

SOUTH AFRICA / JUDGMENT

Mangena v S (A328 2016) [2017] ZAGPPHC 1267 (8 December 2017)

[2017] ZAGPPHC 1267

COURT

North Gauteng High Court, Pretoria

BEFORE

Ngobeni, Pretorius

CASE / FILE NUMBER

A328 2016

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IN THE HIGH COURT OF

SOUTH AFRICA

(GAUTENG HIGH COURT,

PRETORIA)

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER JUDGES

(3)

REVISED.

Appeal Ref

No:

A328 2016

Date

of hearing: 16 October 2017

Delivered

on: 8 December 2017

In

the matter between: ESEU
 STEVE
 MANGENA
 APPELLANT
 And
 THE
 STATE
 RESPONDENT

JUDGMENT

NGOBENI, AJ:

INTRODUCTION:

- [1] This was an appeal brought before this court in accordance with the provisions of section 309(1) (a) read with section 304(2) of the Criminal Procedure Act 51 of 1977 and the provisions of the Superior Courts Act.
- [2] The Appellant appeared before the Honourable Springs Regional Magistrate, Mrs B Oswell, at the Springs Regional Court, facing one charge of rape in contravention of the provisions of Section 3 read with Sections 1, 55, 56(1), 57, 58, 59, 60 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 read with sections 92(2), 94, 256, 257 and 281 of the Criminal Procedure Act 51 of 1977 and the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997; as well as a charge of sexual assault.
- [3] The allegation against the Appellant was that on or about July 2010 at Benoni in the Regional Division of Gauteng he unlawfully and intentionally committed an act of sexual penetration with a female to wit VM, a 13 year old girl, by inserting his penis into her vagina without her consent. The second charge was one of sexual assault in terms of section 5(1) read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual offences and related matters) 32 of 2007.
- [4] On 14 October 2016 the court a quo, having listened to all the evidence presented by the state, and by and on behalf of the appellant convicted the appellant on the rape charge, whilst acquitting him on the sexual assault charge. He was sentenced on the same day to life imprisonment.
- [5] The appellant has an automatic right of appeal due to the life term of imprisonment imposed on him by the Regional Court.
- [6] The appellant was brief in his grounds of appeal. He challenges both conviction and sentence. The main basis of his challenge in respect of the conviction is that the learned magistrate erred in rejecting his version as not being reasonable possibly true and finding that the state had proved its case beyond reasonable doubt.

FACTUAL

BACKGROUND:

[7] No preliminary admissions were made in respect of the rape charge. The state was left to prove each and every element of the charge.

[8] The following facts appear to be common cause:

8.1 The complainant was 13 years old at the time of the alleged incident, having been born on [...] 1997.

8.2 TM, the witness, was 12 years old at the time of the alleged incident, having been born on [...] 1998. Both the complainant and the appellant as well as their respective families stayed in the same block of flats at Benoni and had known each other well, for a period of time before the incident.

8.3 The appellant stayed with his wife and child on the fifth floor of the building whilst the complainant stayed with her mother and aunt on the second floor.

8.4 The appellant and the complainant's mother were friends and both were working at Benoni Police Station as police officers.

8.5 LM, the complainant's aunt, witnessed the complainant walking with a limp on 10 July 2010. She informed her sister, who is the complainant's mother, of this.

8.6 A charge of rape and sexual assault was accordingly laid against the appellant on 10 July 2010, immediately whereafter the complainant was sent to Ithemba Rape & Trauma Support Centre where she was examined by Dr Mountford.

8.7 Dr A Mountford, who examined the complainant, noted bruising, swelling and tearing of the urethral orifice; tearing of the labia minora at 3 o'clock; bruising of the para-urethral folds; swelling and a healing tear at 1, 3, 6 and 7 o'clock.

8.8 The appellant was arrested on the same day and charged.

[9] The court a quo found that the appellant was positively identified by the complainant as the person who had ordered her to lie on the floor, before raping her.

RELEVANT LEGAL PRINCIPLES AND EVALUATION THEREOF:

[10] Nugent J in *S v Van der Meyden* 1999 1 SACR 447 (W) 448 f-g elaborates as follows: "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. 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."

BACKGROUND:

[11] The complainant was a single witness in so far as the rape incident is concerned. She told the court a quo that on the date in July, which she cannot remember, she was playing hide and seek with her friends, S and T within the block of flats that they were staying in. She and T went to the 5th floor to hide while S remained at the bottom counting. The appellant allegedly exited his flat where he was residing on the 5th floor, and called the complainant while she was with T on the same floor. T told her not to go to the accused, but she insisted as the appellant used to send her to the shops. On reaching his door, she noticed that he was no longer there. She thought that he had gone inside to fetch something and as a result she went inside the flat. She was surprised to notice that the appellant had hidden himself behind the door, which he suddenly closed and locked. He then threw the keys underneath a table.

[12] The appellant then instructed her to undress but she did not respond. He did so 3 times. He followed her around the table and tripped her whereupon she fell down. He pulled a firearm from his back, which he pointed at her and instructed her to undress. Once on the ground he pulled her oversized trousers and her panty down and inserted his penis into her vagina. As he was done he stood up and went to the passage. She was then able to escape and found her friends sitting on

the steps downstairs. She informed them that appellant had raped her. She later noticed the appellant leaving in his vehicle wearing

different clothes going towards the direction of his work. She did not tell her mother for she was afraid of the appellant. On another day, which she had forgotten, her aunt realized that she was not walking properly and informed her mother, who then enquired from her what had happened. She did not tell her mother of the incident. As a result thereof her mother slapped her. She then told her mother that the appellant had raped her. She was taken to the police station and later to the doctor for examination on the same day.

[13] Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on the evidence of a single competent witness. However, the danger of relying exclusively on the sincerity and perceptive powers of a single witness has evoked a judicial practice that such evidence be treated with the utmost care. The remarks

of De Villiers JP in R v Mokoena 1932 OPD 79 at 80 need to be mentioned: "Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by (the section), but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect. Thus the section ought not to be evoked where for instance, the witness ······, has not had proper opportunities for observation, etc." In other words even though the complainant was found to be an honest, reliable and credible witness, her evidence in regards to the appellant and the incident of rape ought to have been thoroughly tested.

- [14] The State's case, as a whole, has numerous glaring material contradictions. T, who was called by the state, attributed the incident of them playing hide and seek to the charge that the appellant had been acquitted of. According to her after she had left the complainant who had entered into the appellant's flat, the complainant came back running, finding her alone at her home, and informed her that the appellant had touched her bum and had wanted to rape her. S was at home when the complainant made this report. The complainant, however, in her evidence indicated that the incident of being touched on her bum happened when she was peeping through the window, not that they had been playing hide and seek when she was called by the appellant.
- [15] T made no mention of playing hide and seek on the date that the complainant informed her that she had been raped by the appellant. She only informed the court that she was at her place of residence when the complainant came and informed her that there was something that she wanted to tell her which she would tell her the following day. It was only on the following day that the complainant had told her that the appellant had raped her. The complainant, however, in her evidence informed the court that, after running out of the appellant's flat, she found T and S seated at the steps wherein she informed them that the appellant had raped her. The complainant alleged that her mother had to assault her for her to report the incident of rape. Her mother, however, denies having assaulted her. It is of concern that the complainant alleged that she could not tell

her mother, whom she used to share issues with, since the appellant had threatened her with a fire arm. Surprisingly her evidence in chief is to the effect that immediately after the incident she ran and informed her friends, who were waiting for her on the steps, of the rape, contrary to S's evidence.

- [16] According to the Criminal Procedure Act, 51 of 1977 a trial-within-a-trial is only considered when the issue is on the admissibility of evidence. The question to be decided is if the evidence presented was made freely and voluntarily and is therefore admissible. It is found that the issue regarding the statement of the complainant is not if the statement was made "freely and voluntarily" but if the content of the statement is correct and therefore deserves the court's attention to make a finding on the credibility of the complainant. A trial within a trial is therefore irrelevant for the purpose of this appeal and unnecessary. The magistrate correctly gave the appellant the opportunity to call Const Molefe, who took down the statement, during the defence case in order to place the truth of the content of the

complainant's statement before court.

- [17] It is clear, having regard to the evidence of Lumka Phoswa, the regional prosecutor who was assigned to receive new dockets; and that of Cst Molefe, who took the complainant's first statement, as well as that of Major Johns, the investigating officer who took the complainant's second statement; and that of Dr Mountford, who had examined the complainant, that the complainant tailored her evidence in court insofar as the date and time of the incident. She had already known that the appellant had a strong alibi in respect of the date and time she mentioned in her initial statements.
- [18] Having regard to the contradictions in the state's case, and the issues regarding the date and time of the incident, coupled with the reservations described above regarding her failure to report the incident of rape, it cannot be found that the complainant's evidence was satisfactory in all material aspects. In particular it cannot be found that the complainant was a reliable and credible witness.
- [19] The appellant testified and called a number of witnesses who corroborated him on a crucial aspect of the matter, namely the date and time of the incident. He denied having been at the scene at the time of the alleged rape on 8 July 2010 but rather was involved in an operation to arrest one Linde Nyamakazi, a former police officer, who was testifying at Benoni Magistrate's court. He alleged that on the particular day he woke up at eight in the morning. He collected his friend and colleague, Constable Mkhondo, at Daveyton with whom he travelled to Alexandra to consult his doctor, Dr Maringa. They left Alexandra at 12:40 for work at Benoni police station where they arrived at 13:30. He later left at 14:50 with his commander, Warrant

Officer Lebisi and colleagues, Constables Mkhondo, Makula and others for an operation at the Benoni Magistrate's Court. The former police officer whom they were to arrest, left the court building followed by Lumka Phoswa, a regional court prosecutor. They later took the former officer, who had been arrested, to his place in Daveyton to drop off his child, before detaining him at Benoni police station at 15:45. They later went around on other operations until they knocked off. He never went back home until being off duty at 22:00 . His version of events was corroborated by his commander, colleagues, wife, and the regional court prosecutor. His pocketbook was accepted by the court a quo as exhibit. His whereabouts at work were endorsed in the book and countersigned by his commander as confirmation of having examined the book.

- [20] The complainant was clear as to when the alleged offence occurred, in particular on 8 July 2010 at 15:15, as she reported to her mother, the doctor who examined her, Constable Molefe who took her first statement, Major Johns who took her second statement and regional prosecutor Lumka Phoswa.

[21] An appeal court's approach to the findings of fact by a trial court was crisply summarised in *S v Hadebe & Others* 1997 (2) SACR 641 (SCA) at 645e - f: 'in the absence of demonstrable and material misdirection by the trial court, its findings of fact were presumed to be correct, and would only be disregarded if the recorded evidence showed them to be clearly wrong'.

The question is, having regard to the appellant's alibi which was confirmed not only by his colleagues and wife, but by the prosecutor as well, can it be not be said that the court a quo misdirected itself by not finding that there is a reasonable possibility that the explanation which has been put forward by the appellant might be reasonably, possibly true.

[22] My view is that, in the absence of any criticism that could be levelled on the defence case, there were no grounds to reject the evidence and the alibi of the appellant.

[23] I have considered the totality of the evidence, the merits and demerits of the State and Defense cases, as well as all the probabilities and improbabilities thereof. In my view the evidence of the accused is reasonably, possibly true. The court a quo misdirected itself by finding that the state had proved its case beyond reasonable doubt. The accused's evidence ought not to have been rejected as false. The state failed to prove its case against the appellant beyond reasonable doubt.

[24] I accordingly propose the following order:

1. The appeal against conviction is upheld .
2. The conviction and sentence against the appellant is hereby set aside.

NGOBENI AJ

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

PRETORIUS C

JUDGE OF THE HIGH COURT

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