

SOUTH AFRICA / JUDGMENT

Buti v S (CA&R 361/2014) [2015] ZAECHGC 77 (13 August 2015)

[2015] ZAECHGC 77

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Goosen, Cossie

CASE / FILE NUMBER

CA&R 361/2014

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R 361/2014

DATE: 13 AUGUST 2015

In the matter between

MBULELO BUTI.....Appellant

And

THE STATE.....Respondent

Appeal against conviction – appellant convicted of rape and assault with intent to do grievous bodily harm – evidence of a single witness – magistrate rejecting version of appellant who pleaded consensual sexual intercourse on basis of inherent improbabilities – accepting evidence of complainant as satisfactory in all material respects when contradicted on material issue – magistrate also failing to consider inherent improbabilities in complainant's version when considering evidence as a whole – conviction set aside.

JUDGMENT

Date heard: 5 August 2015

Date delivered: 13 August 2015

GOOSEN, J.

- [1] This is an appeal against the appellant's conviction on charges of rape and assault with intent to do grievous bodily harm. The appellant pleaded not guilty to the charges which arose from events on 28 September 2008. In his plea explanation the appellant admitted that he had sexual intercourse with the complainant. He stated that this occurred with the complainant's consent at his home on the evening in question after the complainant had voluntarily accompanied him to his home.
- [2] The state led the evidence of the complainant and her sister, V....., to whom she had reported the incident. A copy of the J88 medico-legal report prepared by Dr. Bhatti was handed in by consent and without any evidence being led regarding the findings recorded in the report. The appellant testified in his defence.
- [3] It is common cause that the magistrate was faced with two mutually destructive versions in relation to the rape and assault of the complainant at the appellant's house. In relation to these events the prosecution was reliant upon the evidence of a single witness.
- [4] The state case was that on the night of 28 September 2008 the appellant had come to the house of the complainant. She was there in the company of her sister and her six-month-old child. The complainant asked the appellant about money that he owed her child. He said he would give her the money and suggested she follow him to his house. She did so, leaving her sleeping child in the care of her sister. When they got to the appellant's house he sat down inside and drank some beer he had in his possession. He told her he had sent a child to get change so he could give her the money. After a while, when the child did not return, the complainant wanted to leave. The appellant then locked the door and proceeded to assault the complainant.
- [5] According to her he throttled her and pushed her into the bedroom. He pushed her onto the ground and while choking her he stuck his fingers into her eyes. She was partially under the bed. She indicated to him that she would get undressed. She then removed her underclothes. He was on his knees choking her and with his fingers in her eyes. He then penetrated her. The appellant thereafter lifted her up onto the bed and proceeded to have sexual intercourse with her. He did not use a condom. After the assault she asked him why he had not used a condom when he knew that she is HIV positive. He said he knew. He then got up and the two of them got dressed. He told her that what had happened should remain between them. The complainant then left to return home. The appellant accompanied her to her house.
- [6] When she arrived there she told her sister that the appellant had raped her. The sister asked where he was and was told he was outside. She invited him in so that they could call the police. When he entered she "jumped at him". The appellant then assaulted her by hitting her on the head with a bottle. He ran away and the community members were called.

- [7] The appellant's version was that he was returning home from the taxi rank where he had left his wife. She was travelling to Motherwell. On the way home he passed the complainant's house. The door was open so he stopped by and greeted the complainant. He and the complainant had a secret love affair. She was in the company of her boyfriend and her sister. When he made to leave the complainant followed him outside. When asked why she said she wanted to spend time with him since his wife was away.
- [8] The complainant had her young child with her on her back. They then went to a nearby house owned by a Mama V..... where the complainant arranged to leave the child. After this they went to the appellant's house. There they had consensual sex. He denied that he assaulted her in any manner.
- [9] After the sexual intercourse they returned to the complainant's house. When they got there she went inside. He was outside talking to a person by the name of D..... He heard a commotion and D.....'s girlfriend came out and said that the complainant was being assaulted by her boyfriend. The appellant went into the house, apparently to explain why they had been away for so long. When he entered, the complainant's sister and the boyfriend attacked and assaulted him. He sustained a stab wound to his chest. He then ran away. He was subsequently arrested and charged. It appears from the record that the arrest occurred in July 2014 whereas the incident occurred in September 2013.
- [10] In dealing with the evidence the magistrate was alive to the fact that the complainant was a single witness in relation to the crucial question of consent and that her evidence was to be approached with caution. In evaluating the complainant's evidence, the trial court found her to be a credible witness based on his assessment of her demeanour. He found that she did not contradict herself in her evidence and that there was nothing in the presentation of evidence, which negatively affected her credibility. It is of course trite that a court of appeal will not interfere with the trial court's findings on the credibility of a witness lightly. It will only do so where such findings are based on misdirection or are not supported by the evidence.
- [11] The basis of the credibility and reliability finding is to be found in the trial court's treatment of the corroborating evidence of the sister, V....., and the available "objective" medical evidence. It was not based, it appears, upon an assessment of the inherent probabilities associated with the version presented by the complainant.
- [12] The magistrate pointed to the fact that V.....'s testimony "corroborated" the complainant in the following respects: (a) that the complainant's boyfriend was not present at the house on the night in question, contrary to the appellant's assertion that he was; (b) that the child was left at the complainant's home when she left with the appellant; (c) that the complainant informed her on her return that she had been raped; (d) that the complainant's eyes were

swollen and neck was injured and (e) that the complainant took the child to Mama V..... after the alleged rape.

[13] The magistrate noted certain contradictions between the evidence of the complainant and V....., namely as to whether or not the child was asleep when the complainant left the house and whether or not V.....s boyfriend was present before the complainant left the house. It was the complainant's version that he was not whereas V.....

said that he was. The magistrate regarded these as immaterial, and as having no bearing on the credibility and reliability of the

witnesses.

[14] The presence of another male person at the house of the complainant, whether the boyfriend of the complainant or her sister, was however an important feature of the appellant's case and served as a key element in the magistrate's rejection of the appellant's version on the probabilities.

[15] On the complainant's version there was no other male person present. The appellant said her boyfriend was present. A reading of the record suggests that the appellant may well have assumed that the person who was present, was the complainant's boyfriend, whereas it was her sister's boyfriend. The magistrate, in my view, was wrong to consider this aspect to be immaterial to the assessment of the credibility and reliability of the complainant. This is all the more so in the light of the allegations of assault, upon the complainant by the boyfriend, and by the boyfriend upon the appellant. If it is accepted, as it must be, that the appellant became aware of the "boyfriend" when he first arrived at the house, then there is no explanation for why the complainant denies the presence of a "boyfriend". If indeed the "boyfriend" was V.....'S

then that fact bears upon the assessment of the probabilities inherent in the complainant's version. In this regard the magistrate found it improbable that she would leave the house in order to have sexual intercourse with her secret lover if her boyfriend was present. On V.....'s version and on the complainant's version that improbability doesn't

arise. If it was her boyfriend who was present, then her stated reason for following the appellant to his house, the probabilities of which the magistrate did not consider at all, namely to secure payment of money owed to her child, would have served as an explanation to her boyfriend.

[16] The magistrate went further to find that the complainant had injuries to her neck and eyes were red, which he found was "consistent with the objective evidence". Reference was then made to the J 88 medical report. The J88 medical report does not record any injuries to the neck. It also does not record any injuries to the complainant's eyes. It records the injuries as follows: Swollen right eye (kicked); Swollen left side of forehead (Kicked); and Swollen left foot (Sprained).

- [17] In dealing with this the magistrate appears to have accepted that this is inconsistent with what the complainant stated occurred during the assault. The transcript of the judgment is incomplete at this point. What does appear, is a statement that this inconsistency “does not have a detrimental effect on the credibility of the evidence of the state”.
- [18] Mr. Dauberman, on behalf of the appellant, argued that the medical evidence provides no corroboration for the version of the complainant. It provides only evidence that the complainant suffered an assault without in any manner indicating by whom that assault was perpetrated. In this submission he is correct. Insofar as the magistrate found that there was objective evidence to corroborate the injuries which the complainant said she had i.e. to her neck and eyes, that finding is incorrect and constitutes a misdirection on the facts.
- [19] The manner in which the medical evidence was presented leaves much to be desired. Our courts have on a number of occasions commented on the highly undesirable practice of the prosecution simply handing in a J88 medical report with the consent of the defence without leading evidence to explain not only the source of the information contained in the report, but also the nature of the findings. The evidence is by its nature, based on expertise and the conclusions involve the expression of expert opinion. Absent a proper factual basis and the qualification of the witness, the content of a J 88 can provide little or no assistance to a court.
- [20] In this instance the presentation of appropriate evidence by the examining doctor may well have provided reliable clarification which might have facilitated the proper adjudication of the disputed issues. The contents of the medico-legal report must, at face value, raise concern about the reliability of the complainant’s version.
- [21] In dealing with the version of the appellant the magistrate evaluated the probabilities and came to the conclusion that his version was so improbable as to warrant rejection as not being reasonably possibly true.
- [22] In *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139i – 140a it was stated that in evaluating the evidence and in coming to a decision as to whether the state has proved beyond a reasonable doubt that the accused is guilty of an offence the correct approach 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.”
- [23] The standard of proof set in a criminal trial is a stringent one. It serves to ensure that persons who may be innocent of criminal conduct are not readily convicted. It is a standard which occasionally will have the effect that a person who may indeed have committed an offence is nevertheless acquitted. That is the price we pay for insisting that an accused’s guilt is established beyond a reasonable doubt. There is no onus upon an accused to

establish his innocence. Where there is a reasonable possibility that the accused version is true, then he or she is entitled to the benefit of the doubt. An accused person need not of course be believed. All that is required is that his or her version must be reasonably possibly true. If that is so then the prosecution has not proven beyond a reasonable doubt that the accused is guilty.

- [24] The magistrate considered the following aspects of the appellant's evidence to be improbable. Firstly that the complainant would leave her boyfriend to accompany the appellant to his house to have sexual intercourse. Yet it was common cause that the complainant accompanied the appellant to his house voluntarily the stated reason being to collect money owed to the complainant's child. The "improbability" only arises on the basis that the appellant assumed the "boyfriend" was the complainant's boyfriend.
- [25] Secondly, the magistrate considered it highly improbable that the complainant would return from a secret tryst and then allege that she was raped. This however is not an inherent improbability in the appellant's version. The fact that the complainant reported an alleged sexual assault is to be weighed against the version presented by the appellant. That is the nature of the so-called first report witness testimony. It points to consistency in the version presented and does not thereby establish the veracity of the evidence of sexual assault. An accused is not burdened with an onus to explain why a complainant would allege assault following consensual sexual intercourse and an inability to explain it does not mean that his evidence of consensual sexual intercourse must necessarily be rejected.
- [26] In this instance the appellant stated that when he got to the complainant's house he heard a commotion and was told that the complainant was being assaulted, apparently by her boyfriend. The third and fourth improbability is related to this aspect. The magistrate found it improbable that the appellant would return to the complainant's house if he knew the complainant's boyfriend was present. The magistrate appears to have ignored the explanation, namely that he, the appellant, left with her and so he returned with her. Furthermore, the magistrate appears to have lost sight of what is equally highly improbable, namely that the appellant, having just violently raped the complainant leaving her with visible injuries would return to her house in circumstances where she could easily report the rape and cause him to be arrested. This fact the magistrate ignored.
- [27] The magistrate did not subject the complainant's evidence to a careful assessment of the probabilities. Thus, for instance, no regard was had to her stated reasons for leaving her house to go to the appellant's house. She said that she went to get money which the appellant owed her child. She left without informing her sister and immediately the appellant suggested that he should follow. On her own version she appears to have expressed concern to the appellant about the fact that he did not use a condom during the assault pointing out to him that he was aware she was HIV positive. No consideration was given to why he should know that she was HIV positive. Nor why she should be concerned – after all, on her version, she had just been violently assaulted and raped by the appellant. It was the complainant's version that she took her child to her neighbour after she had returned from

the appellant's house because the child was awake. Why this would be necessary is not apparent. No consideration was given to the fact that the appellant knew that the child had been taken to the neighbour's house. It is improbable that he would have done so in the light of the evidence of V..... which was to the effect that this occurred when the appellant was assaulting her.

[28] The magistrate also did not consider that V....'s had been drinking on that day. By her own admission she could not clearly recall everything because she had been consuming alcohol. It was also the state case that no police statement was taken from her on that occasion because she was under the influence of alcohol. None of these factors were considered in the assessment of the reliability of the V.....'s evidence.

[29] Having regard to all of these factors I am of the view that the magistrate was wrong to consider that the complainant's evidence, a single witness in relation to the alleged assault, was satisfactory in all material respects. In my view it was not. When regard is had to the evidence as a whole, the question arises whether the weight of the evidence points inevitably to the guilt of the accused. In my view the magistrate erred in coming to the conclusion that it does.

[30] In the result I make the following order:

1. The appeal succeeds;
2. The convictions and sentences are set aside.

G. GOOSEN

JUDGE OF THE HIGH COURT

COSSIE, AJ.

I agree.

N. COSSIE

ACTING JUDGE OF THE HIGH COURT

Appearances: For the Appellant

Mr. P. Dauberman

Peter Daubermann Attorneys

For the Respondent

Ms. M. September

Director of Public Prosecutions

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