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

CASE No. A 986/2011

DATE:07/05/2013

In the appeal of:

SIFISO MASEKO

Appellant

and

THE STATE

Respondent

JUDGMENT

Van der Byl AJ:-

[1] This is an appeal, lodged with leave of this Court, against conviction and sentence.

[2] The Appellant (to whom I will for the sake of convenience refer to as “the Accused”) was charged in the regional court, sitting at Amersfoort, with a contravention of, particularly, section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, read with sections 51 and 52 of the Criminal Law Amendment Act, 1997, in that upon or about 29 August 2009 and at or near Amersfoort he did unlawfully and intentionally commit an act of sexual penetration with one MB, a 36 year old male person, by inserting his penis into his anus without his consent,

[3] The Accused, who was duly represented, pleaded not guilty and added, through his legal representative, that he denies having committed the offence.

[4] On 9 December 2010 he was, despite his plea of not guilty, convicted as charged and sentenced to 15 years imprisonment.

[5] On behalf of the State the magistrate heard the evidence of the complainant and a warrant officer in the SAPS who received a report from the complaint, whilst the Accused testified in his defence.

[6] The complainant, Mr. MB, testified that he was at a place called "China 1" on Friday, 29 August 2009, where he, his friend, one "Rasta", and a third person were drinking. They continued drinking through the night. In the process they drank about two bottles of brandy ("half jacks") and six beers. The next morning at about 9h00 the Accused arrived there apparently also with some liquor and appeared to have been under the influence of liquor. He himself was also reasonably under the influence of liquor. The Accused then invited him to accompany him to his house to have something to eat there and said that there was also some beer. He accompanied him to the Accused's house. Upon their arrival the Accused locked the door and ordered the complainant to undress. He wanted to scream, but the Accused picked up a knife and held a screwdriver against his neck. He then undressed and was ordered by the Accused to bent forward. The Accused then applied some Vaseline to his anus, whereupon, the Accused penetrated him, apparently, four times almost without interruption, each time ejaculating. Having done that he ordered the complainant to lick his penis which he did. Having done that he spit the semen that came into his mouth out on a pillow on the bed. Thereafter he ordered the complainant to get dressed and unlocked the door. He ordered him to walk directly to his work. He, however,

went to the Police Station where he reported the matter to Warrant Officer Zwane. From there he accompanied Warrant Officer Zwane where he pointed the Accused out at a tuck shop. From there he was taken to the hospital where he was medically examined.

[7] Warrant Officer Zwane confirmed in his evidence that the complainant, looking scared, crying and smelling of liquor, but appearing to be sober, came to him at the charge office on 30 August 2009 at about 14h30 and reported that he was raped by a man who threatened him with a screwdriver and a Rambo knife. Having requested them to go where it was private, he then took off his trousers and showed him his anus. It appeared to him that his anus was bruised and swollen with some whitish marks like semen. On his underpants he could see stains of blood. From there he took him to a house where according to him the incident had taken place, but they found the place locked. From there they went in search for the culprit and eventually found him in the street at the back of the complainant's house. He approached the Accused, introduced himself and asked him to take him to his house. There the Accused took a key from his pocket and unlocked the door. On the bed he found a bottle of Vaseline under a blanket. On the pillow on the bed he saw what appeared to him to be semen as well as blood spatters. He, thereupon, arrested the Accused after having warned him of his rights. He seized the Vaseline, the pillow cover and the complainant's underpants which he eventually entered into the SAP 13 register so that it could be sent to Forensics. He then took them both, together with a crime kit, to the hospital.

[8] As already indicated the Accused elected to give evidence in his defence.

[9] He testified that he indeed found the complainant at the place of his friend, "Rasta", where they were drinking. When all the liquor was consumed he left. The complainant

asked him to accompany him to town where he lives. On their way he went into a house to drink some water. He then saw the complainant arriving there with the Police. He denied having been to his house with the complainant.

[10] It would appear that the report (J88) on the complainant's medical examination and the complainant's clothes handed in were, for some inexplicable reason, not handed in as exhibits.

[11] The magistrate with unnecessary prolixity, sometimes dealing with inadmissible evidence, rejected the Accused's evidence as false and held that the evidence of the complainant who impressed him as a witness, was corroborated by the evidence of Warrant Officer Zwane.

[12] It is a trite principle in our law that if an accused's evidence is, judged on the evidence as a whole, reasonably possibly true, he or she is entitled to be discharged or, even if his or her evidence is not reasonably possibly true, he or she is still entitled to his or her discharge if the State failed to prove the accused's guilt beyond all reasonable doubt (see: *S v Mgedezi and Others* 1989 (1) SA 687 (A) at 703E, *S v Van der Meyden* 1999 (2) SA 79 (W) at 80H-81B; and *S v Mbuli* 2003 (1) SACR 97 (SCA) at 110d, para [57]).

[13] It has also been held by our Courts, as a trite principle, that where, as in this case, the State's version and the Accused's version are mutually exclusive both can simply not be true.

[14] In this regard I can refer to the case of *Van der Meyden*, *supra*, in which the learned Judge held at 81F as follows:

“Evidence which incriminates the accused, and evidence which exculpates him, cannot both be true - there is not even a possibility that both might be true - the one is possibly true only if there is an equivalent possibility that the other is untrue. There will be cases where the State evidence is so convincing and conclusive as to exclude the reasonable possibility that the accused might be innocent, no matter that his evidence might suggest the contrary when viewed in isolation”.

See also: S v Van Aswegen 2001 (2) SACR 97 (SCA) at 101e, para [8]

[15] As I already indicated, the magistrate rejected the Accused’s evidence.

[16] As was held in S v Francis 1991 (1) SACR198 (A), a court of appeal’s powers to interfere with the findings of fact of a trial court are limited. At 204d the learned Judge of Appeal expressed himself as follows:

“The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court’s conclusion, including its acceptance of a witness’ evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness’ evidence - a reasonable doubt will not suffice to justify interference with its findings.

Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court’s evaluation of oral testimony”.

[17] having scrutinized the evidence and the magistrate’s judgment I am unable to find any indication that the magistrate misdirected himself in having rejected the Accused’s evidence. As a matter of fact the Accused’s evidence is contradicted by the evidence of

Warrant Officer Zwane who could not have thumb sucked what he testified as to what he saw in and on the Accused's bed.

[18] In so far as the Accused's evidence has been correctly rejected the question to be considered is whether the State has on the evidence of the complainant and Warrant Officer Zwane proved its case beyond all reasonable doubt.

[19] It was contended on behalf of the Accused that the complainant's evidence could not have been held to be reasonably true, particularly, if regard is had to his state of sobriety.

[20] As I have already indicated, the magistrate, however, indicated that he was impressed with evidence of the complainant and held, correctly in my view, that his evidence was in certain respects corroborated by the evidence of Warrant Officer Zwane.

[21] In my view the magistrate cannot be faulted on his findings in this regard.

[22] This brings me to the question of sentence.

[23] In terms of section 51 of the Criminal Law Amendment Act, 1997, read with Part III of Schedule 2 to that Act, the prescribed sentence is 10 years imprisonment for a first offender.

[24] The Accused has various previous convictions of robbery and assault, but is a first offender as far as rape is concerned.

[25] The magistrate, relying seemingly on the provisions of the proviso to subsection (2) of section 51, which provides that the maximum term of imprisonment that a regional court may impose in terms of that subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years, held that this case is so serious that the prescribed minimum should in this case be extended with a further five years.

[27] I am, notwithstanding the serious nature of the offence, unpersuaded that this is a matter where a sentence in excess of the prescribed 15 years imprisonment is justified in the circumstances. As a matter of fact, as is apparent from the record, the State in the proceedings a quo requested the imposition of the prescribed minimum sentence.

[28] For these reasons the following orders are made;-

1. THAT the appeal against conviction be dismissed.
2. THAT the appeal against the sentence be upheld and the sentence of 15 years imposed be set aside and replaced with a sentence of 10 years imprisonment.
3. THAT the sentence imposed in terms of paragraph 2 above be antedated to 9

December 2010

P C VAN DER BYL

ACTING JUDGE OF THE HIGH COURT

I agree

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VV THLAPI

JUDGE OF THE HIGH COURT