

SOUTH AFRICA / JUDGMENT

Mbuyane v S (A382/09) [2009] ZAGPPHC 140 (6 November 2009)

[2009] ZAGPPHC 140

COURT

North Gauteng High Court, Pretoria

BEFORE

B.R. Southwood, S.S. Omar

CASE / FILE NUMBER

A382/09

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
(NORTH GAUTENG HIGH COURT,
PRETORIA)**

Date: 2009-11-06

UNREPORTABLE

Case Number: A382/09

In the matter between:

VUYANI MBUYANE

Appellant

and

THE STATE

Respondent

JUDGMENT**SOUTHWOOD J**

- [1] On 8 September 2008 the appellant was found guilty of rape in the Kabokweni regional court and sentenced to 15 years imprisonment. With the leave of this court the appellant appeals against both the conviction and the sentence.
- [2] The appellant pleaded not guilty. His defence was that intercourse had taken place with the consent of the complainant. The appellant formally admitted that on 26 March 2006 and at Zwelisha he had intercourse on 3 occasions with the complainant.
- [3] The state tendered the evidence of the complainant, S M, and her friend Eunice Malaza. The state also tendered the J88 (the report of the medico legal examination) in respect of the complainant and the appellant admitted the contents of the report and the conclusion of the doctor. The report reflects that at 03h00 on 27 March 2006 Dr. A.P. van den Heever examined the complainant and recorded the following:

‘RELEVANT MEDICAL HISTORY AND MEDICATION:

Allegedly raped on evening of 26 March, 06. Pt reports being assaulted and strangled and then forced into intercourse – she reports man using a condom.

CLINICAL FINDINGS: In every case the nature, position and extent of the abrasions, wound or other injury must be described and noted together with its probable date and manner of causation. The position of all injuries and wounds must also be noted on the sketches.

- (1) Subconjunctival bleeding ® right eye lateral.
- (2) Tenderness around neck and at back + left flank.
- (3) No vaginal pathology noted.

6. **MENTAL HEALTH AND EMOTIONAL STATUS:** Good

7. **CLINICAL EVIDENCE OF DRUGS OR ALCOHOL:** None

8. **CONCLUSIONS**

Injuries in keeping with history.’

The relevant sketch reflects subconjunctival bleeding around the right eye and painful areas covering the whole of both forearms and hands, the whole of the front of both thighs, and on both sides of the front of the neck as well as swollen soft issue over the area between the waist and shoulder blade on the left side.

- [4] The appellant testified and also tendered the evidence of Simpiwe Radebe and Sipho Mashele. Sipho Mashele and the appellant are brothers.

[5] It is common cause that:

- (1) the incident took place just after midnight on 26 March 2006 at the home of Sipho Mashele after Sipho and Eunice had gone to sleep in an outside room;
 - (2) the complainant, Eunice, the appellant, Sipho, Simpiwe Radebe and his girlfriend, Promise, spent some hours in the sitting room of Sipho's home, talking, listening to music, drinking beer and cider and cold drinks, until Sipho and Eunice decided to go to sleep and Simpiwe and Promise left;
 - (3) when Sipho and Eunice and Simpiwe and Promise left the complainant and the appellant were left alone in the sitting room;
 - (4) the appellant had already shown interest in the complainant;
 - (5) the complainant and the appellant then had intercourse on three occasions (according to the appellant) and one prolonged occasion (according to the complainant). The appellant used three condoms during the intercourse;
 - (6) early in the morning on 26 March 2006 the complainant and Eunice left the house and the complainant returned to her home;
 - (7) the complainant went to the hospital on 26 March 2006 where she had to wait until midnight before Dr. Van den Heever examined her;
 - (8) Dr. Van den Heever recorded his findings in the J88 at about 03h00 on 27 March 2006.
- [6] The complainant testified that she had gone to Sipho's house in the company of Eunice who was Sipho's girlfriend. She had met the appellant for the first time at about 13h30 on the afternoon of 25 March 2006. She had not previously met or even seen him. She and Eunice attempted to go home on at least two occasions but were prevented by the appellant and Sipho. From about 20h00 she and Eunice and the appellant and Sipho sat and talked and the men drank beer. They were joined during the evening by Simpiwe and Promise who spent some hours at the house. After Sipho and Eunice went to sleep and Simpiwe and Promise left the

house the appellant indicated that he wanted to have intercourse with her and she refused. The appellant persisted and when she resisted he assaulted her. During the assault the appellant put his hands around her throat and strangled her. During the struggle the complainant cried and screamed. Eventually the appellant overcame her resistance and had intercourse with her against her will. He had intercourse with her for some time and used three condoms. Afterwards they slept and she stayed there until early morning when she left with Eunice. She told Eunice that the appellant had assaulted her by striking her and strangling her and that he had had intercourse with her against her will and that throughout he had used a condom. She went to hospital on 26 March 2006 but had to wait until midnight to see the doctor. She reported the rape to the police the next day.

[7] The appellant testified that he met the complainant for the first time at about 13h30 on 25 March

2006. They had gone to a café where he had proposed love to the complainant who, he said, had accepted. At Sipho's house he had had intercourse with the complainant with her consent. They had intercourse on 3 separate occasions. On each occasion he used a condom. After each act of intercourse he and the complainant lay together and talked. He did not strike or strangle the complainant and she did not sustain any injuries while in his company. In his evidence in chief he could not explain when or how she sustained the

injuries found by the doctor and he could not explain why the complainant should lay a charge of rape against him if she had consented to the intercourse other than to say that she had quarrelled with her boyfriend. Only in cross-examination did he suggest that her boyfriend had told him, the appellant, that he had assaulted the appellant. This was not put to the complainant in cross-examination.

[8] On appeal the appellant's attorney has subjected the state's evidence to minute scrutiny and referred to all the contradictions between the complainant's and Eunice's evidence and to the alleged improbabilities in the state's evidence.

[9] Whatever the contradictions and whatever the improbabilities (in my view there are none that are material) the evidence must be tested against the objective evidence of the medical examination which is common cause. This evidence shows that within hours of the incident the complainant reported to the doctor that on the evening of 26 March 2006 she was assaulted and strangled and then forced to have intercourse with a man who used a condom; that the doctor found subconjunctival bleeding around the right eye and tenderness around the neck, back and left flank and that there were a number of painful areas around her throat and on her forearms and thighs. All these objective findings are consistent with the complainant's description of the assault in her evidence and what she reported to Eunice the morning after the incident. The complainant's evidence that she cried and

screamed during the assault is corroborated by Eunice. In the light of this evidence the appellant's evidence that he did not assault the complainant and did not see any injuries simply cannot be believed. The appellant clearly could not explain how the complainant had sustained the injuries or why she would bring a charge of assault against him. It was only when he was pressed in cross-examination that he suggested that the appellant's boyfriend had assaulted her – clearly an afterthought –

and gave a number of unconvincing and clearly contrived reasons why the complainant laid the charge of rape. In addition the appellant's

evidence is inconsistent with the following probabilities:

- (1) If the complainant consented and they had intercourse in the circumstances described by the appellant

- clearly congenial - it is highly improbable that shortly after the incident she would report that she had been assaulted and raped to Eunice, Dr. Van den Heever and the South African Police Service;
- (2) If the complainant consented to have intercourse with the appellant it is highly improbable that he would assault her;
- (3) If the complainant consented to have intercourse with the appellant she would have simply had intercourse and not cried and screamed. If the story was a fabrication it would be highly improbable that the evidence of the complainant and Eunice would be so similar with regard to the incident itself;
- (4) It is highly improbable that the complainant would lay a false charge of rape if she did not have a strong motive to do so. On the record there is none.

With regard to the complainant's evidence it is also significant that no attempt was made to discredit her on the strength of her statement and that the appellant's version was not put to her in any detail.

- [10] The appellant could not deal with these probabilities and in my view his evidence and that of his witnesses was correctly rejected by the regional court in the face of the objective evidence and the probabilities. The appeal against conviction therefore cannot succeed.
- [11] The appellant's attorney also argued that the appellant did not receive a fair trial as required by the Constitution. He contended that the presiding magistrate descended into the arena, led evidence on behalf of the state and interrupted the defendant's cross-examination by asking questions at inappropriate times. It is significant that this point was not raised during argument before the court a quo and that the appellant's legal representative did not object to the nature or duration of the magistrate's questioning and point out that he was being hampered in the presentation of the appellant's defence. It is obvious that a presiding officer is entitled to ask questions particularly in order to clarify matters arising from the evidence. It is also well-established that the questioning should be conducted in such a way that the presiding officer does not lose his objectivity or demonstrate partiality. While it is true that the presiding magistrate did ask a number of questions, perhaps more than is desirable, the content of the questions shows that he did this primarily, if not exclusively, to clarify the evidence. On a reading of the record I am not satisfied that the presiding magistrate lost his objectivity or showed that he was not impartial. In my view the argument is not borne out by the record and it cannot be upheld.
- [12] As far as sentence is concerned the appellant's attorney argues that the sentence is excessive and that the court did not consider a number of relevant matters properly or sufficiently. It is not necessary to consider all the matters raised. The court overemphasised the seriousness of the offence. It stated that the complainant was severely beaten, which is not borne out by the record, and it was influenced by the fact that there were three acts of intercourse (which ordinarily attracts a life sentence) despite finding that there was 'one

continued sexual action of one rape' (which attracts the minimum sentence of 10 years imprisonment). The court also did not sufficiently take into account the role of alcohol. It is clear that the appellant

consumed a great deal of alcohol during the course of the day and the evening. As a result the court imposed a sentence which is excessive and differs to such an extent from the sentence which this court would have imposed that interference is justified. In my view a sentence of 12 years imprisonment was the appropriate sentence.

Order

- [13] 1. The appeal against the conviction is dismissed;
2. The appeal against the sentence is upheld and the sentence of 15 years imprisonment is set aside and replaced with a sentence of 12 years imprisonment;
3. In terms of section 282 of Act 51 of 1977 it is ordered that the substituted sentence be deemed to have been imposed on 8 September 2008.

B.R. SOUTHWOOD

JUDGE OF THE HIGH COURT

I agree

S.S. OMAR

ACTING JUDGE OF THE HIGH COURT

CASE NO: A382/09

HEARD ON: 2 November 2009

FOR THE APPELLANT: MR. C. JORDAAN

INSTRUCTED BY: Coert Jordaan Inc Attorneys

FOR THE RESPONDENT: ADV. G.J.C. MARITZ

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 6 November 2009

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/ZAGPPHC/2009/140.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mbuyane-v-s-unknown-topic-agpphc-2009>

Prepared on 11 October 2026 · Esheria