

SOUTH AFRICA / JUDGMENT

Dumani v S (CA&R9/17) [2017] ZAECHGC 62 (16 May 2017)

[2017] ZAECHGC 62

COURT

Eastern Cape High Court, Grahamstown

BEFORE

T Malusi, N Molony

CASE / FILE NUMBER

CA&R9/17

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION – GRAHAMSTOWN

Case No: CA&R

9/17

In

the matter between:

THEMBELA

DUMANI

Appellant

and

THE

STATE

Respondent

JUDGMENT

MALUSI J

- [1] The appellant was charged with rape before the Regional Court, Queenstown. The provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 were invoked as it was alleged the complainant was raped more than once and grievous bodily harm was inflicted on her. At the conclusion of the trial he was convicted as charged and sentenced to 18 years imprisonment. The appeal against conviction lies with the leave of court a quo.

- [2] Before dealing with the grounds of appeal I shall deal first with the evidence leading to conviction. The complainant testified that on 1 August 2015 she was enjoying herself with a group of friends at a tavern known as Norman's place. At about 23h00 she requested for an escort from her friends to her cousin's abode as she was moderately drunk and wanted to sleep. The appellant was part of the group that accompanied her though he was a stranger to the complainant. Upon her cousin opening the door for the complainant, the rest of the friends left for the tavern except for the appellant who was milling around. The complainant suddenly had a change of mind and wanted to return to the tavern. The cousin requested the appellant to escort the complainant back to the tavern.
- [3] The complainant gave evidence that along the way on a street corner the appellant started to assault her. She fought back but was overpowered by the appellant who knocked her to the ground. A sustained assault ensued until she lost the strength to resist. She was dragged by the appellant to his shack nearby.
- [4] According to the complainant she was undressed by the appellant. She was raped on two diverse occasions by the appellant during the course of the night. She left the shack the following morning accompanied by the appellant. She later reported to her cousin and laid a charge with the police.
- [5] A medico-legal report (J88) was admitted by consent. It listed numerous injuries sustained by the complainant all over her body and genital area.
- [6] The complainant's cousin confirmed her version regarding her escort by the appellant. She confirmed that the complainant had visible injuries on the morning she came to her house to enquire about the appellant's full name and address. She was adamant that the complainant only reported the assault by the appellant and not the rape.
- [7] The appellant testified that he had a secret sexual relationship with the complainant for at least six months before the incident. On the night of the incident he escorted the complainant back to the tavern as requested by her cousin. Whilst he was enjoying himself, the complainant insisted they must leave the tavern for his home. He relented after initial resistance. Along the way they fought as he still wanted to go back to the tavern and the complainant forcefully insisted they go to bed. An acquaintance of the appellant intervened and convinced them to go to bed. According to the appellant he twice had consensual sexual intercourse with the complainant during the course of the night.
- [8] The appellant's acquaintance testified that one night he fortuitously met the appellant and a woman in the street. The appellant was hit with an open hand by this unknown woman who was light in complexion. Upon enquiry he established that the woman was overcome by a fit of jealousy. He prevailed on them to go to sleep which they did.

- [9] The regional magistrate exercised caution in evaluating the evidence of the complainant as she was a single witness. He accepted her evidence as he found her an impressive witness who was articulate and sequential in her narration of events. He found that the injuries recorded in the J88 corroborated the complainant's version and were at variance with appellant's version of a minor scuffle. He found the appellant's version to be false, riddled with inherent improbabilities and rejected it.
- [10] Mr Solani, who appeared for the appellant, submitted that the complainant's version was improbable. It was highly unlikely she agreed to be accompanied by a stranger at night. Furthermore, the appellant would not have hit the complainant without a reason. He argued for the conviction to be set aside.
- [11] Ms Hendricks, who appeared for the State, submitted that credibility was the only issue in dispute. She submitted the regional magistrate had correctly accepted the complainant's evidence and rejected the appellant's version which was improbable.
- [12] The approach of a court on appeal to the findings of fact and credibility by a trial court is settled law. It was authoritatively stated that '... in the absence of demonstrable and material misdirection by the trial court, its findings of fact were presumed to be correct, and would only be disregarded if the recorded evidence showed them to be clearly wrong'[1]. These findings are presumed to be correct because the trial court has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies[2].
- [13] In my view, there is no improbability in the complainant agreeing to be escorted by the appellant back to the tavern. The appellant was in their company on the way from the tavern. Clearly, he was known to the complainant's cousin who asked him directly to accompany the complainant. The assault was not without a reason. It was aimed to subdue any resistance from the complainant to a stranger (appellant) dragging her off to his shack to rape her. It achieved that aim as the complainant was no longer resisting the appellant's instructions and actions at the time they arrived in the shack.
- [14] I am not persuaded that the findings of fact and credibility by the regional magistrate were wrong. He gave a well-reasoned

judgment. He applied the law correctly in assessing the complainant as a single witness and evaluating the entire body of

evidence. The only incontrovertible conclusion after an assessment of the evidence before the court a quo was that the appellant was guilty as charged. His assertion of a secret relationship was correctly rejected as manifestly untrue. As correctly pointed out by Ms Hendricks the appellant barely knew anything about the complainant's personal details. The alleged affair and trysts with the complainant were clearly a figment of the appellant's imagination. A recapitulation of the assessment of the entire evidence is not necessary in these circumstances.

[15] In the result, the following order is issued:

15.1 The appeal is dismissed.

T MALUSI

Judge of the High Court

Molony AJ: I agree.

N MOLONY

Acting Judge of the High Court

Mr MT Solani for the appellant instructed by Legal Aid SA, Grahamstown

Adv S Hendricks for the respondent instructed by The Director of Public Prosecutions,
Grahamstown

Date Heard: 19 April 2017

Date Delivered: 16 May 2017

[1] S v Hadebe and Others 1997(2) SACR 641 (SCA) at 645 e-f; S v Kekana 2013(1) SACR 101 (SCA)
at paragraph 8.

[2] R v Dhlumayo 1948(2) SA 677 (A) 705.

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