

SOUTH AFRICA / JUDGMENT

J.S.C v S (CA&R312/16) [2017] ZAECHGC 25 (9 March 2017)

[2017] ZAECHGC 25

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S M Mbenenge, E Revelas

CASE / FILE NUMBER

CA&R312/16

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy

IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CA&R

312/16

In

the matter between:

J.
S. C.
Appellant
and
THE
STATE
Respondent

JUDGMENT

MBENENGE J:

- [1] The appellant and N. A. C. (the complainant) had been married to one another, but got divorced during or about 2010. Approximately 3 years thereafter, on 15 July 2013, the appellant, in violation of a protection order, stealthily made his way into the premises of M. S. (M.), the complainant's boyfriend with whom she had spent the previous night. The events that subsequently occurred, about which more will be said later in this judgment, resulted in the appellant being charged with rape before the Regional Court, Aliwal North, the allegation having been that on or about 15 July 2013 and at or near Block [...], D., Aliwal North, the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant by having sexual intercourse with the complainant without her consent.[1]
- [2] Consequent upon a plea of not guilty having been tendered and the appellant's legal representative indicating that the basis of the appellant's defence would not, "at [that] stage", be divulged, the trial ran fully, culminating in the appellant being eventually found guilty as charged and sentenced to undergo life imprisonment.
- [3] The instant appeal is against both the conviction and the resulting sentence.[2]
- [4] The complainant testified that during the morning of 15 July 2013, whilst watching television at M.'s place and unsuspecting, she beheld a shadowy figure at the entrance of the house. Upon looking closer she observed that the appellant, her ex-husband, was entering the house. She was still in a state of shock and frightened, when the appellant said "this is where you enjoy yourself at your new house". She did not reply to this, and merely stood up. The appellant instructed her to sit down whilst he sat on M.'s bed. She had hitherto been eating on a plate and used a black steak knife to cut meat which had been part of her meal. She put aside the plate and the knife, and gave attention to her uninvited guest, the appellant. The appellant took possession of the knife and thereupon instructed her to lock the premises and go with him. She required to know what the intended destination was and what the appellant was up to. The appellant's response was "if you scream I'm going to put this knife in you". The complainant said the threat of being stabbed coupled with having experienced the appellant kill her former boyfriend motivated by jealousy resulted in her submitting to the appellant's instructions.
- [5] After the appellant had armed himself with the knife and had looked around to check if neighbours were not seeing them, they (the appellant and the complainant) left M.'s premises. The appellant had initially intimated that they should proceed to a spot located along the banks of the Orange River, but that course was changed at the instance of the appellant. The first point they got to was a spaza shop. There were people moving in and out of the shop. She resorted to eye gestures with a view to drawing the attention of the people at the shop to her plight, to no avail. She was also afraid that if she told any person around

there of her predicament they might get hurt as happened to her former boyfriend whom the appellant had stabbed to death.

- [6] They (the appellant and the complainant) left the shop and proceeded to the banks of the Orange River where the appellant started making unsolicited intimate overtures including kissing her and persuaded her to part with M.. She kissed back fearing that if she were to be dismissive the appellant might be agitated or angry, and end up harming her. At some point after they had been by the river for almost the whole day, her cellphone rang and it turned out that M. was calling. The appellant instructed her to respond to the call and inform M. that she was on her way back to his (M.'s) place. She did as instructed. It was around 19:00 when they eventually left the banks of the river and visited somebody else who was said to be owing the appellant some money. Nothing became of that visitation because the alleged debtor (M.) turned out to have been drunk. The complainant said she did not tell M. of her predicament even at some point when the appellant had left the two (the complainant and M.) and gone to a shop, as M. had been intoxicated. She also did not escape at that point fearing that the appellant might easily catch up with and apprehend her. The appellant had also taken possession of her cellphone. He separated the cellphone battery from the cellphone and put the two items in his pocket.
- [7] After those visitations they eventually reached the appellant's place, at Block C. There the appellant instructed her to lie on the bed, get into blankets and undress herself. Her protestations and endeavours to push the appellant off her, proved futile. The appellant became agitated and remarked that "you [are] getting better men [than] me". They had sex, to which she did not consent. She spent the night at the appellant's place. Throughout the ordeal, the appellant put the knife next to himself. In the morning, at the instance of the appellant, they had another bout of sex, amidst protestations from her all of which were unavailing.
- [8] There was a stage during the night when she and the appellant accompanied T., the appellant's cousin who had been suffering

from stomach ache, to hospital. The complainant said she felt unsafe to alert the hospital staff of her plight, afraid that the appellant might harm her. Throughout her interaction with the appellant she felt subjugated, because the appellant always had the knife in his possession; he was a constant source of threat to her.

- [9] In the late afternoon (of 16 July 2013) the police knocked at the door. She pleaded with the appellant to open the door and when he eventually did the police entered the house. She had been raped and even showed the police the knife with which the appellant had threatened her. The police seized the knife, which was eventually exhibited in court.

- [10] Under cross-examination, apart from suggestions made that if she had not been a willing party, she could and should have escaped from the appellant. The upshot of the version of the appellant put to the complainant, which she denied, was that the appellant had sex with her only in the morning of 16 July 2013, with her consent.
- [11] Constable Nothole testified that she attended upon the appellant's place of residence after M. had reported her as having gone missing. She had been aware of the existence of a protection order that had been issued in favour of the complainant against the appellant. When she got there she knocked on the door, to no avail. She thought there was no one inside the house and kept returning there several times to check whether the house had been occupied. The door was eventually opened, after she had threatened to kick the door open, having been suspicious that there was somebody inside the house. She saw the complainant standing behind the appellant, visibly frightened. When asked what had happened the complainant reported how the appellant had "kidnapped" her from M.'s place after surreptitiously gaining entrance there, forced her out of that place at knife point, and ultimately raped her.
- [12] The appellant testified in pursuit of his defence to the charge. He said when he left his place in the morning (of the 15 July 2013) he was bent on meeting the complainant and conversing with her concerning "issues about [their] house". He clandestinely gained entrance into the house where the complainant had been, hiding himself from the sight of neighbours. Whilst the complainant was busy tidying up the premises he entered the house and hid himself under a table. The complainant got back to the house and went into the bedroom. He followed her to the bedroom. She was visibly shocked as she did not expect him. He invited her to sit down as he wanted to speak to her. The complainant requested him to accompany her to the shop where she wanted to buy grandpa tablets and some tobacco. That did take place.
- [13] After leaving the shop the appellant proposed that they go to a secluded spot, away from disturbances. They walked until they got to the banks of the Orange River where they "chatted about issues...involving [their] house". He had been bent on proposing that they resume their love relationship and stay together as before. They engaged in some intimacy (they "kissed"). They left the spot (by the river) and visited two other homesteads. He also testified about the visitation to the hospital during which he said the complainant had interacted freely with other people. He said he had sex with the complainant in the ensuing morning (of 16 July 2013). The complainant had consented to that. He claimed to have no knowledge of the knife the police found in his homestead. He said he had seen the knife there and had used it, presuming that her children had brought it there on a previous occasion. He denied having taken the knife at M.'s place.
- [14] The court a quo was satisfied with the testimony of the complainant and that of Constable Nothole in its entirety, and found that the version of the appellant was not reasonably and possibly true.

- [15] The appeal against conviction is predicated primarily on the contention that the court a quo ought to have found that the version of the appellant was reasonably possibly true and that, therefore, the State had not proved its case beyond reasonable doubt. It is further contended that the appellant did not contradict himself and gave evidence sequentially and logically, in a manner that lacked improbabilities.
- [16] It is indeed so that had the court a quo been of the view that the version of the appellant was not improbable and was reasonably and possibly true it would have had to acquit the appellant on the basis that the State would, in that event, not have proved its case beyond a reasonable doubt.[3] There is, according to the relevant notice of appeal by which the appellant should stand or fall, no other basis for assailing the judgment of the court a quo. The appellant does not point to any shortcomings on the part of the testimony of the State witnesses. This limits the appeal to a consideration of whether the appellant's version can be said to have been reasonably and possibly true. That task must of course be undertaken upon a consideration of all the evidence presented before the court a quo.[4]
- [17] I am of the view that a reading of the judgment a quo justified the conclusion reached that the evidence given by the appellant could not reasonably possibly be true.

The appellant had prior to the date in question stabbed the complainant's former boyfriend to death having been jealous of the relationship the complainant had with the said boyfriend. Heedless of the protection order, the appellant clandestinely gained entrance into M.'s house where the complainant had been. According to the complainant the appellant armed himself with a knife. The knife was in the appellant's possession throughout his interaction with the complainant and was picked up at the scene of the alleged rape by police after the complainant had pointed to it as having been the knife with which she was threatened.

- [18] The version of the appellant that the knife had always been at his place was not put to the State witnesses and emerged for the first time when the appellant testified. I agree with Mr Els, counsel for the respondent, that if the appellant had been on cordial terms with the complainant as he would have the court believe, it was unnecessary for him to arm himself with M.'s steak knife and to keep it in his possession all the while. There would also have been no need for the appellant to remove the battery from the complainant's cellphone and keep the phone in his possession if he had been on a good footing with the complainant.
- [19] Why the appellant would not open the door as soon as the police knocked thereon, and waited until the police threatened to kick the door open, is a further factor that renders the appellant's version not reasonably and possibly true.
- [20] The complainant was clearly abducted from her boyfriend's place, subjugated by the appellant at knife point, into being with, and eventually raped by, the appellant. The version of the appellant to the contrary was correctly rejected, with the result that the court a quo was justified in coming to the conclusion it did and convicting the appellant.

- [21] What of the appeal against the sentence? The legislature has ordained that where the victim has been raped more than once in the absence of substantial and compelling circumstances a sentence of life imprisonment must prevail.
- [22] I consider that rape, in end by itself, is a serious offence. In *S v Abrahams*[5] the observation was made, however, that “some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases....of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust”. [6]
- [23] In this matter, much as there was a threat of the use of a knife, the complainant received no injuries. There was no evidence led concerning the extent of the psychological impact the rapes had on the complainant. Even though she had submitted totally to the appellant’s will, their visits to the hospital, to his friends and to the shop (for her convenience), all being normal activities, suggest that the complainant did not suffer constant terror and fear, as many other victims often do. In my view, the magistrate ought to have regarded these factors as compelling and substantial. That, coupled with the personal circumstances of the appellant,[7] in my view, constitutes substantial and compelling circumstances warranting the imposition of a lesser sentence.
- [24] I have not lost sight of the fact that the appellant has a previous conviction of murder for which he was sentenced to undergo 15 years imprisonment. That makes the appellant, in this instance, to be deserving of a long term imprisonment.
- [25] In the result, the appeal against conviction is dismissed, and the sentence of life imprisonment imposed by the court a quo is set aside and substituted with the following:

“The accused is sentenced to undergo a term of twenty years’ imprisonment.”

S M MBENENGE

JUDGE OF THE HIGH COURT

I agree

E REVELAS

Counsel for the Appellant

: D P Geldenhuys

Instructed by

: The Grahamstown Justice Centre

Counsel for the First Respondent : D Els

Instructed by

: The Office of the DPP

Grahamstown

Date heard

: 01 March 2017

Judgment

delivered :

09 March 2017

[1]

In contravention of section 56(1), 57, 58, 59, 60 and 61 of the Criminal Law and Sexual Offences Related Matters Amendment Act 32 of 2007, read with section 51(1) and Schedule 2 to the Criminal Law Amendment Act 105 of 1997 (by reason thereof that the complainant had been allegedly raped more than once and allegedly threatened with a knife).

[2]

In terms of section 309 B of the Criminal Procedure Act 51 of 1977.

[3]

S v Van der Meyden 1999 (1) SACR 447 (W) at 448 f-g, where Nugent J (as he then was) said: “The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable

doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see for example, R v Difford 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward

might be true. The two are inseparable, each being the logical corollary of the other.”

[3]

S v Van der Meyden 1999 (1) SACR 447 (W) at 448 f-g, where Nugent J (as he then was) said:

“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable

doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see for example, R v Difford 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward

might be true. The two are inseparable, each being the logical corollary of the other.”

[4]

See Van der Meyden (supra), where (at 448 h-i) it was held: “In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.”

[4]

See Van der Meyden (supra), where (at 448 h-i) it was held:

“In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.”

[5]

2002 (1) SACR 116 (SCA).

[6]

Para [29].

[7]

He was 44 years old at the time of being sentenced; he left school at grade 8; and he used to be employed.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2017/25.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/jsc-v-s-unknown-topic-aecghc-2017>

Prepared on 10 October 2026 · Esheria