of attempted rape. In the light of the foregoing, we are unanimous in our view that good grounds exist for this Court to interfere with the sentence imposed by the Court *a quo* on the appellant.

[20] In the result we make the following order:

1. The appeal against both conviction and sentence is upheld.
2. The conviction of the appellant by the court *a quo* is hereby set aside and in its place is substituted the following:  
“The accused is found guilty of attempted rape.”
3. The sentence imposed by the court *a quo* on the appellant is hereby set aside and replaced with the following:  
“The accused is sentenced to seven (7) years imprisonment.”
4. The order of the court *a quo* in terms of s 103 of the Firearms Control Act 60 of 2000 shall remain in place.

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P.M. MABUSE  
JUDGE OF THE HIGH COURT

I agree, and it is so ordered

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E. BERTELSMANN  
JUDGE OF THE HIGH COURT

Appearances:

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|------------------------------------|--------------------------|
| <i>For the appellant:</i>          | <i>Attorney S. Moeng</i> |
| <i>Counsel for the respondent:</i> | <i>Adv. L. Pienaar</i>   |
| <i>Date Heard:</i>                 | <i>2 March 2015</i>      |
| <i>Date of Judgment:</i>           | <i>12 March 2015</i>     |