

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

Appeal No. : A15/2006

In the appeal between:

MBUTI FRANS MDALI

Appellant

versus

THE STATE

Respondent

CORAM:

EBRAHIM J *et* MOLEMELA, AJ

JUDGMENT:

MOLEMELA, AJ

HEARD ON:

6 AUGUST 2007

DELIVERED ON:

8 AUGUST 2007

[1] This is an appeal against conviction and sentence. The appellant was convicted on 6 October 2004 on one count of rape in the Regional Court sitting at Welkom and was subsequently sentenced to imprisonment for 10 (ten) years.

[2] The following background facts are undisputed:
2.1 That the complainant and the appellant had known

each other prior to the day of the incident;

2.2 That the appellant, his friend George, the complainant and her friend Ntswaki had enjoyed drinks at a tavern known as Manny's tavern until 07h00 the next day;

2.3 that after leaving the tavern the appellant, the complainant, George and Ntswaki all boarded the same taxi and ended up at the appellant's shack in Mshenguville;

2.4 that the appellant and the complainant had sexual intercourse on the day in question;

2.5 that the appellant and the complainant did not have a love relationship on that day.

[3] The main issue in dispute was whether the sexual intercourse that took place between the appellant and the complainant was consensual.

[4] I turn to deal with the complainant's account of what happened. According to the complainant when they left the tavern at 07h00, she is the one that signalled for the taxi to stop outside the tavern. She had signalled by making the

sign of a fist, which is the normal sign made by passengers headed to Putsuasteng. After boarding the taxi, the taxi-driver told her and her friend that he was headed for Mshenguville. The complainant then paid the taxi fare. The appellant and his friend George also boarded the same taxi. The appellant then asked the complainant to accompany him to his place of residence at Mshenguville and stated that they would thereafter go to a place known as Ditsheng. The complainant refused.

4.1 While they were in the taxi, the appellant informed the complainant that the complainant's lover, one Mpho, had had sexual intercourse with the appellant's lover, one Lesego. The complainant told the appellant that the incident had nothing to do with her.

4.2 When the taxi stopped at a taxi-rank in Mshenguville, the appellant said that all four of them must alight from the taxi. The complainant informed him that she and Ntswaki would not be alighting as they were headed for Ditsheng. The appellant then opened the door of the taxi and pulled her out of the vehicle. The appellant's friend George, opened the other door and pulled Ntswaki out. When the complainant tried to loosen herself from the appellant's grip, the appellant drew a knife. The taxi-driver then told the complainant and Ntswaki not to go back into the vehicle.

4.3 The complainant demanded to know from the appellant

where he was taking her and he threatened to stab her with a knife. She walked alongside Ntswaki, while the appellant and George followed closely behind them. They walked in that fashion for about 100 meters and then arrived at the complainant's shack.

4.4 Up to the time they arrived at the shack, she had not tried to scream or run away because she was afraid of the appellant, who was still holding a knife at that time.

4.5 Upon arriving at the appellant's shack, the appellant opened the door and pushed her inside. He instructed George and Ntswaki to wait outside and also told them to go and buy beer.

4.6 He then closed the door but did not lock it. He undressed his pants and underwear and then undressed her pants and underwear. He instructed her to open her thighs and then raped her.

4.7 At a point when the appellant was just about to ejaculate, Ntswaki opened the door. George then threw Ntswaki onto the bed and stated that she could see what was happening. The appellant got off the complainant, slapped Ntswaki on the thigh and told her to stop making noise. The appellant then said that Ntswaki must have sex with George. George however refused and stated that he could not have sex with

Ntswaki as she was crying and could later accuse him of having raped her.

4.8 After the rape, the appellant asked the complainant to forgive him as he had only wanted to hurt her. The appellant then put his trousers on. The complainant also put her panties and pants on. She and Ntswaki then left the appellant's place. They went to the police station, where the complainant laid a charge of rape against the appellant.

[5] I turn to the appellant's version. He testified that while he and George were enjoying drinks at Manny's tavern, the complainant and her friend joined them where they were seated. The complainant then requested that the appellant give her liquor and he obliged. While they were enjoying their drinks, he asked the complainant whether she would have sex with him. The complainant agreed, but only after demanding an amount of R30.00, which he gave to her while they were at the tavern.

5.1 They continued drinking together. At some point the appellant mentioned that he had found an unknown pair of trousers at his place of residence. The complainant then mentioned that the pair of trousers belonged to Mpho, her boyfriend. Both he (the

appellant) and the complainant were worried and hurt by the fact that their lovers had cheated on them. He (the appellant) decided that he would avenge himself for what Mpho had done by having sex with Mpho's girlfriend, i.e. the complainant.

5.2 The appellant, the complainant, George and Ntswaki all left the tavern together at 07h00. The appellant signalled to an approaching taxi that he was headed for Mshenguville. The taxi was a sedan motor-vehicle. Only sedan motor-vehicles ferried passengers from that point to Mshenguville, while the passengers headed to Putsuasteng were ferried by minibus taxis only.

5.3 The four of them boarded a sedan taxi to Mshenguville where they alighted at the taxi rank. They all walked to the appellant's place of residence, which was about 100 meters from where they had alighted the taxi. Both the complainant and her friend Ntswaki alighted voluntarily from the taxi and accompanied him and his friend George to his shack. He was not in possession of a knife.

5.4 Upon the arrival at the shack the appellant and the complainant went to buy two quarts of beer and the four of them enjoyed the beer while they were seated around the table in the kitchen area. The kitchen area is separated from the bedroom area only by a curtain.

5.5 While they were having drinks he reminded the complainant of her undertaking. The two of them then went to the bedroom area, undressed themselves and had consensual sex on the bed while George and Ntswaki were consuming liquor in the kitchen area. When they had finished having sex they joined George and Ntswaki and enjoyed more drinks. When the drinks were finished, they all left the shack. He returned to his shack a short while later.

5.6 George was called as a defence witness. His evidence amply corroborated that of the appellant.

[6] The court *a quo* stated that "the complainant, though

subjected to a lengthy cross-examination by the defence, was a reliable and honest witness". I respectfully differ with this finding. There were many contradictions in her evidence. Although she had previously denied having been to the appellant's place of residence before the date of the incident, she later admitted that she once spent the night there, sleeping on the floor while the appellant slept on his bed with her friend, Meme. Although she had in her examination-in-chief not mentioned any assault on her by the appellant while they were at his shack, she later testified under cross-examination that he had slapped her once while they were seated on the bed. She then changed this version and stated that he had slapped her once while she was standing. She then mentioned that he had also slapped her once when they alighted from the taxi.

6.1 Although she had initially testified that she had not screamed or cried due to the fact that the appellant had instructed her to be quiet, she later on changed this version to say that she cried just before the appellant raped her.

6.2 She testified that when the appellant pulled down her panties and her pants he was holding the knife in his hand. Under cross-examination when it was put to her that if that were the case she would have sustained injuries, she testified that the knife was on top of the bed when the appellant pulled down her underwear and pants.

6.3 There was also a material contradiction regarding the appellant's conduct just before penetration. See page 37 of the record line 16 – 25.

“Mr Reyneke: “But before that she had testified, in chief she said that he grabbed her legs by her thighs and opened it. Then she, when I cross-examined her on the first part of it, she said no, he did not grab her. He had a knife in his hands. She got no cut marks. That is because he opened her legs with his knee. And now there is a third version that she says he instructed her, she opened her legs and then he put his knee in between. So that is why I am asking the witness why is there three versions before the court.”

6.4 On a number of occasions, the complainant
could not furnish answers during cross-
examination

Page 38 line 24:

"Now I am asking you, why do you have three versions before
court?

(No audible reply)

Do you have an answer, ma'm?

-- No answer".

Page 46 line 2:

"I am putting to you, you testified in chief that you showed the
doctor your vaginal bruises.

--- That is true.

Why then, according to the doctor's report, it says that: 'On
gynaecological examination no visible injuries detected, ...'

There was no bruising.

--- (No audible reply)

Maybe u got no answer.

--- No answer.

Ma'm I'm putting it to you, you slept with the accused with
consent. He did not rape you.

--- It is not true.

And that is the reason why you are contradicting yourself by your chief and cross-examination testimony.

--- (No audible reply)

--- I do not have an answer”.

[7] It is trite law that the evidence of a single witness must be clear and satisfactory in all material respects. See **S v FLORIS** 1962 (1) PH 91 (A), where the court stated as follows:

“The evidence of one single witness cannot be accepted if the:

- (1) had an interest or bias to the accused;
- (2) has made a prior inconsistent statement;
- (3) contradicts himself in the witness-box;
- (4) has not had proper opportunities for observations.”

Also see **S v ARTMAN AND ANOTHER** 1968 (3) SA 339

(A), where the court had the following to say:

“In accepting the evidence of a single witness all that is required is that his testimony should be clear and satisfactory in all material respects.

The ultimate requirement is proof beyond reasonable doubt ...”

[8] It is quite clear that the evidence of the complainant does not

satisfy the requirements laid out in the aforementioned cases. Although counsel for the respondent had in his written heads of arguments supported the court *a quo*'s finding with regard to the reliability of the complainant's evidence as a single witness, he conceded during his oral argument at the hearing that her evidence was not clear and not satisfactory in all material respects.

- [9] I also respectfully disagree with the court *a quo*'s finding that the version of the appellant "was not only impossible or improbable, but it is superfluous". It would seem that the court *a quo* evaluated the appellant's version in isolation and not in the context of the totality of evidence. I agree with the argument of counsel for the appellant to the effect that the *reason* for having sex with another has nothing to do with the fact that such a person has been given permission for sexual intercourse. I also do not understand why the court *a quo* was adamant that the score between the appellant and Mpho had long been settled before the day of the incident, whereas the appellant had pointed out that he had only heard about

the sexual intercourse between Mpho and his girlfriend from the complainant right there at Manny's tavern. The score could therefore not have been settled before that day.

[10] See **S v KUBEKA** 1982 (1) SA 534 (W) 537 where the following was stated:

“Whether I subjectively disbelieve him (the accused) is, however, not the test. I need not even reject the State case in order to acquit him. It is not enough that he contradicts other acceptable evidence. 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.”

10.1 The correct approach in evaluating evidence was laid out in **S v CHABALALA** 2003 (1) SACR 134 (SCA) as follows:

“The correct approach to evaluating evidence is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.”

See also **S v V** 2000 (1) SASV 453 (SCA) at 455 A – C:

“It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false.”

See also **S v M** 2002 (2) SACR 411 (A) where the following was said:

“It is so that taken on its own no grounds existed for the rejection of the appellant’s evidence but the right approach was not to take it in isolation but rather to examine it in the context of the whole case in order to determine whether it could stand.”

[11] Considering uncontroverted evidence to the effect that the taxis ferrying passengers to Mshenguville were sedans and that the ones ferrying passengers to Putsuasteng are minibuses, it is puzzling why the complainant and his friend boarded the sedan taxi in the first place, as they were

allegedly headed for Putsuasteng and not Mshenguville.

[12] When one considers that the complainant was allegedly threatened in broad daylight and that there were other people in the vicinity of the taxi rank as well as in the yards of the houses in the same street as the appellant's shack, the complainant's failure to scream for help or to run away from the appellant is rather fishy. What must also be noted is that if the appellant had forcibly taken the complainant to his place of residence in order to rape her, he would surely not have chosen to do it in the presence of a possible state witness being Ntswaki, the complainant's friend. Thus the probabilities of the case do not favour the version of the complainant.

[13] I am therefore satisfied that the court *a quo* erred in rejecting the appellant's evidence as false and not accepting it as reasonably possibly true. This view was also echoed by counsel for the respondent during his oral arguments.

[14] I accordingly make the following order:

1. The appeal against the conviction and sentence succeeds.
2. Both conviction and sentence are set aside.

M. B. MOLEMELA, AJ

I concur.

S. EBRAHIM, J

On behalf of applicant: Mr. J.D. Reyneke
Instructed by:
Legal Aid
BLOEMFONTEIN

On behalf of respondent:
Instructed by:
Director Public Prosecutions
BLOEMFONTEIN