

SOUTH AFRICA / JUDGMENT

Makgai v S (A571/2011) [2013] ZAGPJHC 181 (22 July 2013)

[2013] ZAGPJHC 181

COURT

South Gauteng High Court, Johannesburg

BEFORE

Naidoo, Devo

CASE / FILE NUMBER

A571/2011

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IN THE HIGH COURT OF

SOUTH AFRICA

(NORTH GAUTENG HIGH

COURT, PRETORIA)

CASE NO. A571/2011

DATE: 22/07/2013

NOT REPORTABLE

In

the matter between:

LESIBA

MOSES MAKGAI

APPELLANT

and

THE

STATE

RESPONDENT

JUDGMENT

NAIDOO AJ

- (1) The appellant was charged in the Regional Court, Bela Bela as follows: Count 1 - Kidnapping
Count 2 - Contravening Section 3 of the Sexual Offences Act 32 of 2007 (Rape)
Count 3 - Contravening Section 3 of the Sexual Offences Act 32 of 2007 (Rape)
Count 4 - Assault with Intent to do Grievous Bodily Harm Count 5 - Kidnapping

The appellant was found guilty on counts 2, 4 and 5 and sentenced to ten (10) years', two (2) years' and three (3) years' imprisonment respectively on each of the three counts I have mentioned. The sentences in respect of counts 4 and 5 were ordered to run concurrently with the sentence in respect of count 2, thus imposing an effective sentence of 10 years' imprisonment on the appellant. The court a quo granted leave to appeal against the conviction only. The appellant was legally represented at the trial. Mr MG Botha appears, in this court, for the appellant and Mr MD Matjokana appears for the Respondent.

- (2) The complainant, OM, the first of the five witnesses called by the State, testified that she and the appellant had previously lived together as husband and wife after the appellant had paid lobola. They appear to have had a troubled relationship, causing her to leave him and return to the home of her mother, towards the end of 2009. Her evidence is that she had obtained a Protection Order in terms of the Domestic Violence Act against the appellant, and on 12 January 2010, she was on her way to the Bele Bela Magistrate's Court, that being the return date stipulated in the Protection Order. She was accompanied by her younger brother, S, the fifth state witness. Shortly after she left home, she encountered the appellant, who sent her brother to fetch some documentation from his house and then joined her in boarding a taxi in order to get to the court. She however, did not appear in court that day, as the appellant assaulted her and took her, against her will, to the home of his uncle in Rustenburg, after his cousin, Tshepo Makgai, had brought clothes belonging to the appellant and the complainant. These were clothes that she had left at the matrimonial

home, when she left the appellant at the end of 2009. In Rustenburg, she had tried, unsuccessfully, to gain access to a telephone in order to make contact with her family. She then pretended to be ill and the appellant and his uncle took her to the local clinic where she enlisted the assistance of the nursing staff to secure the arrest of the accused and his uncle, and to return to her mother's home. She was held in Rustenburg for three days. This incident was the subject matter of count 1.

- (3) One evening, a few weeks later (on 28 February 2010), the complainant encountered the appellant at a shop near her home. He asked to speak to her and when she refused, he assaulted her, causing her to lose consciousness. On regaining her senses, she found herself in a cave in some bushes. She was held captive in this cave by the appellant who raped her

twice during the twenty four hour period that he held her there. She also testified that she was severely assaulted by the appellant in order to make her submit to him. When she returned home the next evening, she reported to her mother what had happened to her. The appellant was thereafter arrested, and the complainant was then taken to a hospital where she was examined and treated. This incident was the subject matter of counts two to five.

- (4) Ruth Mataba Mosenekke testified that she is a nursing sister at a clinic in Rustenburg. She confirmed the complainant's evidence that the latter came to the clinic, and asked for assistance as she had been kidnapped. Her observation was that the complainant looked scared, she was shaking and crying. She confirmed that in order to detain the accused for a longer period at the clinic to allow the police to arrest him, she put a drip on the complainant, even though the later advised that she was only pretending to be ill. This witness confirmed that she called the complainant's mother, at the request of the complainant, and advised her that the complainant was safe.
- (5) Nicholas Mabonyane, who is a forensic nurse at the Bela Bela Hospital examined the complainant on 2 March 2010. He noted physical injuries on various parts of her body as well as injuries to her genital area. He concluded that there was forceful sexual penetration and that her injuries were also consistent with having been assaulted with a blunt object and a fist. He recorded his findings on the form that is commonly referred to as the "J88". I pause to note that photographs depicting the injuries of the complainant as well as the cave where she was taken by the appellant, were handed up as exhibits. These photographs were taken on 4 March 2010.
- (6) F M, the mother of the complainant corroborated the evidence of the complainant in all material respects, with regard to the two incidents I have referred to. There were some discrepancies regarding the exact time the incident at the shop (on 28 February 2010) may have occurred, as well as the time period regarding the absence of the complainant when she left home on 12 January 2012. This witness indicated that she waited for the complainant for some weeks, but from other evidence placed before the court, it is evident that the complainant had been gone for a few days. In my view these discrepancies do not render her evidence unacceptable, nor does it discredit the evidence of the complainant. The final witness for the State, Samuel Makubela also corroborated the evidence of the plaintiff as well as that of F M with regard to his role in the sequence of events.
- (7) The accused testified in his defence and called two witnesses, Paulinah Baloyi and Tshepo Makgai. His version amounted to a bare denial, in that he denied having raped the complainant and alleged that he was not in her company after his encounter with her at the shop on 28 February 2010. He said that he and Paulinah in fact observed the complainant's mother and another woman assaulting the complainant with a whip commonly referred to as a "sjambok" and a broomstick. This was, of course, strenuously denied by the complainant and her mother. The evidence of Paulinah merely confirmed what the accused said regarding the assault on the complainant, and, on the whole, does not take the matter

much further. The accused denied that he kidnapped the complainant on 12 January 2010, and alleged that they went to Rustenburg at the complainant's request and that she had in fact called his cousin Tshepo to bring their clothes. Tshepo Makgai testified that he had been called by the complainant and that is how he took the clothes to the appellant and the complainant. The latter directed him to where they would be waiting for him. That concluded the evidence for the defence.

- (8) The learned magistrate, in evaluating the evidence was mindful of the fact that the complainant was a single witness and he rightly concluded, with regard to counts 2, 4, and 5 that the complainant's evidence, albeit that she was a single witness could be relied upon. In spite of the discrepancies that I have mentioned in paragraph (6) above, my view is that such discrepancies have not tainted the evidence for the State to the extent that it cannot be relied upon. The complainant, for example, while initially giving exact times regarding the length of her stay in the caves, the time of day she spoke to the appellant at the cave and the time they left the cave, later conceded that these were estimates "in her head". Exact times are not always vital to the credibility of the evidence, and approximations are acceptable, provided that they do not detract from the reliability of the evidence as a whole.
- (9) In this regard, I refer to the appellant's Heads of Argument (page 11, paragraphs 4.13.3 and 4.13.4) in which the complainant's credibility is called into question because she said that it took about an hour to walk from the cave to her home. In the light of what I have said about estimations of time, clearly this was an estimate on the part of the appellant. In his Heads of Argument, the appellant alleges that according to the Global Positioning System, the cave was three kilometers away from the township. There is no evidence on record relating to the Global Positioning System in confirmation of this allegation, apart from Photograph 6 (of the photographs that were handed up as exhibits), which depicts an instrument showing certain coordinates. Mr Botha was unable to take the matter any further when asked to indicate where in the record such evidence could be found. I will, accordingly, place no reliance on the submissions relating to the Global Positioning System.
- (10) The appellant also attacked the credibility of the complainant because of the differences between her viva voce evidence and the statements she had made to the South African Police. When the complainant was being cross examined on these differences, the trial court indicated specifically that it was allowing the cross examination provisionally, until the police official who took the statement was called. The police officer was not called. It is trite that the complainant's viva voce evidence must super-cede any other evidence regarding her version of events.
- (11) Mr Botha argued that as a result of the troubled history between the complainant and the appellant, the complainant had motive for falsely implicating the appellant, especially with regard to the kidnapping and rape charges. Ms Matjokana pointed out that the complainant's conduct does not reflect such motive. I agree. It makes no sense that the complainant would have gone to the trouble of faking illness in order to get assistance to contact her family, if she had gone willingly to Rustenburg in the first place, and if there was no threat from the

appellant.

- (12) It is also common cause that the complainant was no longer living with the appellant on 12 January 2010. His evidence is that he had packed a bag that morning because he was going to work in Tzaneen. The complainant could not possibly have known that his bag was packed and, much less, where it could be found. On the other hand, her clothes were still in the matrimonial home where the appellant lived. It is far more probable that he had packed both bags and requested his cousin Tshepo to deliver the bags. His version that it was at the complainant's request that they went to Rustenburg is, therefore, improbable, and negates the assertion that the complainant was falsely implicating the appellant.
- (13) As intimated above, the appellant's defence was largely a bare denial of the complainant's version, and as such, was not very convincing at all. The trial court correctly rejected his version. It must also be borne in mind that both Tshepo Makgai and Paulinah Baloyi grew up with the appellant and seem to have a close relationship with him. Their evidence should therefore be approached with caution, as they clearly have an interest in protecting the appellant. Therefore, such corroboration that they may have provided for the appellant's version cannot, in my view, be relied upon
- (14) While I agree with the caution expressed by Smallberger AJA in *S v Mtsweni* 1985(1) SA 590 (A), when he said (as translated in the headnote):

"although the untruthful evidence or denial of an accused is of importance when it comes to the drawing of conclusions and the determination of guilt, caution must be exercised against attaching too much weight thereto. The conclusion that because an accused is untruthful, he therefore is probably guilty must especially be guarded against. Untruthful evidence or a false statement does not always justify the most extreme conclusion. The weight to be attached thereto must be related to the circumstances of each case"

my view is that the circumstances of this case, as supported by the evidence, are such that the lack of truthfulness on the appellant's part justifies the inference of guilt.

- (13) I, accordingly, propose that the following order be made:

13.1 The appeal is dismissed

I agree and it is so ordered

DEVO J

Date of Hearing: 22 July 2013

Date of Judgment: 22 July 2013

Counsel for Appellant: Mr MG Botha

Instructed by: Justice Centre, Pretoria

Counsel for the Respondent: Ms MD Matjokana

Instructed by: The State

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