

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

CASE NO: CA&R 23/12

In the matter between:

THANDILE SOLONTSI

APPELLANT

And

THE STATE

RESPONDENT

APPEAL JUDGMENT

HINANA AJ

[1] On 21 September 2011, the appellant was convicted of rape by the Magistrate and sentenced to eight (8) years imprisonment. In convicting, the appellant the Magistrate¹ found that:-

¹ Page 60 line 13- page 61

- (a) The complainant was a single witness and the court approached her evidence with extreme caution.
- (b) The complainant appeared to be honest and was not discredited during her cross examination
- (c) The complainant frequently cried and was extremely upset.
- (d) There was no evidence that she was falsely implicating the appellant.
- (e) She did not report the first rape² incident immediately.
- (f) She reported the second rape incident³ to her friend, one O[...].
- (g) O[...], when called to testify, testified about the second rape incident.
- (f) That the appellant forced the complainant to his house and raped her⁴
- (i) The second rape incident⁵ was never reported to the police and the appellant was not charged in respect of this incident and
- (j) The appellant was found guilty of having raped the complainant during the first rape incident.

[2] Leave to appeal was granted on conviction only.

[3] The appellant was charged with rape, having contravened the provisions of section 3 of Act 82 of 2007, the charges read with the provision of section 51 of Criminal Law Amendment Act 105 of 1997, in that on or about 2009 at or near Mputhi location in the Regional Division of Eastern Cape, the said accused

² Which occurred during the night on 13 June 2009

³ Which occurred on 07 July 2009

⁴ See footnote 2 above

⁵ See footnote 3 above

did unlawfully and intentionally commit an act of sexual penetration with the complainant, to wit, Z[...] D[...] by inserting his penis into a vagina without the consent of the said complainant.

[4] The grounds upon which the appeal is founded are as follows:

“1. The learned magistrate erred in finding that the State has proved the guilt of the appellant on a charge of rape beyond a reasonable doubt.

1.1 More particularly the learned magistrate erred in not having regard to the evidence of Z[...] D[...], the complainant which shows that for all intents and purposes she had consented to the sexual intercourse with the appellant on the day in question.

1.2 More particularly the learned magistrate erred in not having regard to the fact that the complainant did not explain how she was raped by the appellant except by crying the word rape.

[2] The learned magistrate was incorrect in not finding that the evidence of the appellant that the complainant had consented to the sexual intercourse was a true version.

[3] The learned magistrate erred in not taking the evidence of the complainant with caution as a single witness who had not reported the alleged rape to anybody for flimsy reason.

[4] The conviction is against evidence and weight of the evidence.”

[5] In deciding this appeal, it is, in my view, apposite that I should refer to the relevant evidence of the complainant Z[...] D[...] (the complainant) when she testified before the magistrate. She testified that she knew the appellant very well as the appellant was her neighbour. She started knowing the appellant ever

since she resided at Mputhi. On 13 June 2009 she was called by the appellant by her name and she waited for the appellant. The appellant asked the complainant whether she had a love affair and she said yes and that she was in love with one Tamsanqa. The appellant testified that she was lying by saying that she was in love with Tamsanqa⁶. The appellant asked the complainant to accompany her so that he (the Appellant) can put some clothes and thereafter he will go and collect the livestock.

[6.1] The appellant was accompanied by the complainant to the appellant's premises. On arrival, they found one Lungelwa and the Appellant did not put on clothes as he stated but instead he just sat down and watched television. After 17h00 hours, the complainant asked Appellant to accompany her but he refused and informed the complainant that she will not be leaving. Later, the Appellant accompanied the complainant.

[6.2] As they were proceeding to the complainant's premises, and in between the gardens, the appellant asked the complainant why she wanted to go home and he further told the complainant they must have a love relationship. She wanted to go but the appellant told her that if she wanted to leave, then she must first hug him (appellant)

[6.3] The complainant refused and this time it was raining. Seeing that she was being delayed by the appellant, who was repeating that the complainant must hug her, she then decided to hug the appellant because she wanted to leave.

⁶ Page 4 line 11

[6.4] The appellant was not happy with the way the complainant hugged her and wanted the complainant to kiss him and indeed the complainant kissed him on his cheek. After having kissed the appellant, the appellant refused her to let her go and he held the complainant saying that they must go back to his home.

[6.5] They went to the appellant's premises and leaned against the wall.

[6.6] The appellant then pulled the complainant as the complainant wanted to leave and pulled her inside the hut. When the complainant was pulled by the appellant, Ongezwa came and the appellant said "we must wait for Ongezwa"

[6.7] The appellant pulled the complainant and at one stage the complainant broke away and ran. She was chased by the appellant and was found next to the tank. The appellant again pulled the complainant to the hut where they were sitting watching television. As the appellant pulled the complainant, there were other people being Lungelwa and Ongezwa sitting watching television. The complainant only heard their voices as they were talking. She was pulled to the bedroom and at that time the complainant was refusing. Inside the bedroom it was dark and there was no light.

[6.8] The complainant was asked to sit and she refused, nevertheless, the appellant told the complainant she will not leave. She was then put on top of the bed, she stood up, and she was asked to sit down, otherwise if she did not, the appellant would clap her.

[7] The complainant told the court a *quo* that the appellant clapped her on her face and she screamed. The appellant called the complainant “my person” and the complainant rejected this. In the house, there was a radio that was on loudly, as she screamed, nobody came to her rescue. The appellant threatened to stab the complainant and told her that he was not afraid of the family members of the complainant. The complainant was asked to climb on the bed but she refused. She was threatened to be clapped again then she climbed on to the bed.

[8] The appellant pulled the complainant’s pants and the complainant got off the bed, she was put back by the appellant, and the appellant raped her.

[9] After being raped, she wanted to go but appellant refused to let her to go.

[11] The appellant went to the kitchen and the complainant tried to escape. However, she met the appellant in the passage and was taken back to the room and was raped for the second time.

[12] In the morning, the complainant wanted to go and was accompanied by the appellant. At her home, she did not report this incident because she was afraid of the stigma attached to rape.

[13] For the purposes of this judgment I need not to deal with the second rape incident because the appellant was not charged with it.

[14] Under cross examination she maintained that the appellant raped her and that she did not report the incident because she did not want her grandmother to quarrel with the appellant's family.

[15] She maintained that the sexual intercourse was not consensual.

[16] O[...] M[...] (O[...]) was called to corroborate that she was once told by the complainant that she was raped by the appellant on 13 June 2009 (the first alleged rape incident).

[17] In her testimony she told the court that whilst they were at her home she narrated her story that was worrying her to the complainant.

[18] The complainant then cried and asked whether O[...] knew Thandile (referring to the appellant).

[19] The complainant told O[...] that the appellant raped her at her home⁷

[20] On my understanding of the evidence before court, the reason why the O[...] was called was to corroborate what was said to her by the complainant in

⁷ Referring to the second rape incident

respect of the first rape incident⁸. However O[...] testified about the incident which, was not before court and of which the appellant was not charged.

[21] Under cross examination O[...] agreed that the first rape incident was never reported to her by the complainant.

[22] In my view, the complainant was hard done by the state specifically about the second rape incident (in July 2009). This court finds it difficult to understand why the appellant was not charged of this incident and instead have evidence led regarding an incident which was not before court.

[23] Ms Van Zyl, counsel for the respondent very well conceded that the second rape incident was not before court and that the state failed the complainant. However, she said the court should still confirm the conviction with regard to the offence for which the appellant was charged.

[24] The National Prosecuting Authority has an constitutional obligation to prosecute cases. When the docket was presented to it for a decision, whoever looked at it did not apply his mind and this led to an injustice to the complainant.

[25] Having said that, the issue which is central in this appeal in my view, is what effect does the failure by O[...] (who was called by the state), to

⁸ Which occurred on 13 June 2009

corroborate the complainant's evidence with regard to the first rape incident has on the conviction of the appellant.

[26] Put differently, can the court prefer the evidence of one state witness over the other (state witness), taking into account that this was a state case.

[27] In **S v Agliotti**,⁹ Kgomo J (as he then was) clarified what is on acceptable evidence and had this to say "acceptable evidence in a criminal trial is not just the say so of a witness, i.e what the witness tells the court in chief, it is that evidence as qualified and coloured by cross examination"¹⁰.

[28] Nugent J (as he then was) in **S v Mayden**¹¹ held that:

"A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt and so, too, does it look at the exculpatory evidence in isolation to determine whether it is reasonable possible that it might be true. A court does not base its conclusion on part of the evidence".¹²

[29] Most recently, Majiki AJ (as she then was) dealt with a similar matter in **Kuse v the State**¹³ and found that the state was not only confronted with

⁹ 2011(2) SACR 437 (GSJ)

¹⁰ At par 32

¹¹ 1999(2)SA 79 (W)

¹² At page 81 par A

¹³ CA&R 307/2012 heard on 30 May 2012 and delivered in June 2012, with Dambuza J (as she then was) concurring, see also Mangoma v State case no: 155/13 ZASCA 205 delivered on 2 December 2005

contradictions in the state case, but there were other improbabilities. The conviction of the appellant was set aside.

[30] In **Ex Parte v Minister of Justice**. In re **R v Jacobson and Levy**¹⁴, Stratford JA had this to say:

*“prima facie evidence in its more usual sense, is used to mean prima facie proof of an issue of the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges onus”*¹⁵

[31] In **S v Shackell** ¹⁶ Brand AJA (as he was then) had this to say:

*“It is trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonable possible true in substance the court must decide the matter of acceptance of that version. Of course it is precible to test the accused version against the inherent probabilities. But it cannot be rejected merely it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot be reasonable possible be true.”*¹⁷

¹⁴ 1931 AD 466

¹⁵ At 478

¹⁶ 2001(4) SA 1 (SCA)

¹⁷ Par 30

[32] The Supreme Court of Appeal in **S v Chabalala**¹⁸ held that:

“the correct approach is to weigh up all the elements which pass towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inferences strengthens and weaknesses probabilities and improbabilities on both side and, having done so to decide the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt. The result may prove that one scrap of evidence or one defect for the case for either party (such as a failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (counsel) to afford termination to latch on to one (apparently) obviously aspect without assessing it in context of the full picture presented in evidence”¹⁹

[33] Zulman JA in **S v V**²⁰ when it was :

“it is trite that there is no obligation upon an accused person where the state bears the onus, “to convince the court”. If his version is reasonable possible true is entitled to his acquittal if though he is explanation is improbable. A court is not entitled to convict unless it is satisfied not only that explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused version is reasonable possible true but whether one subjectively believe him is not the test. As pointed out in

¹⁸ 2003 (1) SACR 134 (SCA)

¹⁹ At par 15

²⁰ 2000 (1)SACR 453 (SCA)

many judgments of this court and other courts the test is whether there is a reasonable possibility that the accused's version may not be true."²¹

[34] In my view, the Magistrate misdirected himself in convicting the appellant. The Magistrate considered the evidence of the complainant in isolation of the evidence of O[...]. . The court of appeal can interfere with the decision of the lower court where the discretion exercised by the magistrate or the lower court was unreasonable or capriciously arrived at. It is either the discretion was properly or reasonable exercised and if it was, the court of appeal may interfere with that decision. If it was not, the Court of Appeal has no power to interfere with it, **S v Kgosimore**²².

[35] The above dicta was applied and followed in the case **Mphela v Haakdoornbult Boerdery CC**²³. The Constitutional Court re iterated the principle laid down in **National Collision for Gay and Lesbian Equality and others v Minister of Home Affairs and others**,²⁴ where the following was said:

“that the court of appeal will interfere where it is shown that the discretion was not judicially exercised but that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonable had been made by a court properly directing itself to all the relevant facts and principles.”

²¹ At par 3

²² 1999(2) SACR 238 (SCA) at 241 g

²³ 2008(4) SA 488(CC)

²⁴ 2000(2)SA 1 (CC)

[36] In the result the appeal against conviction succeeds.

[37] The following order is made:

1. The conviction and sentence of the Appellant is accordingly set aside.

M.N. Hinana

ACTING JUDGE OF THE HIGH COURT

I concur

B. Majiki

JUDGE OF THE HIGH COURT

For the appellant : Mr Mgcotyelwa

Instructed by : Legal aid

Mthatha

For the respondent : Adv Van Zyl

Instructed by : **The National Director of Public Prosecution**
Mthatha

Heard on : **06 March 2015**

Delivered on : **23 April 2015**