

SOUTH AFRICA / JUDGMENT

Fouche v S (Appeal) (A 239/24) [2025] ZAWCHC 76 (25 February 2025)

[2025] ZAWCHC 76

COURT

Western Cape High Court, Cape Town

BEFORE

Le Grange, Bhoopchand

CASE / FILE NUMBER

A239/24

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: A239/24, OSH100/18

In the matter between

PAUL FOUCHE

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Scheduled date of hearing: 31 January 2025

Date of judgment: 25 February 2025

Coram: Le Grange J, Bhoopchand AJ

BHOOPCHAND AJ:

[1] This is an appeal against conviction. The Oudtshoorn Regional

Magistrate found the Appellant guilty on one count of contravening the provisions of Section 3 of the Criminal Law (Sexual Court

Offences and Related Matters) Amendment Act 32 of 2007. The Appellant was charged with unlawfully and intentionally raping the Complainant, N[...] D[...], a 17-year-old female, on 16 April 2018, without her consent. The provisions of the minimum sentence legislation applied. The Appellant was sentenced to eight years imprisonment, of which two years were suspended for five years.

[2] The Appellant advanced two principal grounds of appeal. He alleged that the Magistrate erred in finding that the State had proved its case beyond reasonable doubt and rejected his version of events. The Appellant alleged specifically that the Magistrate failed to evaluate the medical evidence and the Complainant's first report to her mother before concluding that the Appellant penetrated the Complainant orally and vaginally. The Respondent opposed the appeal.[1] This Court shall consider the evidence pertinent to the grounds of appeal.

THE EVIDENCE

[3] On 15 April 2018, the Complainant secured a lift in the car the Appellant had been travelling in after visiting a nightclub in Oudtshoorn. When the car stopped to allow the Appellant to purchase

cannabis, he handed her his mobile phone. However, the car drove off without him. Towards midday on 16 April 2018, the Appellant searched for the Complainant and his mobile phone. After finding her, he discovered that the driver of the vehicle had his mobile phone, and the two had smoked the Tik they found in the battery compartment of the Appellant's phone.

[4] The Complainant accompanied the Appellant to the driver's home to fetch his cell phone. Upon discovering the driver was at work, the Appellant took the Complainant to the nearby Westcott Park and, then, by force, into the bushes alongside the road towards De Rust. The Complainant testified that the Appellant penetrated her twice orally and twice vaginally after threatening her with a knife. The Appellant nicked her nose with his knife. She reported the incident to her mother that night and the police thereafter.

[5] The Complainant's mother, C[...] A[...], confirmed that the Complainant reported the incident to her. The mother observed that the Complainant was not herself; she had been crying and was disturbed. The Complainant complained bitterly about having to perform oral sex on the Appellant. The Mother noticed the cut on the Complainant's nose and scratch marks on her face.

[6] The Complainant was examined two days later. The doctor recounted the history provided to him. Someone took the Complainant into the field and raped her. She may have used drugs the day before. The perpetrator used a condom. On examination, the doctor found a 7mm cut on the Complainant's nose, the appearance of which was consistent with an injury that could have occurred two days earlier. He found no genital injuries. The doctor testified that he would not expect to see injuries from forced penetration if the perpetrator used a

lubricated condom. He was unsure of the effects of drugs used a day earlier.

- [7] The Appellant's testimony amounted to a complete denial of the rape. He confirmed meeting the Complainant the night before the incident, locating her the following day, and accompanying her to the driver's home and Westcott Park. His evidence then diverged from that of the Complainant. He initially testified that he had accompanied her home and later that he had accompanied her to her aunt's house close to where he had found her earlier that day. The Complainant had offered to compensate him for smoking his Tik. He discovered days later that she accused him of raping her.
- [8] The Appellant was probed about the Complainant's motive to implicate him. It was put to the Appellant that there were stories about young women who gave sex in exchange for Tik. He was asked whether he had heard of the practice. He replied, rather obstreperously, that he could not say he had not heard of it. It was put to him that his phone and Tik were taken, and he wanted the Complainant to compensate him with sex. The Appellant denied this. Did the Complainant cry rape to her parents to avoid disclosing that she accompanied older men and had taken the phone and the Tik? The Appellant's response was inaudible.

THE MAGISTRATE'S

JUDGMENT

- [9] The Magistrate found that the Complainant had given her account of the events of 16 April 2018 spontaneously and in detail. She withstood a proper and comprehensive cross-examination from an experienced lawyer. She did not contradict herself in any material

respect and maintained the version of events she testified to in her examination in chief. Although fraught with emotions and crying

occasionally, the Complainant did not try to mislead, and no inherent contradictions flowed from her testimony. He was mindful that the Complainant was a single witness, and her testimony had to be viewed cautiously,[2] but he could convict an accused on the single evidence of a competent witness.[3] The Magistrate could hardly criticise how the Complainant rendered her testimony.

- [10] The mother's testimony could not corroborate the rape, and it was not the reason why it was admissible. Her testimony was clear and concise, without any inherent contradictions or improbabilities. The

Magistrate did not get the impression the mother wanted to mislead. He was satisfied that the Complainant's account of the rape to her mother was made voluntarily and at the earliest opportunity. It was a suitable first report.

- [11] The doctor's testimony was not in dispute. It did not advance the State's case any further except that it emphasised that there may not be genital injuries from vaginal penetration, especially when a condom is used. The cut on the Complainant's nose was consistent with an injury that could have occurred on the day of the incident.

- [12] The Appellant testified and was also subjected to comprehensive cross-examination. Ultimately, the manner in which he gave evidence did not convince or impress the Magistrate. Nor was his account plausible. The Court considered some of his statements. Certain statements that were put on his behalf to the Complainant and her mother were later denied. He was uncomfortable under cross-examination and found it difficult to answer the Prosecutor's questions properly. He entrusted his phone to the Complainant, but he never threatened to take steps about the phone, which he could have used as a motive for the Complainant fabricating the complaint against him. The Complainant's detailed testimony was inconsistent with it being a mere fabrication.

EVALUATION

- [13] The Magistrate reminded himself that the question to be answered was whether the State had discharged its obligation to prove its case against the Appellant beyond a reasonable doubt. The Complainant's testimony was truthful[4] and had to be accepted, whereas that of the Appellant could not be accepted where it contradicted the State's. The Magistrate found the Appellant guilty as charged.
- [14] Key aspects of the Appellant's evidence support the Magistrate's findings. It was put to the Complainant that the Appellant would testify that they went towards Westcott Park after they had been to the driver so he could leave her at home. The Complainant confirmed the Appellant's version, stating that he had told her of a shortcut through the park to get her home. The Appellant testified, contradicting what was put to the Complainant, that he walked her back to her aunt's home, where he found her earlier that day after they had been to the park. The version put to the Complainant corroborated her evidence of why she accompanied the Appellant to the park. As for the Appellant, Westcott Park was an unexplained detour on the way back. If the Appellant wanted to leave the Complainant at her aunt's house, they would have returned the same way they did when they went.
- [15] It was put to the Complainant that the Appellant had established from the four persons smoking at the house where he located her earlier that day that the Complainant and the driver wanted to sell the Appellant's phone the night before. The Appellant knew of the Complainant's alleged attempt to sell his phone before they proceeded to the driver's home. The Complainant had told him on the way to the driver's home that she and the driver had smoked the Tik concealed in his phone. The phone was important because the Appellant used it daily to speak to a female friend in New Zealand.

Yet, when probed about his reaction to the missing phone and the Tik, he gave the implausible answer that he was merely disappointed with the Complainant.

[16] The Appellant testified that the Complainant agreed to pay him R100 for the Tik she had smoked. She would get the R100 from her mother. He waited outside her aunt's home for the money, but the Complainant did not return after she went inside. The Appellant testified that he knew where the Complainant lived as he had been there earlier and had spoken to her father. Why did he wait outside the aunt's home to get the R100 the Complainant promised him?

[17] The Appellant provided contradictory testimony on his knowledge of where the Complainant lived, whether they smoked drugs and whether they smoked together, how he established that the Complainant wanted to sell his phone, whether the Complainant had volunteered to pay for the Tik she had smoked, and his interactions with the Complainant's

father when the latter confronted him about raping the Complainant. The Magistrate correctly rejected the Appellant's version of events, and that ground of appeal must fail.

[18] The Magistrate recognised the limitations of the doctor's evidence. Neither the doctor's testimony nor the mother's had any direct bearing on whether the Appellant raped the Complainant as the Appellant suggests it should have. The Magistrate found that the Appellant committed the offence he was charged with on the competent and credible evidence of the Complainant. The Complainant's account to her mother was the first report of her rape. It was important because it occurred soon after the rape and proved consistency in the Complainant's testimony.[5] The mother confirmed that the Complainant had identified the Appellant as the perpetrator and that the Complainant suffered scratches and cuts to her face.

[19] The Magistrate had to deal with the evidence of a single witness and had to consider two mutually destructive versions, one alleging that a rape occurred and the other denying it altogether. The Magistrate's

evaluation of the evidence and his judgment on conviction is beyond reproach.

[20] There are well-established principles governing the hearing of appeals against findings of fact. In the absence of demonstrable and material misdirection by the trial court or the holistic evaluation of the evidence, its findings of fact are presumed to be correct. They will only be disregarded if the recorded evidence shows they are clearly wrong.[6] The Appellant acknowledged the law and principles applicable to appeals on conviction. The transcript indicates that the Magistrate

evaluated the evidence holistically and correctly. This Court aligns itself with his findings.

[21] After scrutinising the evidence presented by both the State and the defence, this Court cannot identify any error or misdirection, either in fact or in law, with the prosecution and conviction of the Appellant. This Court finds no merit in the Appellant's grounds of appeal, and they stand to be dismissed.

[22] In the premises, I propose the order that follows.

ORDER

The Appellant's appeal against his conviction is dismissed.

Bhoopchand AJ

I agree, and it is so ordered.

Le Grange J

Judgment

was handed down and delivered to the parties by e-mail on 25 February 2025

Appellant's Counsel: LN Adams

Instructed by Legal Aid, South Africa

Defendants Counsel: N Ajam

Instructed by the NDPP

[1] The Respondent's application for condonation for filing its heads of argument is granted. The appeal was determined, by agreement, on the papers and the written submissions of the parties.

[2] S v Sauls 1981 (3) SA 172 at 180 E-G

[3] Section 208 of the Criminal Procedure Act 51 of 1977

[4] S v Weber 1971 (3) SA 754 (AD) at page 758

[5] S v Hammond 2004 (2) SACR 303 (SCA), Vilakazi v The State (636/2015)

[2015] ZASCA 103

[6] S v Hadebe and Others 1997

(2) SACR 641 (SCA) at 645e-f. See also: S v Monyane and Others 2008 (1) SACR 543 (SCA) at para 15; S v Francis 1991 (1) SACR 198 (A) at 204e, S v Ntsele 1998 (2) SACR 178 (SCA), S v Naidoo 2003(1) SACR 347 (SCA), at para 26

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