

SOUTH AFRICA / JUDGMENT

Matsie v S (A202/18) [2020] ZAGPPHC 356 (14 July 2020)

[2020] ZAGPPHC 356

COURT

North Gauteng High Court, Pretoria

BEFORE

LC Haupt, V Tlhapi

CASE / FILE NUMBER

A202/18

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER

JUDGES: YES/NO

(3)

REVISED.

CASE

No : A

202/18

14/7/2020

In the matter between:

PHADIMISA
ESAU MATSIE
Appellant
and
THE
STATE
Respondent

JUDGMENT**HAUPT AJ:****INTRODUCTION:**

- [1] The appellant was found guilty of rape, a crime in contravention of the provisions of section 3 read with sections 1, 56(1), 58, 59, 60 and 61 of Act 32 of 2007.[1] This is an appeal against the appellant's conviction and his subsequent sentencing on 8 June 2017 to 14 years' imprisonment imposed by the Regional Court of Vereeniging.
- [2] The appellant pleaded not guilty to the charge of rape. He confirmed an explanation of his plea by disclosing the basis of his defence in terms of section 115 of Act 51 of 1977, through his legal representative. He argued that the complainant was his mistress and that they had consensual sexual intercourse on the day in question.
- [3] During the proceedings before the Regional Court, the appellant was represented by three different attorneys. His first attorney withdrew after the appellant informed him that he had instructed a private attorney. The second attorney withdrew after a conflict of interest arose between him and the appellant during their consultation. The appellant also took issue with the third attorney who represented him during the trial by alleging during his cross examination that his legal representative was not putting his version to the witnesses. In the notice of leave to appeal, the appellant also recorded that he was not satisfied with his attorney's representation of his case and that inter alia his constitutional right to legal representation was not protected and applied.

POINT IN LIMINE: INCOMPLETE RECORD

- [4] The matter was previously postponed to reconstruct the record of the proceedings before the court a quo. The appellant argues, in limine, that it is still not clear whether all concerned parties were involved in the reconstruction process. Only the presiding Magistrate confirmed that the record is a true reflection of the evidence. With reference to the judgments in *S v Schoombbee*[2], and *S v Zondi*[3] it is further argued, that despite the reconstruction effort, there still remains missing portions of the record. As a consequence thereof, the appellant's counsel is placed in a position where it is impossible to draft heads of argument in the appeal in respect of conviction on behalf of the appellant without a full transcript. Furthermore although some of the evidence with regards to the merits is transcribed, the record does not suffice and cannot be regarded as a full record which is required to properly argue the grounds of appeal as set out in the notice of appeal.
- [5] I do not agree with the argument. The appellant does not dispute any of the added words or correction and the reading of the record reflects the evidence of all the witnesses who testified during the trial. I am in agreement with the argument on behalf of the respondent that there are no defects in the record and that insofar as there are any, they are not so

serious to the extent that a proper consideration of the appeal is not possible. The few inaudible portions of the record and the nature of the issues to be decided in the appeal, do not in any way render the record inadequate for proper consideration of the appellant's appeal.[4]

CONSIDERATION OF THE EVIDENCE:

[6] The State called 4 (four) witnesses: the complainant, a family friend, Ms D[....] T[....] ("Ms T[....]"), to whom the complainant first reported the incident on the 22nd of November 2015, the detective Sergeant Petunia Motloenjane ("Sgt Motloenjane") who was on duty when the complainant

reported the incident on 23 November, and Dr Thompson, who examined the complainant the day after the incident took place.

[7] Only the appellant testified. His attorney indicated that the 2 (two) witnesses that the appellant wanted to call to corroborate his version where his cousins "F[....]" and "F[....]" , but that these witnesses were not prepared to testify on his behalf.

[8] The complainant is a single witness. None of the other witnesses called by the State witnessed the incident. Insofar as the complainant's evidence is concerned, one must approach it bearing in mind the cautionary rules relating to the evidence of a single witness. In *S v Sauls and Another*[5] it was held that:

" ... (T)here is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness

The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by DE VILLIERS JP in 1932 may be a guide to a right decision but does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence was well founded ". (Per SCHREINER JA in *R v Nh/apo* (AO 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[9] The complainant was 23 years of age at the time of the incident. She testified that at approximately 22h30 on 22 November 2015, she as on her way back home from her aunt's residence in Orange Farm, Extension 1. She wanted to catch a taxi. As she could not find a taxi, she started to walk home. She proceeded on her way in Orange Farm pass the Jabulile Secondary School when she noticed the appellant coming from behind and she then asked him where he is going. She thought that he was also on his way home. It was the first time that she had seen or met the appellant. They walked together and he started a conversation with her. He enquired from the complainant where she was heading and where she stayed.

She replied that she stayed at Club Dubai. The appellant offered to walk the complainant home and she thanked him.

- [10] She testified that a bit further along in an open field, whilst walking, the appellant came from behind and attempted to strangle her. He dragged her to the ground. When she asked him if he wanted money, he replied that she knew what he wanted. The appellant instructed the complainant not to scream and if she did not, he would not harm her. The complainant testified that whilst the appellant was raping her, he was looking to the side to make sure that nobody saw them. During the rape, the appellant was on top of the complainant and he put his arm on her neck and inserted his penis without a condom into her vagina.
- [11] After being raped, the appellant offered to walk home with the complaint which offer she rejected. The appellant then asked her how he could trust her not to report him. She replied by offering him her mobile phone number, stated her name and that he could check by calling her, whether she had reported him or not. The appellant saved the complainant's mobile phone number on his mobile phone and informed the complainant that his name is "Thabo". Thereafter they parted ways.
- [12] The complainant testified that she was shaking and crying when she arrived at her friend's (Ms T[...]) house. Her friend did not open the door immediately and she first had to identify herself. She told Ms T[...] what had happened whereafter she went to bed. Her testimony in this regard was corroborated by Ms T[...].
- [13] The complainant testified that she did not wash herself that evening. The next morning she immediately went to the police station to report the incident. She went with a Warrant Officer Foley to the crime scene where photographs were taken. The police took her to the clinic where she was examined by Dr Thompson. She was given some medication to take for 28 days. She testified that she sustained red marks on her neck and cuts on her private parts. The incident was very traumatic for her. She received counselling.

She is the mother of a young child born form her relationship with her boyfriend, whom she met in 2015.

- [14] Three days after the incident on 25 November 2015, the appellant called the complainant on her mobile phone. He indicated that he wanted to apologise in person. She immediately reported this at the police station and also indicated on her mobile that the appellant had contacted her. The appellant called her just as she was about to leave the police station and the police officers (Sgt Motloenjane and 2 other colleagues) listened and advised her to meet the appellant at the PicknPay centre ("the PnP") where they would monitor the situation. When the appellant called the complainant again, arrangements were made for them to meet at 19h30 at the PnP.

- [15] The complainant again went to the police station to confirm the arranged time, date and venue. When the police accompanied her to the PnP, they advised her that she should drop her handbag once she is with the appellant, which would signal the police that this was her assailant.
- [16] She testified that when she met the appellant on the arranged date, they had a conversation and after a while she dropped her handbag as arranged with the police. This resulted in the police officers exiting their vehicles and apprehending the appellant. At that stage, she also confronted the appellant with what he had put her through and that since the incident she was not able to sleep.
- [17] The complainant stood well under crossexamination. She was resolute in her answers with little to no contradictions that were of any import. At no stage in the heads of argument before us, was it argued that her version was improbable. Rather, the argument was focused on the reasonable possibility that the appellant's version may be true.
- [18] Ms T[...] confirmed that on the night of the incident in question, she was alone at home with her two children when somebody knocked extremely hard on the door. It was late at night and she was not aware that the complainant would be visiting her. When she asked who was at the door, the complainant identified herself. When she opened the door she saw a visibly shocked and crying complainant. The complainant confided in her about what had happened, including the events running up to the incident. The following morning, Ms T[...] gave the complainant taxi fare. The complainant left early in the morning to the police station and returned later that afternoon with the police. She corroborated the testimony of the complainant that she has been in a relationship with her boyfriend from at least 2015 and that he is the father of her child
- [19] Sergeant Motloenjane corroborated the complainant's version of events when she reported the incident and the subsequent arrangements when the appellant contacted the appellant resulting in the meeting and arrest at the PnP. She testified that she has been a police officer for 14 years of which 11 has been as a detective. She was on duty when the complainant reported the incident. The complainant informed the police that she did not know the man who had raped her but that she could point him out, that she had his mobile phone number and that he told her not to open a case against him.
- [20] The sergeant testified that, together with constable Mahlakala and officer Madise, they accompanied the complainant to the PnP venue. All three the police officers present assisted in the arrest of the appellant but sergeant Motloenjane was the officer who took down his statement. The complainant identified the appellant to the police officers at the scene as the man who raped her. The appellant's mobile phone fell during the arrest and was later placed in a secured bag at the police station. During crossexamine she testified that the complainant's demeanour on their way to PnP, was that of a person that was afraid and she told her to calm down. She testified that the complainant, was shaking and afraid after the arrest had taken place.

- [21] The sergeant confirmed that the appellant indicated during his arrest that the complainant was his girlfriend. However, the mobile phone of the appellant that was confiscated during the arrest, indicated no conversation between the appellant and the complainant prior to the incident on 22 November
2015. The only conversations between the appellant and the complainant was after the incident had taken place. She was consistent in her testimony that the police picked up the appellant's mobile phone after he had dropped it.
- [22] Dr Thompson testified that he examined the complainant on 23 November 2015 and completed the J88 that was placed before the court a quo. He has 13 years' experience in examining victims of sexual abuse. He testified that he examines victims of sexual abuse daily.
- [23] He corroborated the complainant's testimony. He confirmed the bruising on her private parts which is consistent with blunt force trauma. He provided a thorough explanation regarding the difference between being throttled, strangled and/or restraint and the consequential bruising thereto. Dr Thompson confirmed during crossexamination that the fact that he referred in his report that the complainant was calm during the examination, was not unusual in his experience and it was normal in more mature victims. He confirmed his findings recorded in his report that the complainant's injuries were consistent with vaginal penetration and that she was on contraceptives.
- [24] The appellant denied the charges against him. He gave an elaborate and detailed explanation during evidence in chief, of almost all of which was never put to the complainant during crossexamination. His version was that he and the complainant had a "secret affair" and he had made an arrangement on the night of the incident to meet her at a tavern. He testified that when he saw the complainant, she was drinking a Hunters Dry alcohol beverage. When he met up with her later he gave her another two Hunters' of which she put one in her bag. This was never put to the complainant or Dr Thompson during cross examination. Dr Thompson's report recorded that he could not find or smell any indication of alcohol use by the complainant.
- [25] Although the complainant had never met his girlfriend, nor knew her name, he testified that she said to him that his girlfriend is a "psycho". According to the appellant's version, the complainant had asked him for money, approximately R450.00. She was unhappy about the fact that he did not have the money with him. This also was never put to the complainant during her crossexamination.
- [26] He testified that they had consensual intercourse without a condom, whereafter he went with the complainant to her aunt's house. He attempted to call her the next day. He was concerned that she might become pregnant. During cross examination it was put to him that his concerns was improbable, as the complainant was on contraceptives. Dr Thompson's report also confirmed this.

- [27] According to the appellant the complainant was laughing when they met at the PnP and then she dropped her bag and suddenly she became afraid. The appellant testified that the police assaulted him and that they only took his mobile phone at the police station. They also took his bracelet. Despite testifying that he has been in relationship with the complainant for 3/4 months, he did not provide any details on where the complainant lived or what her surname was. The complainant also did not know where he resided.
- [28] The appellant testified that he and the complainant were on approximately 6 "dates". He was vague on what he meant by "dates". He merely testified that they did not go to the movies. Apparently, he met the complainant at a taxi rank and he would call her from time to time to arrange meetings. This was not put to the complainant during her cross examination. He testified that his cousin (F[....]) knew about the complainant but was not prepared to testify on his behalf due to a personal vendetta with the appellant.
- [29] During crossexamination, he blamed his attorney for not putting his version to the complainant during her crossexamination. He argued that one does not rape a person and then takes their mobile phone number and that if the incident was so violent with reference to the injuries she sustained, why did she not run.
- [30] In reexamination the appellant further elaborated on another person who had knowledge about his relationship with the complainant, another relative called "F[....]". He testified that he also worked for F[....] as a security officer. Again, he blamed his attorney for not calling F[....] as he apparently had given this information to his attorney.
- [31] Given the transcription of the proceedings before us, all that really need to be said is that the appellant was not a good witness. His evidence was throughout evasive, argumentative and inconsistent. In fact, almost all of his evidence in chief consisted of versions that were never put to the complainant and her witnesses despite his attorney being given ample opportunity to crossexamine the complainant on her version.[6] He had no witnesses to corroborate his version. His explanation for the unavailability of his corroborating witnesses, who are close relatives according to him, is unconvincing. Other than their first names no significant particulars were provided.
- [32] A criminal trial is not a game of catchascatchcan, nor should it be turned into a trial by ambush. In considering the appellant's testimony it would appear that as he testified, so his version developed and more and more details were provided, which were never put to the complainant or her witnesses. It is a trite evidentiary principle that a witness should have an opportunity to answer challenges to his/her evidence resulting in that such a witness then knows that it may be necessary to call corroborating or other evidence relevant to the challenges that has been raised.[7]

- [33] In evaluating all the evidence, I am left without doubt that the appellant raped the complainant. Considering the evidence of the appellant as a whole, I am of the view that there is no reasonable possibility that the appellant's version may be true.[8] The state has proved its case beyond reasonable doubt.
- [34] The appellant has a previous conviction for rape. He was sentenced to 10 years imprisonment in June 2004. He served 4 years and was released on parole on 8 December 2013. The incident with the complainant happened less than 2 years after he was released on parole.
- [35] I have considered the grounds appeal in light of the evidence before the Court a quo and the reasoning of the presiding officer in evaluating the evidence. After considering the "mosaic of proof" and the probabilities emerging from the case as a whole and weighing up all the elements which point towards the guilt of the appellant against those which are indicative of his innocence,[9] I am in agreement with the evaluation of the evidence of the witnesses by the Court a quo and that it correctly applied its mind to the facts and the law. Therefore the conviction and sentence should stand and there is no merit in this appeal.

[36] The order thus that I grant is the following:

[36.1] That the appeal is dismissed.

LC HAUPT

ACTING JUDGE OF THE HIGH COURT (GAUTENG DIVISION, PRETORIA)

I agree and it is so ordered.

V TLHAPI

JUDGE OF THE HIGH COURT (GAUTENG DIVISION, PRETORIA)

Date of hearing on accordance with

the 11 May 2020 Consolidated Directives: 11 May 2020

Judgment

delivered electronically:

.....June 2020

- [1] Read together with the provisions of sections 51(1) and Schedule 2 of the Criminal Law Amendment Act, 105 of 1997, as amended.

- [2] 2017 (2) SACR1 (CC) par. [20] and (38) where it was held that the reconstruction of the record is part and parcel of the fair trial process and the procedure for a proper reconstruction involves engaging both the accused and the state in the process. When reconstruction is necessary, the obligation not only lies with the appellant, but primarily on the court to ensure that the process with the right to a fair trial.
- [3] 2003 (2) SACR 227 (W) where the Court emphasised that although the duty lies with the appellant to place an adequate record of the proceedings in the court a quo before the Court of Appeal, the state also has a duty as the custodian of trial records.
- [4] See: S v Machaba 2016 (1) SACR 1 (SCA) as quoted by the Constitutional Court in S v Schoombee and another 2017 (2) SACR 1 (CC) at paragraph 28 as follows : "The requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial ...The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal."
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- [5] 1981(3) SA 172 (A) at 180 E G
- [6] S v Bogtsu 2017 JDR 0638 (GJ) at paras. 31-32
- [7] See : President of the Republic of South Africa and others v South African Rugby Football Union and others 2000 (1) SA 1 (CC); S v Boesak 2001(1) SA 219 (CC) at 924F
- [8] See: S v Fear 1 SACR 45-3 (SCA); S v Mbuli 2003 (1) SACR 97 (SCA) at 110 DF regarding the legal principles applicable
- [9] See in general: S v Chabalala 2003 (1) SACR 13-4 (SCA) at 139-1 to 140A

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Prepared on 10 October 2026 · Esheria