

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A368/10

In the matter between:-

SIMON QALIMOA MPHUTHI

Appellant

and

THE STATE

Respondent

CORAM: VAN DER MERWE, J *et* PHALATSI, AJ

HEARD ON: 2 MAY 2012

JUDGMENT BY: PHALATSI, AJ

DELIVERED ON: 10 MAY 2012

[1] On 2 March 2009, the appellant was convicted on a charge of rape in the Regional Court, held in Sasolburg. He was sentenced to 13 (thirteen) years imprisonment.

[2] He was refused leave to appeal against both conviction and sentence by the Court *a quo*. He was, however, granted leave to appeal against both conviction and sentence by the High Court, per Kruger and Jordaan JJ.

[3] During the trial, the State led the evidence of the complainant and her mother and thereafter closed its case. The only evidence on behalf of the accused was that of the appellant himself.

[4] The complainant testified in chief as follows:

4.1 On 1 May 2008 at about 20h00 she went to Khulu's Tavern in Zamdela, Sasolburg, together with a lady called Maniko.

4.2 She left the said Khulu's Tavern at about 05h00 the morning of 2 May 2008.

4.3 The whole time that she was at Khulu's Tavern, she had been drinking beer with her friends Bonisiwe and the other lady, whose name she did not know.

4.4 She could not remember the quantity of the liquor she had consumed for the duration of her stay there.

4.5 The appellant also arrived at Khulu's Tavern and he probably heard her as she told her friends that she was leaving, because he offered to go with her as they were going in the same direction.

4.6 Along the way, the appellant slapped her with an open hand, started calling her names and took out a knife.

- 4.7 She did not know how it came about that she should fall, but she nonetheless fell to the ground and the appellant raped her.
- 4.8 The appellant left his belt and the knife, on the spot where he raped her, after the rape and took her Motorola cellular phone.
- 4.9 After the appellant raped her, she ran to her parental home. The appellant chased her until into the house.
- 4.10 Her mother heard her crying and she then opened the door. She and the appellant both entered the house.
- 4.11 When her mother confronted the appellant, the appellant swore at her, and her mother went to call the complainant's sister in order for her to call the police.
- 4.12 The appellant then left for his parental home.
- 4.13 When the police came, she and her mother accompanied them to the appellant's home where he was arrested in their presence.
- 4.14 During the arrest, the appellant's sister told the complainant's mother that the appellant admitted that he raped her (the complainant). He further asked the police officer to talk to her that she should not proceed to press charges against him and he would work for

her. He further promised that he would buy the cellular phone that he had taken from her.

[5] Under cross-examination, she said the following:

5.1 Although she was earlier at Khulu's Tavern, she left at some point when it closed down and went to the stokvel at Mothlokwane's place. That was where she met her friends and where the appellant later arrived.

5.2 She was further cross-examined on her statement she made to the police, wherein she stated among other things the following:

5.2.1 that she was from Sekwati Tavern in Phase 3 with the appellant;

5.2.2 After the rape, the appellant took her to her residential place, where she told her mother that the appellant, who was with her at the time, raped her.

5.3 She testified that the incident where she was at Sekwati Tavern was a different, earlier incident where she was also raped, but not by the appellant.

5.4 She further could not say why was it not stated in her statement that the appellant also took her cellular

phone.

5.5 She further never mentioned that the appellant was armed with a knife and never told the police that the knife and the appellant's belt were left at the scene of the rape.

5.6 She had reported the rape to a certain Sememe and the latter found the knife and the belt at the scene. The police were never informed about this information.

[6] 6.1 The State also called the mother of the complainant, who testified that the complainant was drunk when she came in the house in the morning.

6.2 She further confirmed that the appellant admitted having taken the complainant's cellular phone in the presence of the police.

[7] In its judgment, the Court *a quo* found that although the complainant is a single witness, the court found her evidence to be credible as she did not contradict herself. I find this finding very strange indeed.

[8] I have quoted at length in respect of the complainant's evidence to illustrate a litany of material contradictions

between her testimony in court and her statement.

[9] The Court *a quo* did not even take into account that crucial witnesses were not called by the State. The only conclusion which can be made is that the State did not call these witnesses as they were not supporting the complainant's version. In the circumstances the denial of rape by the appellant is reasonably possibly true.

[10] Mr. Pretorius, who appeared on behalf of the State, also correctly conceded that the conviction could not be supported, because of the complainant's contradictions and improbabilities in her evidence.

[11] In the light of the above, it is clear that the conviction should be set aside.

[12] I consequently make the following order:

12.1 The appeal succeeds.

12.2 The conviction and sentence are set aside.

N.W. PHALATSI, AJ

I concur.

C.H.G. VAN DER MERWE

On behalf of appellant: Mr. K Pretorius
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN
Ref.: K PRETORIUS/pl/X379018512

On behalf of respondent: Adv. Danie J Pretorius
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN

/sp