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IN THE HIGH COURT OF SOUTH
AFRICA (GAUTENG DIVISION,
PRETORIA)

Case No: A 652/2014

11/6/2015

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(1) REPORTABLE: ~~0~~NO

(2) OF INTEREST TO OTHER JUDGES: ;;Z(!NO

(3) R SEO ✓

9 June 2015
 DATE SIGNATURE

In the matter between:

THABANG KHALA

Appellant

and

THE STATE

Respondent

JUDGMENT

MOHLAMONYANE AJ:

[1] The Appellant was charged with three (3) counts of rape and two (2) of assault with intent to do grievous bodily harm in the

Regional Court for the Regional Division of Gauteng, sitting in Pretoria. Counts 1, 2 and 4 related to rape charges and counts 3 and 5 were those of assault. The Appellant was convicted of the three counts of rape and acquitted on the assault charges.

[2] The Appellant was charged with the rape subject to section 51 of the Criminal Law Amendment Act, no 105 of 1997, read with Schedule 2 thereof.

[3] The three counts of rape were taken as one for purposes of sentence. The Appellant was sentenced to life imprisonment. In terms of section 103(1) of the Firearms Control Act, no 60 of 2000, the Court *a quo* declared the Appellant as unfit to possess a firearm.

[4] As at the date of sentence, namely 09 April 2009, the Appellant had been in custody for at least two and half a years. Due to the position that this Court had taken of the matter, the Court ordered the immediate release of the Appellant from prison and indicated that the reasons would follow. The reasons are set out below.

[5] From the record of proceedings it is unclear as to when the Court *a quo* granted the Appellant leave to appeal to this Court. All that appears is that an application for leave to appeal against both

convictions and sentence was filed with the Court *a quo* which is dated 28 September 2008.

[6] This appeal is against the said convictions and sentence.

[7] It is undisputed that on the night in question. i.e. 29 October 2006. the complainant. Ms M. E. M. was asleep at about 02h30 with her boyfriend. one Bushy, when the Appellant burst into the house. Two of his male friends remained outside the house. The complainant immediately recognised the Appellant by exclaiming, "*Chakela, what are you doing*". Chakela is the name by which the complainant knows the Appellant. The Appellant started beating Bushy up with a stick. Bushy fled the scene. The Appellant thereupon dragged the complainant outside whilst he was assaulting her by punching her with his fists. Whilst dragging her. the two men approached from behind. The two men and Appellant dragged the complainant for approximately 25 metres. One of them tripped her and she fell to the ground.

[8] After she had fallen, the Appellant raped her after he had undressed her. The other two men took turns to have sexual intercourse with her. After the third one was finished with her. she started screaming. A security officer who came to her rescue

called the police who came and took her to hospital. The complainant had suffered injuries to her left leg.

[9] Susanna Patronella Marx is the doctor who examined the complainant on 29 October 2006. Her findings were that the complainant's dress was torn. The back part of her dress was messy with semen. According to the doctor there were definitely signs of penetration and ejaculation. Semen was taken for DNA analysis. The Appellant's DNA could not be matched to that found in the semen. It came back negative.

[10] If indeed it is true and correct that the Appellant had sexual intercourse with the complainant, then the DNA test ought not to exclude the Appellant. This fact, in my view, raises a doubt as to whether the Appellant raped the complainant.

[11] There is no doubt that the complainant clearly and convincingly identified the Appellant that morning of the incident. The Appellant's defence is just a bare denial. He simply stated that he did not rape the complainant as he was not even at the scene of crime. Both the Appellant and complainant know each other very well. In fact, the Appellant also admitted that the complainant knows him. (see *S v Mtethwa* 1992 (3) SA 766 AD).

[12] Counsel for the Respondent supported the findings of the learned Magistrate, *inter alia*, that the complainant had been a satisfactory witness in all respects. When the DNA issue was put to counsel for the Respondent by the Court, she conceded, correctly so in my view, that this was a problematic issue. She supports the proposition that the only evidence implicating the Appellant is that of assault.

[13] With the view that I have taken of the merits of the matter, it is unnecessary to traverse the other issues raised in evidence before the Court *a quo*.

[14] To my mind, the learned Magistrate misdirected herself in not giving the Appellant the benefit of the doubt as far as raping the complainant was concerned.

[15] It follows therefore that the counts of rape have not been proved beyond a reasonable doubt. The Appellant assaulted the complainant on the morning in question. Assault being a competent verdict on a charge of rape, the Appellant ought to have been found guilty of assault.

[16] In the result the following order is proposed:

16.1 The convictions of rape on counts 1, 2 and 4 are set aside.

16.2 The sentence of life imprisonment is set aside.

16.3 In terms of section 261 (1) (a) of the Criminal Procedure Act, no 51 of 1977 the following conviction is substituted for the conviction of the court *a quo*:

"Accused is found guilty of assault with intent to do grievous bodily harm".

16.4 The Appellant is sentenced to six (6) months' imprisonment.

16.5 In accordance with the provisions of section 282 of the Criminal Procedure Act, no 51 of 1977 the sentence of six (6) months' imprisonment is antedated (backdated) to 09 April 2009.

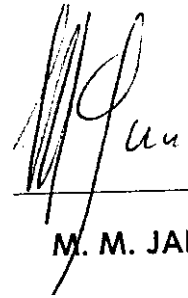
16.6 The declaration, in terms of section 103 (1) (g) of the Firearms Control Act, no 60 of 2000 to be unfit to possess a firearm, remains in force.

MDMOHLA NYANE

[Acting Judge of the High Court of
South Africa.

Gauteng Division, Pretoria]

I agree.

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[.....]
M. M. JANSEN

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

For the Appellant **Advocate L. W. Rankapole**

Instructed by Legal Aid South Africa

For the Respondent **Advocate E Leonard SC**