

IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION: BLOEMFONTEIN

Appeal Number: A187/2014

In the matter between:

[Z...] [N...] [Y....]

Appellant

And

THE STATE

Respondent

CORAM: EBRAHIM, J *et* MOENG, AJ

JUDGMENT: MOENG, AJ

HEARD ON: 1 DECEMBER 2014

DELIVERED ON: 11 DECEMBER 2014

- [1] The appellant was convicted by the Welkom Regional Court on one count of rape of a 22 year old male, in contravention of the provisions of section 3 of the Criminal Law Amendment Act 32 of 2007 and was

sentenced to 10 years imprisonment. He appeals against the conviction with the leave of the court *a quo*.

- [2] The relevant facts which led to the conviction can briefly be summarised as follows. The complainant was from a tavern in the early hours of the morning. He met the appellant, who was in possession of a knife at the gate of the tavern. A security officer was standing guard at the gate and the appellant violently pulled him to his shack. He did not scream as they left the tavern but only did so when they reached the shack.
- [3] The appellant ordered him inside and instructed him to undress his pants and underwear. He obliged and they both got into the blankets. The appellant inserted his penis into his anus and had sexual intercourse with him. The appellant's brother was also present when this ordeal unfolded. He was however not called to testify. The intercourse was very painful
- [4] After intercourse, the appellant showed him a tattoo on his chest and asked him what it represented. He could not tell and the appellant slapped him with an open hand on his face. He started crying and wanted to leave. The appellant bashed him with the handle of a knife several times on the head. Appellant later went to the toilet and he managed to escape to the shack of the second state witness. The

appellant chased him and he got to the door of this shack calling out for help. The second state witness instructed him to go to the door at the back of the house as the one he was knocking at was locked. The appellant was at this stage standing at the corner of the house.

- [5] He was however scared of going to this door as he was afraid that the appellant may drag him back to his shack. He ran to his parental home which is opposite to the appellant's shack. He was only dressed in his pants, as his shoes and T- shirt were left at the appellant's residence. His mother asked him where his clothes were and he reported to her that he met a violent person, but he could not explain any further as he was confused. He did not report the rape to any of them but went to bed. The second state witness arrived later that morning and it is only then that he reported that he had been raped by the appellant.

- [6] The second state witness confirmed that the complainant called out for help in the early hours of the morning saying that the appellant wanted to stab him with a knife. She ordered him to go to her mother's shack in the same yard to seek help. She does not know what further happened and only went to the complainant's house later that morning. The complainant's aunt was scolding him for arriving late at home.

- [7] She also heard that the complainant was only dressed in his pants upon arrival at home. She enquired from him about the incident that

unfolded earlier that morning and he related the incident to her. She advised him to go to the police station so that the police could reprimand the appellant and it is only on their way to the police station that the complainant reported that he had been raped by the appellant. The complainant laid a charge and was taken to hospital for a medical examination. The complainant testified that he screamed and was crying when his anus was examined by the medical doctor. He also reported to the doctor that his head was throbbing as he was bashed several times with the handle of a knife.

- [8] The medical report, completed by Dr Yusuf Vahed noted no external physical or anal injuries except for tenderness on the anus. He however concluded that rape could not be excluded on clinical grounds. This concluded the state's version.
- [9] In his testimony the appellant denied that he raped the complainant. He was at home on the day of the alleged incident when the complainant arrived and asked to be accommodated as he was locked out of his parental home and wanted a place to sleep. He offered him a space on the couch and gave him a blanket to sleep. He was later awoken by someone that had slipped into his (the appellant's) bed. He discovered that it was the complainant, dressed only in his underpants. He knew that the complainant was homosexual. This angered him and he slapped the complainant with an open hand. Appellant chased him out of the shack but he refused

and he had to get the assistance of his brother to get rid of the complainant.

[10] The court *a quo* concluded that the evidence of the complainant was consistent and clear. She concluded that the complainant's demeanour in the witness stand was indicative of the fear that he had for the appellant. The court also concluded that the absence of injuries did not exclude rape and that the tenderness on the anus noted by the doctor corroborated the complainant's version. She found that the second state witness corroborated the complainant in so far as his calling out for help in the early hours of the morning was concerned. She concluded that the appellant's version that the complainant slipped into his bed after being offered a place to sleep was improbable. She was satisfied that the guilt of the appellant had been proven beyond reasonable doubt and convicted the appellant as aforementioned.

[11] I should pause to state that Adv. Strauss, counsel for the respondent, supported the conviction in his heads of argument but conceded that the conviction could not stand after deliberations by Ms. Kruger on behalf of appellant. The evidence of the complainant was that of a single witness. The court *a quo* correctly referred to **S v Sauls** 1981(3) SA 172 (AD) at 180 E-G. The question is whether the trial court properly considered the merits and demerits of the complainant's evidence to determine whether the truth had been told.

- [12] I am satisfied, as will appear hereunder, that the court below committed a number of misdirection's in convicting the appellant. The prosecutor handed the medical report into the record and thereby accepted the correctness of what was stated in it. The magistrate placed great reliance on the J88 medical report in convicting the appellant and concluded that it provided corroboration to the complainant's version.
- [13] The complainant testified that the medical examination was extremely painful and that he was screaming and crying when the doctor inserted something into his anus. No mention of this painful examination was however made by the doctor. When interrogated in cross examination about this inconsistency, complainant stated that he is uncertain whether the doctor noticed his screaming. Probabilities are that if he was screaming and crying during the examination, the doctor would have recorded that.
- [14] He testified in cross examination that he informed the doctor that he was continuously hit with the handle of a knife on the head and that his head was painful, but this was also not recorded on the medical report. This report, contrary to the conclusion reached by the trial magistrate, showed that the complainant's version was not reliable. The magistrate ignored these glaring inconsistencies.

- [15] The magistrate further found corroboration in the version of the second state witness that the complainant was crying when he sought refuge from her shack. It is however a neutral fact that the complainant was slapped by the appellant moments before he left the shack. The complainant also confirmed that he cried, not because of the rape, but because he was slapped.
- [16] It has been repeatedly said, by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, on the issues in dispute. (See *S v Gentle* 2005 (1) SACR 420 (SCA)). The fact that the complainant cried could therefore not strengthen the state's averment that he was raped but in turn strengthened the appellant's version that he slapped him. It is also interesting to note that in so screaming, the complainant did not mention that he had been raped but said the appellant wanted to stab him. This aspect could therefore not have provided support to the complainant's version.
- [17] A similar remark can be made about the complainant's arrival at his parental home without his shirt and shoes. It is undisputed that he left the appellant's shack only in his trouser. The appellant's version is that the complainant left in that state, not because he was raped, but because he slipped into his bed half naked, only in his underpants.

This aspect is therefore also neutral and cannot be regarded as corroborative of the state's version.

[18] It is common cause from the evidence that the complainant was confronted by his mother for arriving in the early morning hours without a shirt or shoes. He replied by saying that he met a violent person but could not explain any further as he was confused. He was also confronted by his aunt later that morning but did not report the incident. It is of importance to note that even when the second state witness arrived, the complainant did not immediately report that he had been raped.

[19] Although not clear from the evidence, the second state witness stated that she told the complainant to approach the police so that they could reprimand the appellant. It is only on their way to the police station that he reported that he had been raped by the appellant. The unassailable conclusion is therefore that the complainant initially reported something that was not serious but that merely warranted a reprimand from the police. It was only later that he reported the rape.

[20] One should not lose sight of the appellant's version. His testimony is that the complainant is homosexual and he got into his bed in a half-naked state. The complainant's immediate report to the second witness when he sought refuge was that the appellant wanted to stab

him and his later report to his mother was that he met a violent person. The appellant confirmed that he was angered by the complainant, slapped him and chased him out of the house. Complainant's initial reaction and reports therefore validated the appellant's version.

[21] I am mindful of the provisions of section 58, and 59, of Act 32 of 2007 that a court may not draw any inference from only the absence of previous consistent statements and any delay between the alleged commission of the offence and the reporting thereof. This provision should however be interpreted so as not to usurp the court's discretion to draw any reasonable and justified inferences from the facts presented as evidence. Any contrary interpretation would in my view affect the fair trial rights of an accused. What a court should do is to have regard to the totality of the evidential material and decide whether a negative inference may be drawn from the complainant's failure to report the offence at the first reasonable opportunity.

[22] It is important to remember that the purpose of the requirement of the "first reasonable opportunity" is to ensure that the complainant's story is not a later fabrication. The complainant was faced with a dilemma in that the second state witness insisted to know what happened earlier that morning. He undoubtedly had to give an explanation more so that he arrived home with only his pants on. He could further not

explain why he was so confused that he could not tell his mother what happened. Rape was in my view an obvious answer.

[23] Had he not reported that he had been raped, it would later have come to light that he got half naked into bed with the appellant. This is said mindful of the fact that there is no reason for the rejection of the appellant's version. One should also not lose sight of the fact that upon escaping from the appellant's shack, he reported that the appellant wanted to stab him. I am satisfied that his delay in reporting the alleged rape adversely affected his credibility and indications are that rape was an afterthought and fabrication.

[24] It is common cause that the accused brother was in the shack when the incident unfolded. The complainant failed to mention this aspect in chief and was only coaxed in cross examination to mention same. The prosecutor was aware of the presence of this witness in the shack before he closed his case. He however elected not to call him. The prosecutor and the court *a quo* seemed to have languished under the impression that it was the appellant's duty to call this witness. There was no duty on the appellant to call this witness. The complainant further testified that he was violently dragged from the tavern in full view of a security guard. The prosecutor also elected not to call this witness. These witnesses could have shed light on what transpired. There were therefore serious shortcomings in the state's version.

[25] The only reasons advanced by the court *a quo* for having rejected the appellant's version was that it was improbable for the complainant, after being given a place to sleep to get into his bed in a semi-naked state. The court *a quo* also regarded it strange that the appellant could not give a reason why the complainant would have wanted to get into his bed with ulterior motives. These reasons were not such as to lead to a rejection of the appellant's version.

[26] One should not lose sight of the dicta in **S v Kubeka** 1982 (1) SA 534 (W), where Slommowitz AJ said at 537 F-G, with regard to an accused's story:

'Whether I subjectively disbelieve him is, however, not the test, I need not even reject the State case in order to acquit him. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State.'

[27] Slommowitz AJ further referred with approval to the unreported judgment in Schulles v Pretoria City Council delivered on 8 June 1950. Wherein Millin J held as follows;

"It is therefore quite a wrong approach for a trial court to say; I ask myself whether this man has come here to commit perjury, and I can see no reason why he should have done that,

therefore his evidence must be true and the accused must be convicted. 'The question is whether the accused's evidence raises a doubt'.

[28] I am of the view that, when all the evidence is considered, the appellant's version is reasonably possibly true. The considerable doubt in the State's case must count to his benefit. On an evaluation of all the evidence the complainant's testimony was not satisfactory in all material respects and the appellant's version was reasonably possibly true. In the premises, the conviction cannot stand.

[29] The following order is therefore made

1. The appeal is upheld.
2. The appellant's conviction and sentence are set aside.

L.B.J. MOENG, AJ

I concur.

S. EBRAHIM, J

On behalf of the appellant:

Ms. S Kruger
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv. M. Strauss
Instructed by:
Director: Public Prosecutions
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