



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: A803/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED ✓

10 June 2015

DATE

SIGNATURE

11/6/2015

In the matter between:

JOHANNES JACOBUS JANSEN VAN VUUREN

Appellant

and

THE STATE

Respondent

JUDGMENT

MOHLAMONYANE AJ:

- [1] This is an appeal by the Appellant against his conviction and sentence of five (5) years' imprisonment imposed by the Regional Court Magistrate sitting in Pretoria on 22 June 2012. The Appellant was convicted of rape in contravention of section 3 of the Criminal Law

(Sexual Offences and Related Matters) Amendment Act, no 32 of 2007. Section 51 and Schedule 2 of the Criminal Law Amendment Act, no 105 of 1997 was applicable.

[2] Leave to appeal against both conviction and sentence was granted on 20 September 2012 by the Court *a quo*. The Court *a quo* extended the Appellant's bail pending the outcome of this appeal.

[3] Although this Court was faced with a reconstructed record which was not certified as correct and true by both the State and the defence counsel, this Court, on the view it had taken of the matter, decided to proceed to finalise the appeal in the interests of justice.

SALIENT FACTS:

[4] On 23 April 2010, a young lady aged [...] years, L.S. ("L.") was allegedly raped by the Appellant. L. had testified that she was good friends with Appellant, whom she affectionately called Jaco. They worked for the same employer at some stage. She trusted him and poured out her sorrows to the Appellant, whom she trusted implicitly. She referred to the Appellant as "*one of my best friends at that time*". On the aforesaid date, at about 9pm she and the Appellant attended a braai with some friends. They thereafter went to the Appellant's apartment, where both of them went for a swim inside a pool. L. later went for a shower. She thereafter put on what she refers to as chef's pants and a long jacket with a zip belonging to the Appellant. After she took a shower, she went to the Appellant's bedroom where she lay on his bed. The Appellant, who also took a shower after L. went to his bedroom, got into bed and chatted with her. According to L., she eventually fell asleep with her back turned towards the Appellant.

[5] When she woke up, L. says she could feel the Appellant's penis inside her and could feel how the Appellant was moving inside her. She states that she could feel every movement.

[6] It is L.'s version that she did not give the Appellant consent to have sexual intercourse with her. According to her she was fully dressed when she fell asleep, but upon waking up her pants were pulled down and her zip was undone.

[7] The Appellant's testimony is that he and L. had taken one "*shot of shooter*" (meaning strong alcohol) before going to the braai that day. At the braai they had one bottle of wine and some Vodka. At his home L. jumped into the swimming pool with her clothes on. When inside the swimming pool she took off her trousers, threw them at the Appellant and teased the Appellant for being a "*sissi*" who was afraid to swim with her. He then put on his swimming costume and jumped into the water. They only swam for a short period as it was cold. They then climbed out of the swimming pool and L., as stated, went to shower. The Appellant waited for her to finish showering and thereafter took a shower. When he finished, he found her lying on his bed. She had taken one of his jackets from the wardrobe which she was wearing. The Appellant stated that he got into the bed with her. They lay against each other and he was "*rubbing her warm*". In other words they were, according to him, warming each other. He was rubbing her all over her legs, back and hugged her. The Appellant then heard her crying and asked her what was remiss as she was visibly upset. Her response was she was missing Marco. Upon inquiring who Marco was, L. indicated that it was her ex-boyfriend. He asked her to turn around so that he could cuddle her as he wanted to comfort her. After a while both of them fell asleep. He later woke up. He stated that he wanted to see whether she wanted to take their friendship a step further as he had earlier that week intimated to L. that he wanted them to be more than friends. He said at that stage L. was awake as well. He says he was aware that she was awake whilst he was moving his body against hers. He then rubbed her on her back with his "*private part*", with a view to see if she would react. He then felt her pushing back into him with her body.

[8] The Appellant then proceeded to touch her, rubbed her leg, her back, "*feeling her up*" and moving his body against her. She then started moving her body against his private parts but still wearing her clothes which she had slept in. As he continued rubbing her, the Appellant stated that she was enjoying it, as she was moving rhythmically with him. To take it a bit further, the Appellant pulled her pants slightly down and according to him he started "*playing*" with her genitals. He touched her genitals

which he felt were wet and rubbed them. It is the Appellant's contention that at all times whilst he was conducting foreplay, L. enjoyed it. When the Appellant rubbed his private parts against hers, she then exclaimed "soen my". At some stage he put his hand in her hand which she squeezed while he was playing with her. He then started kissing her on her neck moving up to her mouth. She then asked what the Appellant was doing to which he replied that he was kissing her. He then stopped kissing her. She lay for a while and then got up. She then told the Appellant that she was of the opinion that he had raped her, which the Appellant denied. The Appellant then climbed out of the bed and sat on the floor. He took her home at about 05h00 the next morning.

[9] It was Saturday night when the alleged rape took place. S. A. C. ("C.") is a woman in whose home L. lived because she was chased away from her home by her stepfather. On Sunday morning, 24 April 2010, L. informed C. about the incident. She told C. that she thought she had been raped and that she had to talk to Jaco (the Appellant) because she was asleep whilst the alleged rape had taken place and did not know what had happened. According to C. when she was informed by L. about what had transpired, L. was emotional and crying.

[10] A. C. ("A."), the daughter of C. had been good friends with both the Appellant and L.. Two weeks prior to the incident, A., L. and Appellant, together with A.'s fiancé, spent some leisure time together as A. was celebrating her birthday, at a place called [...] near Brits, in the North West Province. She testified that L. and the Appellant touched each other, played on the lawn, swam together and that L. lay with her head on the Appellant's stomach.

[11] L. denied any touching between her and the Appellant before the day of the incident. She also denied that she and the Appellant touched and kissed each other just before she fell asleep on the day in question. According to the Appellant on two previous occasions L. slept over at his home. On the first occasion, she had insisted that the Appellant sleep in another room. On the second occasion, L. came to sleep in his

room, when they shared his bed. It is the Appellant's version that he had feelings for L. which he had expressed to her before the day in question.

- [12] The Appellant denies penetrating her with his penis on the day in question. He however, admits having touched, rubbed and played with her on the night in question. On the other hand, L. denies having consented to sexual intercourse with the Appellant.

ISSUE TO BE DECIDED:

- [13] The issue to be decided in this appeal is whether the Appellant did sexually penetrate the complainant with his penis and if so, whether such penetration was consensual.

- [14] The learned Magistrate correctly determined that L. was a single witness whose evidence is required to be clear and satisfactory in all respects as provided for in section 208 of the Criminal Procedure Act, no 51 of 1977 (*"the CPA"*). The learned Magistrate accepted the evidence of L. that on the night in question, before she fell asleep, there was no touching or kissing. The learned Magistrate found her evidence, as fully described above, to be satisfactory.

- [15] The first report she made to C. on Sunday morning is crucial to the determination of whether she was raped or not. L. told C. that she thought she was raped as she did not know what happened. In my view, L., herself, was unsure as to whether she had been raped or not. It is humanly impossible not to feel the initial penetration but only feel it when, according to her, the Appellant was already *"...inside of me"*. According to L. she did not see the Appellant penetrating her. She also reported the incident to A. the Sunday night after the incident on the Saturday night. She gave A. a similar version she gave to A.'s mother, C., i.e. she did not see the penetration, but *"...she felt him inside her"*. L. could have been imagining things that did not happen, because of hysteria, inebriation or guilt. Schreiner JA in *R v Rautenbach*, 1949 (1) SA 135 (A) at 143, summed up the position as follows:

"It is not only the risk of conscious fabrication that must be guarded against; there is also the danger that a frightened woman, especially if inclined to hysteria, may imagine that things have happened which did not happen at all".

[16] The Appellant's counsel submitted that it was impossible for the Appellant to have penetrated L. with his penis in the position in which she lay whilst sleeping. I agree with this submission. Counsel further submitted that if the Appellant had removed L.'s clothing she would have woken up. I also agree with this submission. It was further argued that throughout cross-examination L. repeatedly retorted that she was unsure of what had taken place.

[17] In my view, the totality of circumstances pertaining to the Appellant and L., prior to the incident should be taken into account as they are relevant to what took place on the day of the incident. Although L. stated in her evidence that on the date in question it was only the second time that she had slept at the Appellant's home whereas the Appellant stated it was for the third time, what is crucial is that she did sleep over at the Appellant's home prior to the incident. She stated that on previous occasions she slept over because of the distance between where she lived and Appellant's home. She wanted to save fuel. I find it hard to accept that she slept over to save fuel. Circumstances suggest that she was at ease in the presence of the Appellant and enjoyed his company. If she did not, she would not enjoy alcoholic drinks with him, play around with him and even sleep in his bed. It should also be taken into consideration that the first time when she slept over the Appellant did not sleep in his own bed as he was courteous enough to let L. to sleep on her own in his bed. L. was consequently appreciative of his gentlemanly behaviour.

[18] In the result, I find that the learned Magistrate has erred and misdirected herself in finding that L. 's evidence was clear and satisfactory in all material respects. She also misdirected herself in rejecting the evidence of the Appellant as not being reasonably possibly true.

[19] The version of the Appellant that at a certain stage L. insisted that he kiss her remains uncontroverted. L.'s denial that there was no touching and kissing before she fell asleep does not accord with the

version of L.'s friend of three or four years, A.. She had indicated that the Appellant and L. would drink liquor together, swim together, touch each other and play around on the lawn. It is therefore highly incongruous for L. to deny that she ever touched, kissed or held hands with the Appellant. Sight should not be lost of the fact that the doctor who examined L. stated that there were no injuries found on L.'s genitalia.

APPLICATION TO LEAD FURTHER EVIDENCE:

[20] During the hearing of the application for leave to appeal, the Appellant's legal representative also made an application to lead further evidence in accordance with the provisions of section 309B of the CPA. I agree with the Respondent's counsel that it appears that the Court *a quo* accepted the further evidence tendered by the Appellant. The complainant was not afforded an opportunity of responding to the further evidence as required by subsection 4 (c) of section 309B of the CPA. She suggested that the matter be referred back to the Court *a quo* to give the complainant an opportunity of responding to the further evidence by the Appellant. To my mind, the matter cannot be referred back as that would not best serve the interests of justice. This Court is in a position to finalise the appeal without reference to the further evidence tendered by the Appellant. It should also be noted that it will be a travesty of justice if this matter is further delayed by referring it back as on 28 March 2014, the appeal was removed from the roll because the record was incomplete.

CONCLUSION:

[21] On his own version, the Appellant had put one of his fingers into the genital organs of L. and states that she was enjoying it. In terms of section 3 of the Criminal Law (Sexual Offences and Regulated Matters) Amendment Act, no 32 of 2007, the Appellant's conduct qualifies as a sexual penetration. It could amount to rape if there were no consent from L.. In my view, L. consented to the sexual penetration by the Appellant's finger, during foreplay. Counsel for the Respondent conceded, correctly in my view, that the conviction cannot be sustained. I am unable to hold that the

Appellant had penetrated her with his penis. In the result, the State did not prove the alleged rape beyond reasonable doubt. As a consequence, the conviction is set aside.

[22] For the foregoing reasons, the following order is proposed:

22.1 The appeal against both conviction and sentence succeeds.

22.2 The conviction of rape and sentence of five year imprisonment are set aside.

MD MOHLAMONYANE

[Acting Judge of the High Court of
South Africa,
Gauteng Division, Pretoria]

I agree.

M. M. JANSEN

[Judge of the High Court of South Africa,
Gauteng Division, Pretoria]

For the Appellant **Advocate M Van Wyngaard**
Instructed by **Legal Aid South Africa**

For the Respondent **Advocate E Leonard SC**