

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO**

CASE NO: CA&R 2/13

In the matter between:

SIMNIKIWE MNGENI

Appellant

and

THE STATE

Respondent

JUDGMENT

Stretch J:

[1] The appellant was charged in the regional court with rape committed in circumstances where the victim was raped more than once. He was legally represented and pleaded not guilty, his defence being that the complainant (a [.....] year old female hereinafter referred to as “M”) consented to him having sexual intercourse with her (by inserting his penis into her vagina) at his home in Mdantsane on two occasions on 1 May 2011.

[2] He was convicted and sentenced to life imprisonment in terms of the minimum sentencing legislation. He appeals against the conviction and the sentence imposed, having been granted leave to do so by the trial court.

[3] At the commencement of his trial the appellant formally admitted a forensic report, confirming that his DNA was found in M's cervix.

[4] The complainant testified that she had been at a tavern with her friends on the day in question. At about 01h00 she went outside to urinate. She was moderately drunk. She was called by the appellant, whom she knows well. He was not drunk. He told her that the two of them must go to his home. When she asked why, he slapped her and dragged her up a hill to a certain veld. She admitted that people were drinking outside and said that she did not know whether they had seen the assault. She was of the view that had they witnessed the assault, they would have intervened. On the way he continued to slap her and he also kicked her. She was screaming and crying but not very loudly as she does not have "a bright or a sharp voice" and in any event, there was music playing in the tavern. As a result, nobody heard her.

[5] When they reached the veld he told her to undress. She obeyed. He then raped her from behind while she was on her hands and knees. He did not use a condom.

[6] He then forced her to accompany him to a shack. On the way there he continued to beat her. The shack was occupied by A. and A.. A. opened the door. She told them that the appellant had raped her whereupon the appellant bumped her against the walls, assaulted her

with an Adidas “slop” and asked “am I raping you?” When she reported this to A. and A. they did not say anything.

[7] A. and the appellant went outside and spoke. While they were outside, she again reported to A. that the appellant had raped her. A. came back inside. The appellant went off and returned after about ten minutes later with one of her shoes and her cell phone which had been left behind in the veld where he had raped her. He gave her the phone and said that they must go to his home. While the appellant was gone she did not make good her escape because she thought that A. and A. (who were not her friends) would intervene on her behalf, or that A. would go to her home and report what had happened to her.

[8] After they had left, she ran and knocked at the door of a certain house, but there was no response. He continued assaulting her and threatened to kill her if she made a noise, so she remained quiet.

[9] They entered his home. He closed the door and he told her to undress because he was going to sleep with her. She obeyed and climbed onto the bed. There he raped her for the second time. This time he used a condom because she asked him to.

[10] While he was raping her his mother phoned. He told the complainant not to make a noise (threatening to kill her if she did) and proceeded to engage in a telephone conversation with his mother.

[11] After he had raped her for the second time he “passed out, he slept”.

[12] She looked at the windows and the door to see if she could escape but there were burglar bars on the windows and a burglar gate on the door. She tried to phone her sisters and then sent cell phone messages to them saying that she was being raped but they did not respond because they were asleep. She then went to sleep on another bed in the same room.

[13] She awoke at 06h00 the next morning. When she told the appellant that she wanted to go home, he offered to accompany her but said that they would leave at about 08h00. She said that she wanted to go to church which starts at 09h00.

[14] She waited for the appellant until 08h00 and then told him that she needed her second shoe. He said that he would look for it. Thereafter he accompanied her to a certain shop where she advised him that she was going to the police. He did not respond.

[15] She went to the home of one M. and told her that she had been raped by the appellant. She was crying when she made this report. M. did not ask many questions. She just said that she would escort M to her home which she did. From there her sisters accompanied her to the police who in turn took her to the hospital where she was examined and a medical report was prepared. According to the report (the contents of which was admitted) the appellant was dirty and her clothing was blood-stained and dirty and had grass and soil on it. Her left ear was blood stained, her neck was scratched, and there were small cuts on her back. M explained that the cuts on her back were sustained when the appellant had dragged her. According to the medical report she also had a bruise on the lower part of the entrance to her vagina. The report

stated that M had told the doctor that the appellant was in possession of a knife. The report further stated that the doctor found “no clinical evidence of drugs or alcohol”. According to M, she also told the doctor that the appellant had told her to wash and to wash her panties after he had raped her.

[16] M confirmed that at the time she had a boyfriend, but that he was away. She said that before the appellant raped her, he held a grudge against her as a result of a quarrel and a physical altercation which she had had previously at a shebeen with the appellant’s girlfriend a long time ago. M testified that on that occasion the appellant had said “he is going to kick me until I shit.” She said that before this they did not really talk to each other, and even after that incident it was not as if they “were not seeing eye to eye.”

[17] It was put to her on the appellant’s behalf that he had engaged in a conversation with her on the night in question after she had called him over, and that she had accepted his proposal that they should put the past (the previous quarrel which I have referred to) behind them and that she had agreed to leave with him. On their way however, she brought up the previous quarrel again. As a result she and the appellant ended up having a physical altercation which caused some of the injuries which the doctor had observed when she was examined. It was also during this fight that she lost her cell phone and her shoes. The route to the appellant’s house is through a built up area, and not through a veld as described by M.

[18] She disputed this, including the appellant’s version that both of them were heavily intoxicated.

[19] It was further put to her that the reason why they popped in at A.'s place was because the appellant had to collect his house keys there. At A.s' place she told the appellant that she could not find her shoes and her phone so he left her there and went off to look for them. When he returned they proceeded to his house where they engaged in consensual sexual intercourse twice, first without a condom, and on the second occasion, with a condom, upon M's insistence.

[20] During cross examination she mentioned for the first time that the appellant was carrying a knife while they were walking to his home. Her explanation for not having mentioned this before was the following:

'It is because he was not in possession of a knife when we were in bed.'

She also, for the first time mentioned that she had searched for a key to the appellant's door, but could not find it.

[21] She also changed her version regarding the failure of her sisters to respond to her calls and said that her sisters (whom she had phoned when the appellant was asleep) were sober that night, that they had heard the phone ringing (which on M's version would have been well after one in the morning), but that they had chosen not to respond.

[22] It was put to her that the morning before she left the appellant he had asked her about R50,00 which was missing from her wallet. According to the appellant, she initially denied having taken the money, but before they left she gave it back to him. It was also put to her that when the two of them left thereafter, she even carried a bucket for the appellant so that he could get water to wash himself at a nearby tap. The complainant disputed this.

[23] M. testified for the prosecutions. She confirmed that M had arrived at her home after eight that morning and had reported that the appellant had raped her. She said that M was barefoot and dirty and that she had blood next to her ear. She was upset and crying. M.'s evidence was not challenged.

[24] Thereafter the prosecutor was constrained to apply for warrants for the arrest of the witnesses A. and A., who had failed to attend the hearing despite having been warned. The magistrate, after having authorised these warrants to be issued forthwith, refused an adjournment for the warrants to be executed, resulting in the prosecutor having no choice but to close the State's case.

[25] The appellant testified in his defence. In essence he repeated the version which had been put to M on his behalf. He described in some detail how he had proposed a love relationship to M at the shebeen and how she had hesitated as if she needed time to consider the proposal. He invited her to leave with him and took one step away. She remained standing there. He looked back at her. She then walked towards him and the two of them set off together. En route to his home, M kept on digging up the past and referring to the fight she had had with the appellant's erstwhile girlfriend, despite his assurances that this was something of the past. At one stage she said that she was not going home with him, ostensibly because she had remembered how he had threatened previously that he was going to "get" her. Then she changed her mind, only to bring up the sensitive subject again a few minutes later. This eventually terminated in a heated quarrel with the two of them physically assaulting each other.

[26] In describing what had transpired at his home, the appellant again went into some detail about how he had switched on the television set when they arrived and how he then undressed himself and got into bed. Thereafter M also undressed herself and got into bed with him. The key was left hanging in the door. The house had no burglar bars or burglar gates.

[27] They had consensual sexual intercourse twice and went to sleep. The next morning she woke him up and said that he must accompany her. He agreed, despite the fact that he had a hangover and still wanted to sleep. He testified that when he looked for a R50,00 note which had been left on the table to buy electricity it was missing. M initially denied all knowledge of this money. He put it to her that she had been the only other person in the house. She eventually produced a R50,00 note alleging that it belonged to a friend. This, despite the fact that she had told him earlier on that she had no money. He reprimanded her and told her to ask if she needed money. They left. Two people by the names of Mziyanda and Lumka saw them. In particular, they saw that M was carrying the bucket for the appellant to fetch water to wash himself.

[28] They left the bucket next to the tap and proceeded to the shop which the complainant had referred to in her evidence. He bought electricity and arranged with M to visit her that afternoon. On his way back home, he filled the bucket with water, went home and took a bath. It was then that his sister phoned saying that people were looking for him, saying that he had raped M.

[29] During cross-examination the appellant admitted that he had previously threatened to “beat” M if she laid a finger on his girlfriend. He also admitted that his mother had phoned while he and M were together at his home. When he was asked to describe the fight which he and M had had on the way to A.’s home, he said that she had bumped him causing him to fall down. He became angry and slapped her with an open hand on the face which caused her to fall into a bushy area. He helped her up and apologised, saying that he did not mean to slap her but that anger got the better of him because she was persisting in bringing up the issue about his ex-girlfriend. At some stage she also pushed him. For most of the way they had to hold onto each other because they were drunk and falling about.

[30] The appellant again described in detail how he went back to look for M’s phone after she had told him that it was lost. He described how he first searched at the spot where both of them had fallen down. When he could not find the phone there, he proceeded to the spot where M had fallen near Anele’s house. This was where he found the phone. It is significant that the appellant, having admitted that he looked for and found the phone, denied that he also brought a shoe back. On the aspect of M’s shoes, he testified that he noticed for the first time in the morning when he walked her home, that she only had one shoe. When he asked her about it she said that she had probably lost it on the way.

[31] The appellant did not call any witnesses.

[32] The trial court, in convicting the appellant, found that he was not a good witness, whereas the complainant, whose version it found to have been in line with the inherent probabilities and the medical evidence,

was a good witness. The trial court was particularly critical of the fact that it had not been put to the complainant that the key to the appellant's house had been hanging in the door before, during and after he had had sexual intercourse with the complainant in his house. In this regard, the magistrate said the following:

'The biggest problem in the accused version however is the fact that he failed to mention to Mr Ntlonzi that this key was at all times available in the door, complainant could have left anytime she wanted. ... He thought it necessary to tell Mr Ntlonzi that she is lying that there are burglar bars in his windows, but he did not think about telling Mr Ntlonzi that she is lying about the key in the door as well.'

[33] When the accused testified, the trial magistrate put the following to him:

'You see I am not trying to catch you out but I just know that it will be argued at some stage that the key, that the question of the key being in the door is an afterthought, I want to give you the opportunity now to explain that.'

[34] It is contended on the appellant's behalf that the appellant's failure to instruct his legal representative about the key, appears to have been the main reason for his version having been rejected and for his ultimate conviction.

[35] I am inclined to agree that the trial magistrate placed undue emphasis on the late introduction of the whereabouts of the key by the appellant, whilst simultaneously ignoring similar afterthoughts in the complainant's evidence. For instance, the complainant in her evidence in chief, specifically referred to burglar bars on the door and the windows as the only barriers to her escape. It was only as a result of a direct question about this key during cross-examination that she mentioned for the first time that she not only looked for the key but that she saw it in the bed with the appellant the next morning.

[36] In my view the failure on the part of both the complainant and the appellant to deal with the issue of the key sooner rather than later, is at best a neutral factor; alternatively, a criticism that ought to have been levelled at both the parties, particularly when the onus is not on the appellant to prove his innocence.

[37] It has also been contended that the magistrate erred in not traversing the obvious improbabilities in the complainant's version. I agree. These are:

- a. Her evidence that no one came to her rescue when she was dragged kicking and screaming from a crowded tavern.
- b. Her evidence that the appellant, uninvited, went off to find her cell phone and her shoes in the middle of the night (in a probable state of intoxication), not only empowering her to report his criminal conducts telephonically, but thereafter, to rape her once again.
- c. Her evidence that she reported the rape to Avelo and A. but that they showed no reaction.
- d. Her illogical evidence that she did not make good her escape when the appellant was outside talking to A., or when the appellant went off to look for her phone, because she thought that A. and A. would "intervene" on her behalf (this, despite the fact that they had shown no interest whatsoever in her revelation that the appellant had raped her in the veld).

[38] The magistrate in my view also erred in not addressing any of the inconsistencies and glaring contradictions in the complainant's evidence. The following spring to mind, but the list is by no means exhaustive:

- a. Her denial that he possessed a weapon in her evidence in chief, contradicted by what she told the doctor and by her evidence during cross examination.
- b. Her mentioning that she looked for keys for the first time during cross-examination.
- c. Her evidence in chief that her sisters did not respond to her phone calls because they were asleep, contradicted by her evidence during cross examination that they did hear the calls but chose to ignore them, compounded by the improbability that her sisters, if she had phoned them, would have ignored her calls mindful of the disconcerting fact that she had not yet arrived home in the early hours of the morning.

[39] These contradictions and inconsistencies aside, I am of the view that the trial court's refusal to allow an adjournment for the presence of A. and A. to be secured, is not only a misdirection but that it is a material one which has on its own had the fatal effect of vitiating the conviction. I say so for the following reasons:

- (a) It is the complainant's version that the appellant had assaulted her in the presence of these people, that he had addressed her in their presence using the words: "Am I raping you?", and that she had independently and privately reported to A. that the appellant had raped her.

- (b) It is common cause that these were the first people whom the appellant and the complainant met up with on their way to the appellant's house. Their evidence is, in the circumstances, of vital importance in this matter. It goes without saying that their confirmation of the complainant's testimony would not only fortify it considerably, but would also be strong support for a finding that she had been consistent in her version. Confirmation from an independent witness that the appellant had indeed uttered the word "Am I raping you?", would, in my view, have provided some guarantee that M, being single witness was telling the truth (see *Swanepoel v S* [2008] 4 All SA 389 (SCA) at [14]). Conversely, their testimony may well have supported the appellant's version on these material aspects.
- (c) There is nothing on record to suggest that these witnesses were not available or that they could not have been traced. In my view, the magistrate's refusal of the prosecutor's application to call them, is a miscarriage of justice which has resulted in a manifestly unfair trial, particularly in view of the fact that M is a single witness.

[40] In the premises the conviction falls to be set aside.

Order:

- 1. The appellant's appeal against his conviction and the sentence imposed is upheld.**

2. The finding of the trial court is set aside and is substituted with the following:

“The accused is found not guilty, and he is discharged.”

I.T. STRETCH
Judge of the High Court

15 May 2015

I agree:

C. J. DIFFORD
Acting Judge of the High Court

Counsel for the appellant:

Mr S V Pango

Instructed by:

Legal Aid South Africa

King William's Town

Counsel for the respondent:

Ms N Tokota

Instructed by:

The Director of Public Prosecutions

Bhisho