

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT - BHISHO)**

CASE NO. : CA&R 02/2012

Heard on: 23 November 2012

Date delivered: 01 August 2013

In the matter between:

DUMISANI FUNEKA

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

MGXAJI AJ:

[1] The appellant was convicted in the Regional Court, Mdantsane of armed robbery involving the hijacking of a motor vehicle (count 1), rape (count 2), unlawful possession of a fire-arm (count 3) and the unlawful possession of ammunition (count 4).

The appellant was sentenced as follows:-

- (a) 18 years imprisonment for armed robbery;
- (b) 15 years imprisonment in respect of rape;
- (c) 3 years imprisonment for unlawful possession of a firearm; and
- (d) 1 year imprisonment for unlawful possession of ammunition.

Effectively the appellant was sentenced to thirty three (33) years imprisonment.

- [2] The appellant appealed against his conviction and sentence only in count 2 which is rape having applied for Leave to Appeal but was refused such Leave to Appeal by the court *a quo*. Following a Petition to this court for leave to appeal, amazingly now, against all counts the appellant was granted Leave to Appeal his conviction and sentence in respect of only count 2 which was rape.
- [3] The brief factual background is that the appellant and his two companions on the 29 May 2002 at about 17h45 were given a lift in a Toyota Hi-Ace Kombi Taxi, near Potsdam Village outside East London. Shortly thereafter this Toyota Hi-Ace Kombi Taxi picked up a female passenger who took seat in- front along side this appellant and the driver of that Toyota Hi-Ace Taxi. Along the way the appellant's two companions who sat themselves on the seat behind the driver's seat pulled the Taxi driver from his drivers seat pointing him with a pistol and forced him to lie on the floor behind the front seat with the appellant appropriating not only the driving duty but also determining the route and destination which became a bushy area in Mount Coke being where the appellant parked the Toyota Hi-Ace Kombi.
- [4] The appellant alighted the Kombi and took away with him into the bush the female passenger whilst one of his two companions took the driver to another direction nearby where the driver was tied to a tree and the second appellant's companion remained inside the Kombi.
- [5] It was in this bushy place that the female passenger (hereinafter called the complainant) was allegedly raped by the appellant and left there tied in her legs and arms until the driver who had earlier been tied to a tree

and left there, but succeeded in untying himself, found her and removed her shackles whereafter they inquired at a nearby locality for the Mount Coke Police Station from which Police Station they were transferred to Mdantsane Police Station where they reported their ordeal.

- [6] This complainant according to her evidence was taken by Police to a doctor who instructed her to wait until 19h00 but still could not be examined as she was told to come the following day which she did. Answering a question by the prosecutor whether she consulted the doctor on this following day she answered in the affirmative. No medical report was produced at court.
- [7] The complainant's evidence as gleaned from the record of the proceedings conveys two distinct dimensions regarding how the alleged rape was perpetrated on her. Under direct examination by the Prosecutor she testifies that the appellant, pointing with a firearm at her, tripped her into the ground and stripped her down her legs her trousers as well as her panty from one leg whereafter the appellant tied with her trousers both her legs and with her jacket having tied both her arms at the back, had sexual intercourse with her. It was specifically put to her by the Public Prosecutor "so at the time he was having sexual intercourse with you, were you tied, one you saying that you were tied?" The complainant answered "Yes". In an earlier request to explain the event she says "He then stripped my trousers as well as my panty and I was refusing and I was resisting what he was doing. He then pulled down my trousers and took it off and I was left with the panty, *"He then used my pair of trousers to tie both my legs"*. The Prosecutor asked *"Did he tie you immediately after he took your panty off?"*. The complainant replied "Yes" he tied me immediately with the trousers." *"He then tied both my arms with an over jacket he was wearing"*, *"He then had sexual intercourse"*. *"How were you lying?"*, asked the Public

Prosecutor, "I was lying on my back". *"He thereafter left me"*. Probingly the Public Prosecutor asked *"How were you tied before he had sexual intercourse with you? Can you demonstrate"*. The record refers to indistinct recording her answer was *"Your Worship, he put both my legs together and tied my trousers..8... Inaudible on my legs very tight"*.

- [8] Let it be interposed to indicate that the Toyota Hi-Ace Kombi driver confirms that he found this complainant with her trousers pulled down her legs and both her hands tied behind her back. The Toyota Hi-Ace Kombi driver then untied her whereupon she *"then dragged herself up and we went away"*. He was not told anything by this complainant but was just crying. When the Toyota Hi-Ace Taxi driver asked her the question whether anything was done to her she said "No" but was crying.

- [9] The complainant when under cross examination by the defence attorney testified *"When he finished raping me he bound my legs together with the pair of trousers I was wearing and he then bound both my arms at my back with the lumber jacket I'm wearing"*.

- [10] The court *a quo* in assessing her evidence concludes that *"It is in any event not in dispute that she got raped on the night in question"*.

- [11] The appellant noted an appeal against the finding of rape against him on the grounds that the evidence of the woman as a witness had discrepancies which are:-
 - (i) That it was not possible for the appellant to sexually penetrate her when she was firmly tied below her knees by the appellant.

(ii) That she did not report to the police the rape as had she done so she would have been taken immediately to hospital for examination.

(iii) Her evidence should have been approached with caution.

[12] Dealing with the last ground that the cautionary rule should have been applied by the court *a quo* in dealing with the evidence of the woman relative to her rape complaint as she was a single witness on the rape charge. The Magistrate based his conclusion for conviction on the count of rape on her erroneous view that for the complainant to have been sexually penetrated her legs did not have to be “apart and a normal finding on a medical report does not rule out penetration either.”

[13] Not only was this view by the Magistrate erroneous because the complainant could not explain in the record how the sexual act was performed when she was specifically invited to do so when her legs as she testified in chief were ‘*tightly tied together*’, only under cross examination was she able to tender an explanation that she was tied after the rape on her, it was also bizarre to refer to a medical report as not ruling ‘out penetration either’ when there was no medical report of a rape on her.

[14] The complainant’s contradictory evidence on this crucial aspect of whether something was done on her by the rapist when asked by the first state witness who untied her legs to which question she replied “No”, as also her failure to actually report the rape to him but instead thought the first state witness would do so on her behalf at Mount Coke Police Station where the first state witness reported the armed robbery renders her evidence incredible on whether actual rape did take place. This seems to be compounded by her failure to produce a medical

report when she testifies having been examined at the hospital to which she was taken to by Mdantsane Police Officers, as also her testimony that she had no injuries when she was resisting the rape on her.

- [15] The appellant's ground that the complainant did not report immediately the rape so that she would be taken to hospital is legally misconceived and misplaced. Whilst reporting immediately speaks to consistency with the sexual act alleged it is but just one aspect in the consideration and evaluation of the total evidence but can never be a singular material issue advanced as the appellant herein does, to refute the commission or non-commission of the sexual act allegedly perpetrated. See: S v Trainor 2003 (1) SACR 35 SCA 1 AllSA 435 at 41 b-c

"A conspectus of all evidence is required. Evidence that is reliable should be weighed alongside such as may be found to be false. In considering whether evidence is reliable, the quality of the evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue as in respect of the case in its entirety."

Section 59 of the Criminal (Sexual Offences and Related Matters) Amendment Act 32 of 2007 is to the effect that the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.

- [16] This appeal raises only one issue for consideration and that is whether the court *a quo* had any basis to find the appellant guilty of actual rape. Put in another way did the state prove the rape count upon which the court *a quo*'s finding was based.

Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides “Any person “(A)” who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”) without the consent of B is guilty of the offence of rape. The key words upon which this definition is predicated is sexual penetration without consent. Section 8 defines sexual penetration as including “any act which causes penetration to any extent whatsoever by:

- (a) the genital organs of one person into or beyond the genital organs, anus or mouth of another person;
- (b) any other part of the body of one person or any object including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal into or beyond the mouth of another person, and sexually penetrates has a corresponding meaning.

The court *a quo* has not on the record considered this crucial aspect before it arrives in its finding on count 2. It just convicted on the basis that there was no dispute that rape took place and only identity of the assailants. On this basis nothing further was considered. This is where the Magistrate completely misdirected himself.

[17] Actual rape was never inquired into nor probed at all and therefore not proved.

[18] That however is not the end of the issue, the witness is corroborated on the issue of having been tied on the legs, with her trousers down by the evidence of the first state witness who after finding her tied on the legs with her trousers down he further corroborates this witness on the

aspect that the appellant was the driver who dislodged him and took over as driver of the Toyota Hi-Ace Kombi after having been pointed at by the appellant's companions with a firearm and pulled to lie on the floor in the Toyota Hi-Ace Kombi and as the men who alighted with the complainant into the bushy place where he subsequently rescued her.

- [19] The Magistrate should have, where actual rape is not proved, convicted the appellant of attempted rape in terms of Section 261(1) of the Criminal Procedure Act. From the foregoing paragraph it has been demonstrated that corroborated evidence was led before the court *a quo* on the basis of which conviction could be sustained for attempt to commit the section 3 of the Criminal (Sexual Offences and Related Matters) Amendment Act 2007 offence had this Section 261(1) been applicable as the offence which is the subject of this Appeal was committed in 2002.

The Regional Court Magistrate is entitled to consider competent verdict in a sexual offences should the commission of the offence charged not be proved but proves attempt to commit rape. The Magistrate has discretion to apply the competent verdict legislation as an unavoidable consequence. Section 256 of the Criminal Procedure Act 51 of 1977 vests this residual procedure to the Magistrate should evidence not prove the commission of the rape charge but proves attempt to commit rape. The judicial decisions of the Magistrate and their basis must be founded within the factual evidence led before her or him. His or her findings on facts must be fully set out as also his or her conclusions of the law with the evidence led evaluated and considered sustaining his finding. The rational basis must be fully canvassed and the finding be not have been arrived at without the factual evidential grounds. See: S v Maake 2011 (1) SACR 263 SCA. From the record, however, it does not appear that the appellant was properly informed of the competent

verdicts to the charge before he pleaded. For that reason this Court will not follow that aspect.

I find the Regional Magistrate to have erred to convict the appellant for actual rape when sexual penetration has not been proved. Had Section 261 of the Criminal Procedure Act 51 of 1977 come into operation at the commission of the offence the appellant would have been convicted of attempt to commit rape in terms of Section 261(1) of Act 51 of 1977.

Accordingly the conviction for rape is set aside.

S MGXAJI

ACTING JUDGE OF THE HIGH COURT

I agree: DUKADA, J

D Z DUKADA

JUDGE OF THE HIGH COURT

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