

SOUTH AFRICA / JUDGMENT

Maimane v S (A66/2017) [2017] ZAFSHC 211 (19 October 2017)

[2017] ZAFSHC 211

COURT

Free State High Court, Bloemfontein

BEFORE

Rampai, Reinders, Hefer

CASE / FILE NUMBER

A66/2017

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,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: A66/2017

In

the matter between:

MOJALEFA

J

MAIMANE Appellant

and

THE

STATE Respondent

CORAM:

RAMPAI, J, REINDERS, J et HEFER, AJ

HEARD

ON:

18 SEPTEMBER 2017

JUDGMENT

BY: RAMPAL, J

DELIVERED ON: 19 OCTOBER 2017

[1] These were appeal proceedings. The appellant was found guilty of rape. He was subsequently sentenced to life imprisonment. He was aggrieved by the conviction as well as the sentence. He came on appeal before us with the leave of the court a quo.

[2] An incident took place at Thibela Village of Tseseng in Qwa-Qwa on Saturday 2 April 2011. It was reported to Tseseng Police

shortly afterwards. The police investigation led to the arrest of five suspects. The appellant was among them. He was the first suspect to be arrested.

[3] The suspects were criminally charged in due course. There were two charges. The first was robbery with aggravating circumstances. The second charge was rape as categorized in Part I of Schedule 2 to the Criminal Law Amendment Act 105 of 1997. According to the indictment both offences were committed at Tseseng. The complainant was Ms M. M., an adult female, 34 years of age.

The prosecution alleged that the accused contravened sec 3 Sexual Offences and Related Matters Act 32/2007.

[4] The actual trial commenced at Harrismith Circuit Court on 28 April

2015. Although the 5 accused persons were supposed to be tried together, 4 appeared before the trial judge, my sister Van Zyl J. A certain Matola Kenneth Lepola, who was supposed to stand trial as accused 2, absconded. His case was separated from the rest. The trial proceeded against his 4 co-accused. The appellant's remaining 3 co-accused Mr T.E Motaung, Mr T.N Dasheka and Mr M.M Motsoane were renumbered accused 2, accused 3 and accused 4 respectively. The appellant remained accused

1. They all pleaded not guilty to both charges.

[5] The version of the prosecution was narrated by three witnesses, namely:

Ms M. M., the complainant;

Mr T. E. N., her sister's boyfriend.

Ms M. Doreen Mbhule, sergeant;

Mr Daniel Maloka, warrant officer;

- [6] In the evening of Friday 1 April 2011 the complainant arrived at Lani's Tavern aka Rainbow Tavern. She arrived there at± 20:00. She was with her sister, Ms M. M.. She consumed Hansa beer. She left the tavern at± 02:00 on Saturday 2 April 2011. She was in the company of two couples, namely:
- M. and her boyfriend T. E. N. as well as N. M. and her boyfriend K. N. A. K..
- [7] At one stage she was walking alone some distance behind N. and K. By then M. and T. had already gone their own way in the opposite direction. A group of men surprised her, lifted her up and carried her away from the road to the veld. They then put her down, tripped her and undressed her. At first they vaginally penetrated her one by one. When they were done, they started all over again. But on that second time around they anally penetrated her one by one again.
- [8] She identified one of the rapists as Leburu. She pointed out accused 1, now the appellant, as Leburu. She knew him before the incident. During the vaginal phase of the sexual penetration, the appellant mooted out the idea that one of her breasts be severed. He was pinning one of her arms down at that moment. The appellant pretended, after raping her, that he did not recognise her before. She dismissed his cynical excuse. She told him that he was aware who she was all along.
- [9] From the crime scene the appellant escorted her home. On the way they met K. She told him what the appellant and his co-perpetrators did to her. On their arrival at her place of residence, she lent a blanket to K. to wrap himself up. guess it must have been cold.
- [10] From there she proceeded to the local police station to report the incident. She was still accompanied by K. and the appellant. On the way they passed a house where a night vigil was held. The appellant excused himself and walked in there under the pretext that he wanted to check out if someone could give him cigarette. They waited in the street for his return. They waited in vain.
- [11] Next she proceeded to T.'s place of residence. K. was then her sole companion. She told T. what happened to her. She told him that among those who raped her was Leburu, the appellant. Her sister, M., was in the bedroom during her conversation with T..
- [12] From T.'s she went straight to the police station. She had two companions. K. was still with her. Her second companion was seemingly T.'s acquaintance. She did not know him. She reported the incident. The police took her to Elizabeth Ross Hospital where she was examined.
- [13] On 4 April 2011 Sergeant M.D. Mbhule interrogated the appellant at Tseseng Police Station. She obtained a warning statement from him (see "exi c") The essence of the statement was that he admitted that he knew the complainant; that he had sexual intercourse with her and that he was with her when he met K. in the street in the early hours of the morning on Sunday 2 April 2011. Although the appellant challenged the admissibility of his warning statement his challenge was unsuccessful. Having heard evidence during the course of a

trial-within-a-trial, the trial judge ruled in favour of the respondent and allowed "exi d" as admissible evidence it o Sec 219(a) Act No 51/1977.

[14] The police also obtained a witness statement from T. Emmanuel Nyeule - "exi e".

He aligned himself with the testimony of the complainant. He confirmed that he was at Lani's Tavern on Saturday 1 April 2011; that his companion was K. N. aka K., since deceased; that his girlfriend, M. M. and her sister, M. M. joined them later; that M. and S. were also with them at the tavern and that they were all drinking alcoholic beverages.

[15] The group left the tavern together. On the way he and M. went their own way. The complainant, K. and others went in a different

direction. Later in the early hours of the morning the complainant and K. arrived at his place. Asked what the complainant told him, the witness answered:

"M. told me that Leburu, Matala and also their friends raped her."

Asked what K. said to him, the witness answered:

"K. said the same thing what (sic) M. told me."

[16] The witness noticed that the complainant's lips were swollen; that she was bleeding from her mouth; that she was wearing a pair of pants inside out; that she was crying and that she was so emotional that she could not properly explain to him what had happened to her - T's witness statement was handed up and marked "exi e".

[17] Sergeant D Maloka's testimony was that he was the investigating officer; that on 11 April 2011 he interviewed K. N., nicknamed K.; that he took a statement from him and that K. had died in the meantime.

[18] The important aspects of K.'s statement were as follows:

- He was walking with M. and M., the complainant at one stage;
- The complainant turned back to look for her sister, M.;
- He and M. waited for the complainant to rejoin them in the street;
- Because she was gone for some time, he decided to go look for her;
- He heard the complainant crying in the vicinity where he saw a group of males;
- The members of the group were assaulting and raping the complainant;
- He turned away and rushed back to his girlfriend but she was no longer there;
- On his return from M.'s place he met the complainant awaking with Leburu the appellant;
- She told him that the appellant was one of those who raped her
- However Leburu denied the complainant's allegation;

- Because Leburu said he knew the complainant's rapists, K. called upon him to accompany them to the Tseseng Police Station to report the incident;
- On the way Leburu deviated to a nearby house where a night vigil was held saying that he wanted cigarette;
- Leburu never returned to them and they proceeded further to the police station without him.

[19] K.'s statement was attacked on the ground that, since he did not testify as the original narrator, the statement constituted

inadmissible hearsay. The trial judge considered the argument for the inclusion of the contested statement as well as the argument for its exclusion. In terms of sec 3(1)(c) Act No 45/1988, the court a quo ruled in favour of the prosecution. K.'s statement was accordingly allowed, handed up and labelled as "exi f". That then completed the version of the prosecution against the appellant.

[20] The version of the defence as regards accuse 3, was given by one witness, namely: Mojalefa Jeremiah Maimane, in other words the appellant himself. He testified that he was asleep at the Lani's Tavern at the time of the alleged incident. Consequently he denied the allegation that he was involved. He dismissed as false the testimonies of the complainant, Ms M. Mokoena, Sergeant M.D. Mbhule and the extra-curial statement by the late K. N., alias K., "exi f". He also denied ever making the warning statement "exi d". In a nutshell, he raised the defence of an alibi.

[21] Having heard the evidence, the court a quo convicted the appellant on 20 August 2015 in connection with the charge of rape. His 3 co-accused were acquitted. The ultimate sentence of life imprisonment was then imposed on him in terms of sec 51(1) Act No 105/1997 as amended.

[22] The appellant was aggrieved by the conviction and the sentence. He came to us on appeal with the leave of the court a quo granted on 12 December 2016 to appeal against the conviction and the sentence.

[23] The grounds of the appellants' appeal as regards conviction are:

"1 The Court a quo erred by accepting the evidence of the State witnesses.

2. The Court a quo erred by not accepting the evidence of Appellant as reasonably and possibly true.
3. The Court a quo erred by finding that the Respondent proved its case beyond reasonable doubt."

[24] It was the contention of the appellant that his version was reasonably true. Consequently, it was his case that the court a quo erred in finding that his alibi defence was not reasonably true. Therefore, he implored us to reverse the finding of the court a quo, to accept his evidence and to uphold his appeal.

[25] As regards reliability, the court a quo was mindful of the following unfavourable aspects of the complaint's identification evidence against the appellant as one of her rapists:

that the incident took place at night; that the first scene where she was first attacked as well as the second scene where was sexually

violated were in a dark street; that the moonlight did not adequately illuminate the vicinity; that she made her observation in very stressful prevailing circumstances of violent acts of assault, as well as threats of inflicting serious bodily harm on her; that she was confronted by a group of several males and that she was intoxicated.

All these aspects had an unfavourable effect on her evidence of identification. They diminished the reliability thereof.

[26] On the other hand, the court a quo was also mindful of certain favourable aspects of the complainants' evidence of identification. She knew the appellant very well; she knew him by the name Leburu. In turn the appellant knew her fairly well. He had known her for seven years before the incident. They lived in the same village. During the first episode of her multiple acts of rape by different members of the gang, each of her arms was under a firm grip by a member of the group. They nailed her down to facilitate her rape. At that close proximity she recognised one of the two facilitators as Leburu. They spoke to each other after the series of acts of rape. He recognised her and wanted her to believe he did not recognise her before the gang raped her. He then escorted her home afterwards. He walked with

her all the way from the scene of the crime to the night vigil house. There, on the way to the police station, he vanished.

[27] All those favourable aspects of her evidence of identification significantly enhanced the reliability of her observation. The

court a quo found that the favourable aspects eclipsed the unfavourable aspects. The unfavourable aspects of the complainants' evidence notwithstanding, the court a quo concluded that she was a reliable identifying witness. On the facts, the finding was justified. In my view, of all the favourable aspects of her identificative evidence, her prior knowledge of the appellant, the proximity of the observation and the ample opportunity she had to observe him - strongly bolstered the reliability of her evidence.

[28] As regards credibility, the version of the appellant was not consistent. His initial version was that he was never on the crime

scene at all. He admitted that he was also at Lani's Tavern and that he saw the complainant there. But he then alleged that he got a black-out at the tavern as a result of heavy drinking; that the proprietor of the tavern woke him up and that he was the only patron in the tavern by then. He later changed his initial version. He conceded that he might have been on the scene of the crime. However, he denied raping her. Instead he wanted the court a quo to believe that he rescued her from the group of unknown rapists. His attempt to improvise his evidence did not impress the trial judge. He did so to his detriment. It became clear and obvious that he was a very untruthful witness.

[29] The court a quo believed the version of the complainant. The trial judge favourably evaluated her as follows:

"In general the complainant impressed me as a good witness. She narrated her evidence well and in an orderly and meaningful manner. She indicated when she was uncertain about a specific aspect and I never got the impression that she was trying to fabricate evidence in order to make her case stronger."

[30] The trial judge was alert to the dangers of incorrect identification. *S v Mthethwa* 1972 (3) SA 766 (AD) at 768A. The complainant spontaneously accused the appellant that he, knowing who she was, participated in her multiple acts of rape by his group. She reported to K., at the first available opportunity that the appellant and his group assaulted and raped her. In his witness statement, K. confirmed her version. It is significant to appreciate that the appellant was present when she openly implicated him to K.

[31] The appellant denied the complainants' allegation. However, in his exculpatory statement, he mentioned six names of the persons whom he said had raped the complainant. For that reason, K. invited him to accompany them to the police station to give the names of the culprits to the police. At first the appellant tacitly agreed to do so. But he disappeared on the way. He chickened out. His conduct was not consistent with that of an innocent man. His disappearance tended to give credence to the complainant's version that he also participated in raping her. It also weakened his exculpatory statement. He must have realized that his denial was unlikely to impress the police which was why he vanished on the way to the police station. Of course, the guilty are afraid,

- See "exid".

[32] Unlike the appellant, whose evidence vacillated from a total denial of involvement which was very remote to the truth - to a qualified admission which was closer to the truth, the complainant consistently asserted that the appellant also raped her. She repeated that accusation to T.. Absolutely no ulterior motive was shown why she would have falsely accused an innocent man.

[33] The complainant's gynaecological examination showed that she sustained injuries in her vagina and in her anus. Such medical

evidence strengthened her evidence that the appellant, like all his friends, had penally penetrated her per vagina and per anus.

[34] In his warning statement, the appellant admitted that he had sexual intercourse with the complainant. In his testimony he denied,

admitted and again denied having had sexual intercourse with her on the day in question, being 2 April 2011. Obviously, his early

admission outside court was irreconcilable with his later denials in his testimony. That the appellant was a pathetically

untruthful witness became even more evident during his post conviction evidence in mitigation.

[35] Needless to say that his extra-curial admission was completely at odds with his alibi. The court a quo was alive to the principles that no onus rested on the appellant to prove his alibi and that his alibi could only be rejected if the prosecution evidence against him as an accused was overwhelming - A Kruger: Hiemstra's Criminal Procedure page 14/32.

[36] In my view all those aspects materially corroborated the complainant's evidence. They provided strong corroborative safeguards which significantly reduced the risk of a wrong conviction. *S v Mthethwa*, supra.

[37] As regards the question of probabilities, the evidence of the complainant was not impaired by improbabilities. There was no

previous history of animosity between her and the appellant. She had no score to settle with him. It seemed improbable to me that she would, for no apparent reason, have falsely accused an innocent man by painting him - with the same brush as the guilty men.

[38] It has to be borne in mind that, if the version of the appellant is true, he was not just an innocent man. Over and above that, he claimed that he rescued her from the violent rapists, whom he named. It seemed highly improbable that a rape victim would be that ungrateful to her good Samaritan.

[39] Moreover, it was also very unlikely that an innocent man would have admitted to the police that he had sex with the rape victim unless, of course, the admission was true. An innocent man would not have been afraid to accompany a victim to a police station to tell the police, as he told K., who the actual perpetrators were. An innocent man with nothing to fear would probably not have behaved as the appellant did. He would not have vanished on the way to the police station. He would not have made a pact with guilty men to mislead the court.

[40] There is no doubt that the version of the appellant was seriously tarnished by a number of improbabilities. On the contrary, the version of the complainant was not. Consequently the probabilities and improbabilities, of the evidence as a whole, weighed heavily in favour of the complainants' version.

[41] The court a quo came to the following conclusion:

"When looking at the evidence as a whole, I conclude that in the circumstances the state's evidence against accused 1 is indeed

overwhelming. The version of accused 1 can in the circumstances not be reasonably possibly true and is rejected as false. The

complainant specifically testified that accused 1 had raped her. As already mentioned, he himself admitted having had sexual intercourse

with her. In my view the identity of accused 1, as well as his deed of rape itself, have therefore been proved beyond reasonable doubt."

[42] I am in respectful agreement. The prosecution evidence against accused 1, in other words the appellant, was indeed overwhelming.

The crucial findings relative to the three issues, to

'hit: credibility, reliability and probabilities strongly militated against the evidence or version of the appellant. Consequent I am of the firm view that such version, with all its various shades of adaptations, was correctly rejected. It was not only improbable, unreliable and incredible but it was beyond a reasonable doubt false, as the court a quo ultimately concluded.

[43] On the proven facts the following factual findings were justified:

- The complainant visited Rainbow Tavern at Thibela Village of Tseseng in Qwa-Qwa in the evening of Friday 1 April 2011 with some friends;
- She left the tavern at ± 02:00 on Saturday 2 April 2011 with her friends;
- On her way home she was ambushed, surprised and attacked by a group of approximately 7 or so men;
- She was violently assaulted, seriously threatened and gang- raped;
- During the course of the sexual incident with multiple episodes, each member of the gang raped her twice;
- She was initially vaginally penetrated by each member of the gang;
- She was subsequently turned around and anally penetrated by each member of the gang;
- The appellant was a member of the gang and also actively participated in the complainants' vaginal and anal penetration.

[44] Although the court a quo did not expressly make the findings as listed in the preceding paragraph, such findings were implicit in the acceptance of the complainant's evidence and the corresponding rejection of the appellant's.

[45] The unlawful actions of the appellant as an individual offender considered in isolation from the gang - amounted to contravention of sec 3(1) Act No 32/2007 read with Part I Schedule 2 to Act No 105/1997. He raped the complainant twice

- one act of sexual penetration through the vagina and one act of sexual penetration through the anus. Among others, the section

provides that the crime of rape is committed:

"(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;"

[46] In the circumstances, I am not persuaded that the trial judge committed any material and appealable misdirection as alleged or at all. I could find no substance in any of the appellant's grounds of appeal. In the absence of such misdirection, we are not at liberty to interfere, I would, therefore, dismiss the appeal as regards conviction. I may add that in coming to this conclusion, I was fortified by the attitude of the appellant's counsel.

[47] Now I turn to the second leg of the appeal, the sentence. The personal circumstances of the appellant were as follows:

He was born on [...] 1986. He was 35 years of age at the time he committed the offence on 2 April 201. He was 29 years of age on 21 August 2015 when he was sentenced. He passed matric, in other words, grade 12. He was an unmarried man. He had no dependent minor children. However, his father and his 5 year old niece, depended on him for subsistence. He was gainfully occupied as a bricklayer. On average he generated an income of approximately R4000 per month. To a certain extent, he was intoxicated at the time he committed the offence.

[48] In sentencing the appellant, the court a quo took into account the following as aggravating factors:

that rape is a serious crime. That he participated in the assault of the victim; that she sustained multiple injuries; that he

shamelessly continued to openly humiliate her even after the verdict; that he showed total disrespect towards the victim as a woman and for her physical integrity; that he threatened to cut off one of her breasts; that he did not care to wear a condom; that his conduct was indicative of a complete lack of remorse; that there were poor prospect of having him rehabilitated; that he was privy to an immoral pact to mislead the court; that the abuse of women by men was prevalent in our society; that the interests of society demanded meaningful protection of women from abusive men and that the incident had adverse emotional impact on the victim.

[49] In sentencing the appellant, the trial judge took into account the following as mitigating factors:

His personal profile as previously alluded to and his status as a first rape offender.

[50] The court a quo concluded that there were no substantial and compelling circumstances to justify any deviation from the prescribed

minimum sentence of life. That conclusion is one which, on appeal, I cannot hold to be wrong. In an appeal against sentence, the essence of the enquiry is not whether the sentence was right or wrong, but whether the court entrusted with the sentencing discretion exercised its discretion properly or judiciously. *S v Pillay* 1977

(4) SA 531 (A) per Trollip JA.

[51] In this instance, the appellant's grounds of appeal against sentence were unmeritorious. I am not persuaded that it can be objectively argued and submitted with conviction of conscience that the court a quo committed a misdirection so material that it vitiates its decision on sentence. It being the case, no appellate interference is warranted, in my view. Therefore, I am inclined to confirm the sentence and dismiss the appeal as regards sentence as well.

[52] Accordingly I make the following order:

52.1 The appeal fails in toto.

52.2 The conviction and the sentence are confirmed.

MH RAMPAL,J

I concur

C REINDERS, J

JJ HEFER, AJ

On behalf of appellant: Adv PW Nel

Instructed by:

Bloemfontein Justice Centre

Bloemfontein

On behalf of respondent: Adv KE Lesie-Shale

Instructed by:

Director of Public Prosecutions

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/ZAFSHC/2017/211.html>

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

Prepared on 9 October 2026 · Esheria