

SOUTH AFRICA / JUDGMENT

Gambushe v S (AR38/2020)

[2021] ZAKZPHC 52 (23 July 2021)

[2021] ZAKZPHC 52**COURT**

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mngadi, Bezuidenhout

CASE / FILE NUMBER

AR38/2020

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****KWAZULU-NATAL****DIVISION, PIETERMARITZBURG****Case****No: AR38/2020****In**

the matter between:

PHUMLANI

AMOS

GAMBUSHE APPELLANT

And

THE

STATE RESPONDENT

ORDER

On

appeal from: Regional Court sitting at Ezinqoleni, KwaZulu-Natal (Magistrate L. Yengopal):

1. The appeal against conviction is upheld.
2. The conviction and sentence are set aside.
3. The

verdict of the regional court is set side and substituted thereof with the following: 'Found not guilty and discharged'.

JUDGMENT

Mngadi,J:

- [1] The appellant having been convicted and sentenced to life imprisonment by a court of a regional division appeals as of an automatic right against both conviction and sentence.
- [2] The appellant was charged before the regional court with one (1) count of rape in contravention of s 3 of the Sexual Offences and Related Matters Amendment Act No.32 of 2007 (count 1) and with kidnapping(count 2) . The charge of rape was read with the provisions of subsections (1) and (2) of section 51 and Parts 1 of Schedule 2 of the Criminal Law Amendment Act No. 105 of 1997 (CLM) on the basis that the complainant was raped more than once by the accused, his co-perpetrator or accomplice. The charge alleged that on or about 5 September 2018 the appellant did unlawfully and intentionally commit an act of sexual penetration with L.M. (the complainant) a 20 year old female without her consent. The charge of kidnapping alleged the appellant deprived the complainant in count 1 on the same date and place as in count 1 by forcefully taking her into NPC bushes without her consent and keeping her for a while.
- [3] The appellant initially resisted the start of the trial without DNA evidence. When the charges were put to the appellant, who was legally represented, he pleaded not guilty to the charges and he through his legal representative elected to remain silent.
- [4] The State adduced evidence of only two (2) witnesses, namely; the complainant, and her mother M.M.X. The appellant did not testify and he did not call any defense witnesses. The State with the consent of the defense handed in as evidence the medical report (J88) relating to the medical examination of the complainant. The learned regional magistrate after hearing evidence convicted the appellant as charged on count 1. He acquitted the appellant on the charge of kidnapping finding that it constituted an impermissible duplication of charges with count 1. The court found no substantial and compelling circumstances for the court to impose a sentence less than the prescribed minimum sentenced and imposed on the appellant the sentence of life imprisonment.
- [5] The complainant testified as follows. On 5 September 2018, she was in the village of N[...] where she resided. She at about 19h00 left her place of residence and she proceeded to visit her then boyfriend. She met with her boyfriend and they stood on the side of the road chatting. A young male person dark in complexion approached them. He shined a cellphone flashlight onto their faces. He then said the complainant was his girlfriend. He instructed the complainant's boyfriend to go away. The complainant's boyfriend walked away. The complainant told the unknown person that she did not know him and she was not his

girlfriend. The person insisted that the complainant was his girlfriend. He demanded that the complainant must go with him. The complainant refused. He grabbed the complainant around her neck and the shoulder area. He grabbed her with her jacket and he pulled

her towards a forest. He assaulted her by slapping her on her face. He took her deep into the forest. He instructed her to sit down. He pushed on to the ground. She fell onto her back. He sat down next to her. He instructed her to take off the jacket she was wearing. She refused and he slapped her twice on her face. He instructed to take off the pants she was wearing. She refused and he started strangling her until she coughed and started bleeding from her mouth and nose. She took off her pants. He removed her panty. He lowered his pants. She asked him to use a condom. He took a condom out of his pants' pocket and he put it on. He had sexual intercourse with her. She experienced pain in her private part. He finished and he sat next to her. He then said they must have sexual intercourse again. She told him that she did not want to have sexual intercourse with him. He proceeded to have sexual intercourse with her without a condom until he ejaculated. He deposited his sperms on her belly. He finished and he moved off her. He said he was apologetic for what he had done. The complainant, due to fear, said she was forgiving him. He said if she

ever report what happened he would kill her and burn down her family home. She told him that she would report to her uncle who was a police officer at l[...]. He said he was not afraid of him. He accompanied her out of the forest. He wanted to accompany her to her home. He asked her to point to him her home. She pointed to him a wrong house. He asked for her cell number and the WhatsApp number. She gave the number to him. He had seen that she was carrying a cellphone. He then went away. She proceeded to her home.

- [6] The complainant testified that after two days on a Saturday she was at her home sleeping. She was sleeping with N[...], A.1. and A.2. People knocked on the door. N[...] asked who they were. They responded that they were S[...] and X[...]. She told N[...] not to open the door. The people at the door threatened to kick down the door. N[...] opened the door. They entered the house and they sat on the sofa. X[...] said he was looking for A.3. She told X[...] that A.3. was not around. S[...] said he had come to see her. He said he wanted her to be in a love relationship with him.
- [7] She testified that the person who accosted and raped her on Wednesday 5 September 2018 introduced himself as S[...]. He introduced himself when she said she was not his girlfriend and she did not know him. He did not tell her his surname. N[...] then called her father. N[...]’s father said he would attend to them in the morning. S[...] said he did not care even if N[...] can call her father or even if N[...]’s father had a big head, he was not afraid of him. N[...] went out to call M.X. from his house behind the house in which they were. X[...] went out and he ran away. A.2. too ran away. S[...] hit the complainant with an open hand. He pushed her from the bed to the floor. He said he wanted to kill her and he asked for a knife. She told him to go and look for it in the cupboard. She got an opportunity and she escaped. M.X. and the community members arrived and looked for him but he had ran away. One of the person who arrived was M.M.X. The complainant told her that S[...] raped her on

Wednesday. M.M.X. stayed with them until it was in the morning. S[...]’s mother came to her and she said she was apologizing to her for what her son had done. N[...]’s father arrived and he advised her to report the matter

to the police. X[...] told her that S[...] was Amos Gambushe.

- [8] The complainant testified under cross-examination as follows. No other people came to where on the road she was standing with her boyfriend. There were houses nearby. Her boyfriend ran away. The unknown person chased him away. Her boyfriend saw that she was in danger but he did not seek help for her. She never saw him after that night. It was dark where the unknown person accosted her. She did not know that person and she was not able to identify him or his clothing since it was dark. She after the rape went to her home. She did not report to any person that he raped her. She only told M.M.X. on Saturday morning. She said she was not mistaken that the appellant is the person who raped because when he came with X[...] he said he was S[...] and he said that he wanted her to be his girlfriend, the same thing said by the person who raped her. She said S[...] said 'even on Wednesday I told you that I wanted you to be my girlfriend'. When told that the appellant denied that he was the person who accosted and raped her on Wednesday, she said it was he. She agreed that the appellant went to her house with X[...] for

X[...] to see his girlfriend A.3. She said when the appellant came to the house he had been drinking and he caused trouble. She said the appellant assaulted her and that is when N[...] left and went to call the neighbors. The complainant said the appellant's mother told her that the appellant reported to her that they had caused chaos in the complainant's house and she came to apologize for that. She also agreed that when her mother came to apologize, she came with the appellant. She said the appellant arrived after she had told his mother what he did. She said X[...] showed the appellant her house. She said when the appellant came to her house with X[...] he ought to have seen that she was the person he raped on Wednesday because he had shined the flashlight onto her face. She said it is unlikely that her assailant on Wednesday would say he is S[...], assault her and the appellant on Saturday say, and do the same, if it was not the same person. She said those are her only reasons that it was the same person on both occasions. She said she did not say that the other reason was because the appellant said on Saturday that 'he said on Wednesday he wanted her to his girlfriend' because she thought the court wanted a different reason. She said she did not report the rape before Saturday because she did not know the person who raped her, she did not know where he came from, where he stayed and she had not identified him.

- [9] M.M.X testified as follows. She knew both the appellant and the complainant. The appellant was the child of the area. On 7 September 2018, she heard a quarrel and children crying. N[...] then knocked on her door. She told her that X[...] and the appellant were in their house. She went to the house of N[...]. They found that X[...] and the appellant had ran away. She sat with the children until their father arrived in the morning. The complainant told her that Phumlani raped her on Wednesday. She told her that he raped her when they met at a tavern at k[...]. She told her whilst she was with Gago K[...]. She said she was with S.S, S.S. would be

known to Phumlani. He is S.S. The complainant said she was walking with S.S. and Phumlani hit her with an open hand. She said whilst she was with Gogo K[...] the appellant's mother apologized and she said the appellant did what he did due to alcohol. She said she was apologizing that the appellant and X[...] went to the complainant's place at night. The appellant also arrived and he said he was apologizing it was due to alcohol for them to go to the complainant's place. She heard the appellant apologizing to the complainant for the commotion they caused and the complainant did not say anything.

- [10] The State closed its case. The appellant applied for a discharge in terms of s174 of the Criminal Procedure Act No. 51 of 1977. The regional magistrate refused the application for a discharge. The appellant closed the defence case.
- [11] The learned regional magistrate stated that the onus was on the State to prove the guilt of an accused. The evidence of the complainant was that of a single witness to be approached with caution. However, so reasoned the court, the cautionary rule was not something special, it is not there to absent common sense. The court stated that it was very impressed with the way the complainant testified. She came forth as a person who did not deliberately lie to make her case stronger. The court found that when the appellant said: 'I am repeating what I said to you on 5 September' the only inference is that he was the person with the complainant on 5 September 2018, and that when the appellant elected not to testify that *prima facie* evidence catapulted into evidence beyond reasonable doubt.
- [12] The learned magistrate is not correct in saying that it was not denied that the appellant on Saturday said to the complainant: 'I am repeating what I said to you on 5 Wednesday' or words to that effect. The State was aware before it closed its case that the defence was denying making the said statement. Nevertheless, the State chose not to call any of the other persons who were with the complainant and the appellant in the room when the said statement was allegedly said. The complainant in her evidence in chief did not say that the appellant said the said statement. The complainant said the only reasons she concluded that the appellant was the person who raped her on Wednesday was because he said on Saturday he was S[...] and he assaulted her. The same things said and done by the person who raped her on Saturday. Further, the complainant in the presence of the appellant's mother and Ms. M.M.X. did not accuse the appellant of raping her on Wednesday (5 September) and demand an apology. The complainant also did not tell Ms. M.M.X. that the appellant admitted to her that he raped her on 5 September.
- [13] In my view, the evidence that the appellant admitted on Saturday to the complainant that he raped her on Wednesday is very poor. It is so poor that the appellant's decision not to testify was fully justified. It did not establish a *prima facie* case calling for an answer. The regional magistrate correctly appreciated the fact that on Saturday the appellant said he was S[...] and that he said he wanted the complainant to have a love relationship with did not implicate the appellant to the incident on 5 September 2018.

[14] The State bears the onus to prove the guilt of the appellant beyond reasonable doubt. Furthermore, the accused's version cannot be rejected solely on the basis that it is improbable, but once the trial court has found on credible evidence that the accused's version is false beyond reasonable doubt (S v V 2000(1) SACR 453 (SCA) at 4558).

[15] It was only the complainant that testified that the appellant said 'he was with the complainant on Wednesday 5 September'. The complainant's evidence as evidence of a single witness was required to be clear and satisfactory in all material respect. In S v Dyira 2010 (1) SACR 78 (E) at para 6 the court held: 'In our law it is possible for an accused person to be convicted on the single evidence of a competent witness (section 208 of the Criminal Procedure Act 51 of 1977). The requirement in such a case is, as always, proof of guilt beyond reasonable doubt, and to assist the courts in determining

whether the onus is discharged, they have developed a rule of practice that requires the evidence of a single witness to be approached with special caution (Rex v Mokoena 1956 (3) SA 81 (AD) at 85-86). This means that the courts must be alive to the danger of relying on the evidence of only one witness because it

cannot be checked against other evidence'.

[16] The exercise of caution entails appreciating the danger of relying for a conviction on the evidence, approaching the evidence with caution by closely scrutinizing the evidence to take note of its unsatisfactory features and seeking safeguards that the evidence can safely be relied upon. See S v French-Beytagh 1972 (3) SA 430 (A) at 446A. In S v Sauls 1981 4 All SA 182 (a) it was held that the court will not rely on such evidence where the witness has made a previous inconsistent statement; where the witness has not had a sufficient opportunity for observation and where there are material contradictions in the evidence of the witness.

[17] In my view, there are unsatisfactory features in the evidence of the complainant, as pointed out above.

[18] In S v Francis 1991 (1) SACR 198 (A) at p204 it was reiterated that the powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection, the trial court's conclusion, including its acceptance of a witness evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness's evidence. However, a court of appeal would be at large to disregard the trial court's findings where the record reveals material misdirection of fact. In the absence of such misdirection, the appeal court will only reverse the trial court's conclusion where it is convinced that it is wrong. In that case, the appeal court would be at large to disregard the findings of fact, even though based on credibility and come to its own conclusion in the matter. See R v Dhlumayo and another 1948 (2) SA 677 (A) at 706.

[19] The learned regional magistrate, in my view, failed to approach the evidence of the complainant with the necessary caution. The evidence of complainant approached with the necessary caution exhibits some material unsatisfactory features. It falls short in proving the guilt of the appellant beyond reasonable doubt.

[20] I propose the following order:

Mngadi, J

I agree

Bezuidenhout, J

APPEARANCES

Case Number: AR 38/2020

For the appellant: Mr. X. Sindane

Instructed by: Legal

Aid SA

PIETERMARITZBURG

For the respondent: Ms. K. Essack

Instructed by: Deputy

Director Public Prosecutions

With the consent of the parties, disposed of without oral arguments

Judgment

delivered on

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