

SOUTH AFRICA / JUDGMENT

Koboka v S (CA&R46/2016) [2017] ZAE CGHC 37 (31 March 2017)

[2017] ZAE CGHC 37

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S M Mbenenge, S Tilana-Mabece

CASE / FILE NUMBER

CA&R46/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CA&R

46/2016

In

the matter between:

SINDISILE

KOBOKA

Appellant

and

THE

STATE

Respondent

JUDGMENT

MBENENGE J:

- [1] This appeal, brought with the leave of this court, is against only the conviction of the appellant by the Regional Court, Port Elizabeth after he was found guilty of rape, for which he was sentenced to undergo fifteen years' imprisonment.
- [2] The complainant, C. Z., who had been heavily intoxicated after having been to a tavern, boarded a taxi driven by the appellant during the night in question with two other women and one S., bound for Vera's tavern which they found closed. After another tavern they went to (Kwani's tavern) also turned out to have been closed, it was mentioned that they would be transported to their respective homes. At some point, the two women alighted the taxi, leaving therein the complainant and S.. The vehicle stopped nearby a taxi rank and S. got out of the taxi and left.
- [3] According to the complainant she called for S., who did not respond. She thereupon jumped out of the taxi which was in motion and fell on the ground injuring her back and her leg. Her left eye also bore a red mark. She said the appellant then grabbed her and put her back into the taxi. The appellant slapped her and instructed her to undress herself. He drove to a spot in a place called "Africa" where he raped her in the taxi. From there, the appellant drove to his house, wherein he once again raped her. In the next morning he raped her for the third time, whereafter he left the house unlocked, hence she managed to escape.
- [4] It is at this point that the version of the complainant and that of the appellant begin to part ways. The version of the appellant supported by the testimony of a witness called by the State – S. – was that the taxi ran out of fuel and S. left to fetch money for fuel. A certain P. arrived, in the interim, and aided the appellant with fuel before S.'s return.
- [5] According to the appellant he dropped off the complainant at a tavern. He joined P. at another tavern where they enjoyed

themselves for a couple of hours before going home to sleep.

- [6] Faced with this material contradiction[1] regarding the circumstances in which S. left the scene, the court a quo reasoned:

"Well, as correctly pointed out, it is true that there are certain contradictions in the State version, especially if one compares the evidence of the complainant, with the one of S. Njiva. For instance, the complainant testified that it was S. who suggested that she should go home, as she was too drunk and took her to the taxi.

But S. disputed that. He said as he and accused were to proceed to Central, when they could not find a local tavern, because all those taverns were closed, and complainant followed them on her own.

They even wanted to turn her back, but Shirley said she could come with them.

Complainant also testified that Shirley and Sniza were delivered at their place, but S. said when their taxi ran out of petrol near the taxi rank, they decided to leave as their home was close to that vicinity of the taxi rank.

S. confirmed that the taxi ran out of petrol, but the complainant disputed that. However, though S. and complainant were friends,

and in fact S. was more close to the accused than the complainant.

Even on this particular night, they hang out together. And we must also bear in mind that S. is a close friend of the accused, like any other person, he would try to save his friend.”

[7] The reasoning of the court a quo is unconvincing. The evidence of S. ought not to have been rejected. The evidence of a state witness is not rejected

purely because it contradicts that of the complainant. There were other independent witnesses the State could and should have called, but did not, who were with S. and the complainant when the taxi is alleged to have run out of fuel. The failure to call these witnesses should be laid at the doorstep of the State as a factor pointing to failure on the part of the prosecution to prove the guilt of the appellant beyond reasonable doubt. It justifies the inference that in the prosecutor’s opinion the evidence of these witnesses might probably have given rise to further contradictions which could have reflected adversely on the credibility and reliability of the complainant.[2]

[8] Mr Els, counsel for the respondent, conceded, quite correctly in my view, that an acceptance of the version of S. (and consequently that of the appellant) that the taxi did run out of fuel has the effect that the court a quo erred in not finding that the appellant’s version was reasonably and possibly true; the State did not prove the guilt of the appellant beyond a reasonable doubt.

[9] It is trite law that a final evaluation of the evidence of a single witness can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities.[3] In this regard it is interesting to note that the complainant had to obtain the appellant’s address from S. in order to direct the police to the appellant’s residence. It is improbable that she would have been at the appellant’s place where the alleged rape is said to have occurred.

[10] In these circumstances, the appeal succeeds, with the result that the appellant’s conviction and sentence are set aside.

S M MBENENGE

JUDGE OF THE HIGH COURT

I agree

S TILANA-MABECE

ACTING JUDGE OF THE HIGH COURT

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

: 22 March 2017

Judgment

delivered :

31 March 2017

[1]

If it were to be accepted that the taxi ran out of fuel, the version of the appellant as to what occurred thereafter would prevail, whilst if it were to be accepted that the taxi did not run out of fuel and the vehicle could still be driven, the complainant's version would tie in well with that. [2]

See *S v Teixeira* 1980 (3) SA 756 (AD) at 764 A. [3]

Ibid at 761 A.

[1]

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[2]

See *S v Teixeira* 1980 (3) SA 756 (AD) at 764 A.

[3]

Ibid at 761 A.

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Prepared on 9 October 2026 · Esheria