

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No. : A455/07

In the appeal between:-

MBISELA ALEXANDER LANGUZA

Appellant

and

THE STATE

Respondent

CORAM:

MUSI, JP *et* EBRAHIM, J

HEARD ON:

2 JUNE 2008

DELIVERED ON:

5 JUNE 2008

JUDGMENT

MUSI, JP

- [1] This is an appeal against the judgment of the Magistrate's Court, Bloemfontein wherein the appellant was convicted of rape and sentenced to 6 (six) years imprisonment. The appeal is against the conviction only. It is worth noting that the State did not at the trial press for a conviction and in this Court Mr. Bontes, who appeared for the State, made it clear

that he does not support the conviction. In effect, Mr. Bontes stood by the heads of argument drawn on behalf of the State by his colleague, Mr. Pienaar.

- [2] The factual background to the matter is briefly that the complainant had been at a tavern in the night in the company of friends. At some stage she left the friends and went to the toilet. Her version is that once inside the toilet she was confronted by two men who throttled her. They undressed her and one of them raped her whilst the other kept guard at the door. In the course of the rape her jersey was also removed and used to cover her face. Whilst she was being raped one of her friends, Matsedisio, came in and she pleaded with Matsedisio to help, but Matsedisio simply walked out. Another friend, Refiloe, later came at the stage where the rapist had finished, but she was clapped by the man at the door and prevented from entering the toilet. After her rapist had left, the complainant discovered that her panty and jeans were not there and she had to come out of the toilet semi-naked. Someone borrowed her an overall top in order to cover her lower body. She was hysterical and crying. She

told her friends that she had been raped and they accompanied her to the police station where she reported the incident that same night. She was subsequently examined by a doctor who compiled the J88 report which was subsequently handed in as an exhibit.

- [3] The complainant testified that the person who raped her is the appellant. The appellant, on the other hand, admitted having had sexual intercourse with the complainant in the toilet but said that it was by consent. He testified that he had met the complainant that night and had danced and drank liquor with her. During the dance he had proposed to the complainant that they have sex. He had wanted them to go to his place for the purpose but the complainant suggested that they go to the toilet instead. They then met at the toilet and had sexual intercourse. As they were busy someone who is employed in the tavern came into the toilet to fix a leakage in the system. He, the appellant, then decided to leave the toilet believing that the complainant would follow. He gave lousy reasons why he did not wait for the

complainant to come out of the toilet. He said that he was later confronted by the same person who had surprised them in the toilet who queried why they had sex in a public toilet. He decided to leave the tavern at that point in order to avoid possible recriminations.

- [4] Matsedisio and Refiloe testified on behalf of the State. They both corroborated the complainant as to what happened after the incident. In particular they confirmed that the complainant came out of the toilet half naked, that she was crying and that someone borrowed her an overall top in order to cover her lower body. They also confirmed that they accompanied the complainant to the police station that same night and that the complainant told them that she had been raped. However, on the other issues, these two witnesses contradicted each other as well as contradicting the complainant. It is not necessary to get into the details of the contradictions. They are fully set out in the heads of argument filed by Ms Kruger, for the appellant, and there is no dispute about them.

[5] Now, the magistrate correctly identified the issue that was really in dispute in this case. That is, whether the admitted sexual intercourse between the appellant and the complainant was with consent. In this regard, the magistrate correctly noted that the complainant was a single witness. The magistrate, nonetheless, accepted the version of the complainant, noting that whereas there were contradictions in the State case, these were not material to the central issue of whether the complainant had consented to the sexual intercourse. The magistrate found that the appellant's version was not reasonably possibly true and rejected it as false.

[6] What weighed heavily with the magistrate was the conduct of the complainant after the incident in the toilet. The magistrate remarked that her conduct was consistent with that of a rape victim. The magistrate also found corroboration for the complainant in the testimony of the doctor who examined her the day following the incident. Dr. Chantel Liebenberg testified that the injuries on the complainant were consistent with forced entry.

[7] It appears to me that the magistrate did not pay sufficient, if any, attention to the role of alcohol in this case. It is not

disputed that the complainant and her friends had been drinking alcohol that night. In fact, Matsedisio said that she had been drunk although she could still see what was happening. The complainant herself admitted to having taken alcohol although she would not say she was drunk. However, it emerges from the report of Dr. Chantel Liebenberg that the complainant was still affected by the intake of alcohol even when she was examined the following day. The many contradictions in the evidence of the State witnesses can best be explained with reference to the possible influence of liquor.

- [8] The possible influence of liquor on the complainant would explain the confusion in her evidence as to what happened inside the toilet. She initially said that the two men throttled her and then put her head in the bucket of the toilet and she would have been sitting on her knees whilst she was being raped. Later she changed and said that she was lying on her back as she was being raped. Matsedisio said that when she got into the toilet the two were standing against the wall

whilst having sexual intercourse, with the man's back towards the door; hence she could not see his face. The complainant was also confused about what had happened to her jersey and her statement to the police must be seen against the same background. There are material contradictions between it and her evidence in court. For instance, in the police statement she says that she was raped by two men. She denied telling the police this but it emerges from the doctor's report that the same was told to the doctor.

- [9] In the premises, the possibility that she may have agreed to meet the appellant in the toilet cannot be excluded. It is significant that she did not ask any of her friends to accompany her to the toilet, which Matsedisio suggested she should have done given that the toilet concerned is shared with men. Matsedisio made it known that the complainant was a secretive person, which means that it would not have been out of character for her to keep to herself whatever arrangements she may have made with the appellant.

Refiloe testified that she saw two boys running from the toilet and out of the tavern gate, presumably carrying the complainant's clothing. She did not, however, identify the appellant as one of them. This leaves open the possibility that whilst the appellant and the complainant were having sex in the toilet some naughty boys, seeing what was happening, grabbed the complainant's clothes and ran away with them purely in order to cause embarrassment. The embarrassment and humiliation of being seen semi-naked in a tavern could partly explain the complainant's emotional condition.

- [10] The point, however, is that the onus rested on the State to prove its case beyond a reasonable doubt, including lack of consent. There was no onus on the appellant to prove consent. In a case like this where confusion reigned as to what actually happened, it can hardly be said that the guilt of the appellant had been proved beyond reasonable doubt. The appellant was entitled to the benefit of the doubt.

[11] In the premises, the appeal succeeds and the conviction and sentence are set aside.

H.M. MUSI, JP

I concur.

S. EBRAHIM, J

On behalf of appellant:

Ms S. Kruger
Instructed by:
Legal Aid Board
BLOEMFONTEIN

On behalf of respondent:

Adv. D.W. Bontes
With:
Adv. F.J. Pienaar
Instructed by:
Director Public Prosecutions
BLOEMFONTEIN

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