

SOUTH AFRICA / JUDGMENT

Gqola v S (CA&R 58/2010) [2010] ZAECGHC 77 (4 August 2010)

[2010] ZAECGHC 77

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Smith, Dawood

CASE / FILE NUMBER

CA&R 58/2010

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SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION JUDGMENT

PARTIES:

LUXOLO GQOLA
v
THE
STATE
Case
Number: CA & R 58/2010
High
Court: Eastern Cape – GRAHAMSTOWN
Date
Heard: 4 AUGUST 2010
Date
Delivered: 4 AUGUST 2010

JUDGE(S):

SMITH J
LEGAL
REPRESENTATIVES –

Appearances:

for
the APPELLANT (s): Adv Geldenhuys
for
the Respondent(s): Adv Pienaar
Instructing

attorneys:

Applicant(s):

LEGAL AID SOUTH AFRICA, GRAHAMSTOWN

Respondent(s): DPP – GRAHAMSTOWN
CASE
INFORMATION –
Nature

of proceedings: Key

Words: IN
THE HIGH COURT OF SOUTH AFRICA
EASTERN
CAPE DIVISION, GRAHAMSTOWN
CASE NO: CA&R 58/2010
Date Heard: 4/8/2010
Date Delivered: 4/8/2010
In

the matter between: LUXOLO
GQOLAAPPELLANT
Versus
THE
STATE
.....RESPONDENT

JUDGMENT

SMITH J:

- [1] The appellant in this matter was convicted of housebreaking with intent to rape and Rape and was sentenced to 10 years' imprisonment. The appellant was granted leave to appeal against conviction only.
- [2] The complainant, Nokuzola Peter, testified that on 4 December 2004 in the early hours of the morning at about 4 o'clock she was asleep when she was suddenly awoken by somebody trampling all over her. The person was wearing shoes. She thought initially that it was her boyfriend and baby's father who had gone to a party the previous night. This person however kicked her and started to strangle her. He pressed her down on the bed and started to take her clothes off. At the time she was wearing a skirt and a panty. She struggled and tried to push him off but he was too strong for her. He then raped her.
- [3] Initially he had covered his face with a t-shirt and it was not possible for her to identify him. Her seven month-old baby was in bed with her and had fallen from the bed as a result of the struggle. At some stage her boyfriend, Mandla, entered the bedroom and she told him that she was being raped. The appellant then got up and walked slowly out of the bedroom.
- [4] It had been obvious to her that the appellant must have gained entrance through a window. She noticed that one of the bedroom windows was broken and that the burglar bar had been bent to allow entry into the room. He then grabbed hold of the appellant and she had taken from the kitchen.

- [5] At that stage she had already identified the appellant whom she knows well. She testified that he grew up in front of her and that he lives a street away from her.
- [6] She sustained various injuries during the incident in particular bruising on her right tempo, abrasions on the neck as a result of the strangling and a cut on a finger sustained when she hit the appellant with the cup. She testified that she had locked the door earlier that night when she went to bed.
- [7] Mandla Mpongoshe testified that on the morning of 5 December 2005 he arrived at his house being from a party at his sister's house. He entered the house and knocked on the bedroom door and he could hear his girlfriend shouting inside. When he pushed open the bedroom door he saw that the complainant was with the appellant. The appellant was naked on his upper body and was busy putting his pants on. The struggle according to him occurred on the bed and he had noticed that the child was lying on the floor. He tried to apprehend the appellant in the dining room but the latter broke free and another struggle between them ensued in the dining

room. The appellant however managed to free himself and ran away. He testified that the front door was unlocked at the time when he entered the house that morning. Mandla also testified that the appellant must have gained entry through the bedroom window because

the glass was broken and burglar bar had been bent.

- [8] The complainant's daughter Asandiswa Peter testified that she knows the appellant and that he lives a street away from her family. During 2004 she did have a boyfriend by the name of Mabhuti. She never had any relationship with the appellant and the appellant had never visited her house before. The state also called Neliswa Tishwa who is a close friend of Asandiswa and to confirm that as far as she was aware Asandiswa did not have any relationship with the appellant. The appellant testified on his own behalf and essentially confirmed the explanation that he gave at pleading stage. He stated that at about 3 o'clock on 5 December 2004 he was on his way from a tavern when he decided to go and visit his girlfriend who is the daughter of the complainant.

Before he could enter the gate of the complainant's house however he saw the complainant standing in the doorway. He asked the complainant where her daughter was and she invited him to go inside the house. He noticed that she was naked on the upper body and was wearing a red panty. When he got inside she took her nighty and put that on. The complainant then guided him to a room where she started to kiss him then she took off her clothes and they had sexual intercourse. He testified that she was the one who initiated the sex and that he had consented by implication. He fell asleep after having intercourse with her and about 30 to 40 minutes later she woke him told him that her boyfriend is coming.

- [9] He then heard the complainant saying to her boyfriend that he had raped her. He left the bedroom wearing his clothes but forgot to put on the t-shirt because he panicked when he heard that the complainant was accusing him of having raped her. The complainant's

boyfriend then grabbed hold of him and the complainant hit him on his head with a cup whilst he was still busy talking to the boyfriend. The defence also called one Siyabonga Gqodi who testified that he knew both the accused and the complainant's daughter Asandiswa. He was aware of a relationship between them and that he had known about it since September 2004.

- [10] He testified that on the morning of 5 December 2004 the appellant had left him at the tavern and told him that he was going to visit his girlfriend.
- [11] In order to determine whether or not the state had successfully proven the guilt of the appellant beyond a reasonable doubt the court must consider the evidence in its totality and can only reject the appellant's version if it is not only improbable but also that it is false. From my summary of the evidence it must have been clear that there are some certain inherent improbabilities in the appellant's version. First of all in my view the magistrate correctly found that it was highly improbable that the complainant would have been standing outside in a door at 3 o'clock in the morning half naked and ready to invite the appellant in to come and have sex with her. The complainant testified that the appellant was a child who had grown up in front of her.
- [12] Secondly the appellant's version that he had decided, after having left the tavern, and in the early hours of the morning to go and visit his girlfriend is also highly improbable. In my view the evidence had established beyond a reasonable doubt that the appellant had not been to the complainant's house on a previous occasion. That he would have done so in the early hours of the morning not even knowing whether or not the complainant was home, is in my view improbable.
- [13] The evidence had also established that the complainant's boyfriend Mandla had gone to a party and would have returned at any time. The appellant's version that the complainant had invited him into the house and into her bedroom to have sexual intercourse regardless of that possibility is simply far fetched.
- [14] The complainant was also sharing a bed on that night with a seven month-old baby and she had testified that, on her version, when she had struggled with the appellant when he was raping her, the baby fell from the bed. It is improbable that she would have sexual intercourse with somebody that she knew by sight at 3 am in the morning. Mr Geldenhuis, who appeared on behalf of the appellant, urged the court to find that the appellant's version was reasonably probably true. He submitted first of all that it was quite probable that the complainant having been caught in the act of having sexual intercourse with the appellant, by her boyfriend Mandla, could have fabricated the version that she had been raped. He submitted further that the appellant's demeanor and behavior after Mandla's arrival has described that the appellant is inconsistent with the attitude of somebody who had just been caught in the act of rape. I do not agree with these submissions. The complainant's actions in my view were consistent with those of a person who had just been assaulted. In addition the complainant's version is borne out by the medical evidence and her own evidence of

injuries that she had sustained which was consistent with the attack which she had described. Her boyfriend's reaction was also not consistent with that of a man who has just caught her girlfriend in the act of making love to another man.

- [15] The appellant's version to the effect that he had a relationship with the complainant's daughter Asandiswa, is also in my view palpably false. The magistrate was obviously impressed with both Asandiswa and Neliswa Tishwa. The evidence of the appellant and that of his witness appear on the other hand to be highly contrived and improbable. Regarding the manner in which the appellant had entered the complaint's house, both the appellant and Mandla corroborated each other regarding the fact that a bedroom window had been broken and the burglar bar had been bent. There is some contradiction between the complainant and Mandla regarding the issue of whether or not the front doors had been left locked. The complainant was adamant that the door had been locked from the inside while Mandla testified that when he entered the house on the early hours of the morning the door was open. Be that as it may, if the complainant's version regarding the rape is accepted, it is highly unlikely and improbable that the appellant would have entered the house through the front door.
- [16] In the result I am of the view that the magistrate correctly rejected the appellant's version as being improbable and not reasonably possibly true. I would therefore dismiss the appeal.

J.E SMITH

JUDGE OF THE HIGH COURT

I concur.

F. DAWOOD

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Prepared on 9 October 2026 · Esheria