

SOUTH AFRICA / JUDGMENT

Mhlaba v S (A267/19) [2019] ZAWCHC 148 (8 November 2019)

[2019] ZAWCHC 148

COURT

Western Cape High Court, Cape Town

BEFORE

Cloete, Thulare

CASE / FILE NUMBER

A267/19

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A267/19

In the matter between

PHUMLANI MHLABA APPELLANT

And

THE STATE RESPONDENT

CORAM: CLOETE J; THULARE AJ

JUDGMENT: 08 November 2019

THULARE AJ

- [1] The appellant was granted leave by the Regional Court, Parow, to appeal against his conviction and sentence of seven
- (7) years imprisonment on a charge of attempted rape. He had been acquitted on a charge of assault with intent to do grievous bodily harm.
- [2] The appeal was opposed. The issues were whether that the complainant's version was satisfactory in all respects; whether there was prior act of consummation which took place to conclude that the appellant attempted to rape the complainant and whether the appellant's version was reasonably possibly true.

[2] The complainant had known the appellant before as he had worked for the same employer with her sister. On 25 March 2016 she left the Airport late after work and had to go through the city of Cape Town to get a taxi to Belhar. She was inside a taxi at around

10pm at Cape Town taxi rank when someone called her by her name. She recognized the appellant at the door of the taxi. She knew that the taxi in which she waited would not take her home but would drop her at the Stellenbosch Arterial main road and she would have to walk home from there.

[3] She welcomed the offer by appellant to take her home in his taxi. She alighted from the taxi in which she was waiting and took the appellant's taxi. Appellant waited until the taxi was full before he left the rank. He told the complainant that he would

first drop off all the passengers and would then take her home. The appellant dropped off all passengers, including his girlfriend who was also in the taxi as well as the taxi marshall.

[4] They stopped at a garage in Delft and went together inside the shop where appellant bought himself cigarettes and for her a chocolate, packet of Doritos chips and a cool drink. He later also asked for her indulgence to collect something at his home which he did before they drove further. From his home he drove to a dark area and parked behind an old garage. She asked him if he was taking her home. Initially he did not respond and when she asked him for the second time his face changed. She could see the anger and he told her he would have sex with her.

[5] The appellant pushed her to the back. She pushed back. He pushed her forcefully such that her earring went out. She tried to defend herself as he forced her. He pushed her, choked her and slapped her in her face. He strangled her. She tried to talk to him but the look in his eyes left an impression that he was determined to hurt her. She lay with her back and he told her to remove her pants. She asked him if they could talk and he pulled her pants to remove them. He told her he would have intercourse with her,

that she slept with men for so long and herself and her sister just wanted to use him. He pulled her pants. The appellant had not removed his clothes or exposed himself to her.

[6] She had a jeans legging on, a pink top and a jacket. The top had strings and he tried to use the strings to choke her. She pulled the window and pulled her head out. The jacket and her top were torn in that process. She screamed at the top of her voice for help with her head out of the window. She also tried to get out of the window. Two unknown men saw her and came running down towards the vehicle.

[7] The appellant saw them, got angry and spoke to himself asking but why. The appellant jumped to the driver's seat and drove off in a high speed. She tried to open the door but could not succeed. The appellant drove through the streets and robots. He told her he wanted to drive them to death. She decided to rather throw herself out of a moving vehicle than to be raped. She kept on trying the door and managed to open it. He stopped. She threw her body half-out of the vehicle. Her high heels disturbed her escape

but she managed to get out.

[8] He alighted and approached her with a knife in his hand and threatened to stab her. He instructed her to get back in the vehicle and threatened to kill her. She got one of her shoes still on and she started running towards the nearby factories. She ran away

and did not know what happened to appellant. She got to one factory and a security guard would not help her. She hid in the bushes and after a while a vehicle came by. She got out from hiding and asked for help.

[9] The vehicle was driven by a security guard who came to stop at a nearby factory and she approached the man and asked for help. She reported what had happened and the driver gave her a lift. They first tried to get to her sister but when they did not find her, the driver took her to the police station. She did not know the driver before that date, but he gave his name as Petrus and also gave her his cellphone number.

[9] Her left arm had a big blue mark. She had an injured thigh foot and her knee was swollen as a result of falling out of the vehicle. Her neck was also painful.

[10] Zimisele Petros Ngcobo was an inspecting supervisor for security officers at Omegas Solutions. He was on his way to visit one of their sites, Alpha Pharm in Parow. He had stopped at the gate when a young woman approached him. She was barefoot, screaming and running towards him. The gate was still closed as the security officer on duty had not yet opened for him.

[11] The woman reported that she had escaped from a man who wanted to rape her. She had escaped at the circle near Alpha Pharm and that was where she had left her shoes. He asked her questions. Her clothes were torn. Her top was torn and one could see her teats which were exposed. Her arm was blue her face looked like she had been involved in a fight. She looked like she was mad and the

security officer who was inside the yard attempted to stop her approach.

[12] The woman told him that the driver of the taxi which transported her from town, after dropping off all passengers, attempted to rape her near the cemetery in Modderdam. She knew the person who attempted to rape her. The attacker had a knife. There were voices of people approaching the scene where the attempted rape happened and that is what stopped that she be raped as he drove off. She opened the door whilst the vehicle was in motion and that is what led to her being able to escape.

[13] The complainant frightened him. She was screaming and the manner in which she had opened her eyes was as if she was mad. She was shocked and shocked him such that he initially contemplated driving off. After her explanation he called the police and they waited. After some time he suggested that she wait with the security officers there for the police but she was afraid. He then took her to Delft police station. No man approached him whilst she was with the complainant. She did not know the complainant before

that day.

[14] The appellant confirmed how she and complainant knew each other. He used to take the sister home from their common work place and that would include complainant if she were visiting her. On the day of the incident he went past the sliding door of the taxi which was loading just before his turn to load passengers at the rank. He was checking how far it was from being full.

[15] A voice inside the taxi called for his attention, and asked if he was not Phumlani or Boots. Boots was his nickname. He looked and recognized the familiar face. He also enquired from the person if she was not Anthea and the person confirmed. It was the complainant she was speaking to. They started a conversation about her looking different. She explained that she was sick and had cancer. She enquired if he was also catching a taxi and he told her that he was the driver of the next taxi.

[16] He agreed to take her home as the taxi she had boarded would not take her home. His girlfriend was in his taxi. As they left the city after his taxi was full, he explained to the complainant that Belhar was not his ordinary route and he could not go straight there with a full load. Others in the business would think that he was loading out of his demarcated area and there would be issues. He would first deliver all the passengers and then take her home. He delivered all the passengers including his girlfriend.

[17] After some errands, he drove to a garage with complainant and both went inside the shop. He paid for her pie, chocolate, chips and cool drink and he bought cigarettes. From the garage she sat at the front seat. He had consumed an Indian pill to clean his stomach whilst at the taxi rank. He needed a toilet. He told the complainant and she did not have a problem. He got off the road he was travelling on, stopped, took toilet paper, alighted and left the complainant inside the vehicle.

[18] Whilst busy relieving himself he noticed six men who were approaching the vehicle. He got up, quickly dressed up and got into the vehicle. The complainant asked him what was going on and he asked her to look at the mirror. He saw that one of the six men

had picked up a brick. The area is known for smash- and- grab robberies. They could also be robbed of the car, it could be burnt

and have it as scrap.

- [19] As he started the car, they threw bricks at the vehicle. The complainant screamed for help. She was seated next to him. The rear window was broken as he pulled off. He drove away. He asked the complainant why she was screaming. He asked her to calm down but she would not listen and kept on screaming. She was screaming that whole trip. She was frightened. His attention was on his mirror as he prepared to move into a lane before he got to the robots when he realized the wind coming into the vehicle. As he looked the complainant was no longer next to him. He saw her through his mirror, rolling on the road.
- [20] She had jumped out of the vehicle. He stopped and reversed. She walked past the vehicle. She went past Sasol garage, over the bridge and turned to the factories. He waited for the robots and followed her. When he caught up with her he asked her why did she jump out. She did not answer him but continued walking. He saw that she was injured and thought it must have been from the broken glass when the windows were broken. She did not listen to what he was saying, but ran up to the circle towards the nearest factory where there was security.
- [21] He also came to stop at the gate where the complainant was still screaming for help. The complainant also told the security guards that she was screaming because he wanted to rape her. He explained to the security what according to him happened but they did not want to accept it. They told him to leave before they shot him. He then drove home.
- [22] There are well-established principles governing the hearing of appeals against findings of fact. In *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e-f these principles are set out as follows:
- “In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.”*
- [23] The absence of injuries in relation to being slapped and strangled, on its own cannot be a compartment of the evidence which should lead to the total rejection of it happening or the rejection of the totality of the complainant’s version. The nature of that kind of assault on its own depends on its unique characteristics to lead to visible injuries on a particular victim. The question whether Ngcobo took the complainant first to her sister or directly to the police station, in my view, is not material to the question to be decided. Even if on this aspect Ngcobo’s version may be unreliable, the trial court accepted the report made to him by the complainant on account of all the evidence before it.
- [24] The appellant drove and parked at an isolated, dark and hidden area. He told the complainant that he wanted to have sexual intercourse with her. He pushed her to the back seat of the taxi. The complainant pushed him back. Beyond reasonable doubt the appellant knew that the complainant did not consent to have sexual intercourse with him. The appellant slapped and strangled her to subdue her resistance. He told her to remove her pants and when she did not, he pulled them down. She managed to pull the window open,

struggled to get her head out and screamed at the top of her voice.

[25] Strangers passing by heard her screams and came towards the vehicle. It is this intervention that caused the appellant to stop.

Appellant's mind had been properly made up to carry thorough his evil purpose. The appellant was intent on raping the complainant.

He did not complete all that he had set out to do. The completion of his unlawful conduct was prevented by intervention from outside

agency [Rex v Schoombie 1945 AD 541 at 545-546].

[26] In S v Meyden 1999 (1) SACR 447 (WLD) at 449j-450a it was said:

"The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent."

In considering the process of reasoning of the trial court, in my view, its application of this test was appropriate to the nature of the evidence which was before it. The conclusion it reached accounted for the totality of all the evidence. I am unable to conclude that the trial court was wrong in its findings.

[27] The appellant was 28 years, unmarried and had a minor child of 3 years. He was a first offender. He went up to standard 7 at school. He worked as a general labourer and a part-time taxi driver and earned about R1300 per week.

[28] Gender-based violence in general, and especially of a sexual nature, is very serious. The appellant abused the trust which complainant had on him. The appellant used his masculinity in a toxic way. Most workers in this country depend on public transport.

The abuse and rape of women by those who have penetrated the taxi industry as a mode of public transport in the city of Cape Town needs a concomitant response from the court. In my view, the sentence is not disproportionate.

I would make the following order:

The appeal against the conviction and sentence is dismissed.

DM THULARE

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

J CLOETE

JUDGE OF THE HIGH COURT

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