

SOUTH AFRICA / JUDGMENT

MJV v S (A23/221) [2021] ZAGPJHC 164 (26 August 2021)

[2021] ZAGPJHC 164

COURT

South Gauteng High Court, Johannesburg

BEFORE

NGM Mazibuko, B Vally

CASE / FILE NUMBER

A23/221

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

REPORTABLE: NO

OF INTEREST TO OTHERS JUDGES: NO

REVISED

CASE NO: A23/221

In the matter between:

MJV

APPELLANT

and

THE STATE

RESPONDENT

APPEAL JUDGMENT

MAZIBUKO AJ,

A. INTRODUCTION

1. On 5 February 2013, the Regional Court magistrate Mr Louw convicted the Appellant, MJV (the accused), of committing two acts of sexual assault towards a 26 -years old male, J M[....], (the Complainant) on 1 August 2010, at Cresta. On 15 July 2020, the Appellant was sentenced to ten (10) years direct imprisonment on each count, ordered to run concurrently.
2. The Appellant was legally represented throughout the trial proceedings.
3. The appeal is against the conviction only.

B. THE APPLICANT'S GROUNDS OF APPEAL

4. The Appellant contends that the State did not prove its case beyond a reasonable doubt as the learned magistrate relied on the evidence of a single witness which did not pass the threshold set as a cautionary

rule and that there were contradictions and improbabilities in the State case.

5. The Appellant argues that the learned magistrate should have accepted his version as reasonably possibly true.

C. RELATIONSHIP BETWEEN THE APPELLANT AND THE COMPLAINANT

6. It is common cause that the Appellant and Complainant worked for the same company. The Complainant was a security officer whilst the Appellant was a Sales Manager and superior to the Complainant regarding their employment. The Complainant and his colleague, Mr Mkhwanazi (Mkhwanazi), were rendering their security services and giving water to the cyclists during their (cyclists') competition.

D. SUMMARY OF EVIDENCE IN THE TRIAL COURT

7. According to the State, whilst the Complainant and his colleague, Mkhwanazi, performed their duties at the cyclists' competition at Northem Farm, the Appellant informed the Complainant that there would be a party somewhere and that the Complainant would need to safeguard the party venue. The Complainant accepted the post.
8. The Appellant and Mkhwanazi knocked off, and the Appellant drove them in the company car. He dropped Mkhwanazi at Diepsloot and proceeded with the Complainant to his residential home at C[....].
9. Upon arrival, the Appellant inquired where exactly the party was. The Appellant responded that it would be starting soon. They got inside the Appellant's house, and the Appellant locked the doors.
10. The Appellant went to the bedroom and returned with the pornographic DVD in his pocket, which he played. Whilst the pornographic DVD was playing, the Appellant started touching the Complainant's private parts, undressed, and dragged him into the bedroom.

11. The Appellant was scared as he was warned that any form of resistance would lead to him being killed. Also, in the bedroom, he saw a bullet on top of the table.
12. In the bedroom, the Appellant instructed the Complainant to insert his (Appellant's) penis into his mouth. After that, he instructed him to bend and inserted his (Appellant's) penis into the Complainant's anus and made up and down movements.
13. The Appellant went to the bathroom and ejaculated and gave Complainant a towel to wipe himself. After that, he offered him a cool drink in a glass.
14. The Complainant inquired about the party again. After that, they left the Appellant's house, and the Appellant dropped the Complainant at Monte Casino at the robots. The Appellant reminded the Complainant about not mentioning what had transpired at work; otherwise, he would be killed.
15. The Complainant asked for transport money, and the Appellant indicated that he had no money with him and left the Appellant. The Complainant approached a Metro police which was in the vicinity and told them what had transpired. The Metro police took him to Douglasdale police station.
16. At Douglasdale, he was not immediately assisted as the police laughed at him. Only later he was able to lay a charge of sexual assault against the Appellant and taken for medical examination. He also reported the matter at his workplace.
17. The State also called Mkhwanazi, who testified that after they knocked off, the Appellant drove him and the Complainant and dropped him at Diepsloot. He continued to drive with the Appellant after dropping him.
18. The arresting officer, Mr Masala, testified that he effected the Appellant's arrest on 12 August 2010. He had obtained the telephone number and vehicle registration number of the Appellant from the Complainant.
19. Further, the State called Dr Gazi, who examined the Complainant on the day of the incident. According to the J88, there were no injuries except redness, swelling and the tear at the eight o'clock position on the anal area, consistent with penetration.
20. The Appellant testified and called no further witnesses. He testified that whilst at Northem Farm, he conversed with the Complainant about the female cyclists' physique. The Complainant told him what he used to do when he was a barman at Germiston and had a sexual encounter with the American woman. The Appellant then told the Complainant that he had a pornography DVD that he would show him. The Appellant was interested, and they drove to drop Mkwanzazi and proceeded to his house to show the Complainant the said DVD.

21. They arrived at his home, he played the said DVD and left the Complainant watching it whilst he went to the bedroom to change his work clothes. When he returned, where the said DVD was playing, he found the Complainant fondling himself whilst his trousers were unzipped and open.

22. The Appellant sat next to the Complainant, watched the DVD, and

became aroused. Both then masturbated themselves, both ejaculated, and both cleaned themselves up. The Appellant dropped the Complainant off, and he did not have any money to give to the Complainant when he was asked for transport money.

23. He denied having sexually assaulted the Complainant.

E. THE FINDINGS OF THE TRIAL COURT

24. The trial court found that the State has proven its case beyond a reasonable doubt. It found that the Appellant sexually violated the Complainant as alleged and that the Appellant's version was not reasonably possibly true.

F. THE PRINCIPLES APPLICABLE IN APPEALS

25. The standard of proof of guilt is that the prosecution must prove its case beyond a reasonable doubt. To satisfy the test, the court, in assessing evidence, must look at the total body of evidence.

26. The principles governing appeals have become settled. The appeal court can only interfere in very limited instances. The court can interfere only where there is a misdirection on the law and facts.

G. THE APPLICATION OF THE PRINCIPLES AND THE EVALUATION

27. I am not persuaded that the learned regional magistrate in convicting the accused misdirected himself in any relevant respect in his assessment of the evidence. The totality of the evidence justifies the learned regional magistrate's findings and his conclusions that the version of the accused was not reasonably possibly true and that his guilt was proven beyond a reasonable doubt.

28 The learned regional magistrate treated the Complainant's evidence with caution and was mindful of certain inconsistencies in the evidence. Many features show the Complainant's evidence to be trustworthy and unquestionably true and the exculpatory evidence of the accused to be false beyond a reasonable doubt.

29. The Complainant's evidence was not only credible but clear, reliable and satisfactory in all material aspects. The fact that his evidence falls into the category of 'testimony of a single witness' does not diminish its value. The evidence has to be tested by examining, amongst others, on its internal consistency, the credibility of the Complainant as a witness and its reliability in relation to other facts that have been established, such as in this case, the fact that he was examined by a doctor who found that he had sustained an injury to his anal

passage which was consistent with a penetration of an object into the anus.

30. On this approach, the principle that the evidence should be treated with caution because it emanates from a single witness merely means that care must be taken in its assessment. It certainly does not mean that the evidence should be rejected. Here the learned magistrate did exactly what the law required of him. He assessed the Complainant's evidence carefully and conscientiously. He came to the conclusion that it was not only reliable but that it reflected the truth of what happened to the Complainant when the Appellant took him to the Appellant's home on that fateful day.
31. I also find the Appellant's explanation as to why he brought the Complainant over to his home and then played the pornographic DVD to be lacking in credibility. If he went home to change his clothes, he should have done just that and leave. There was no need to play the pornographic DVD. By doing so, he created an opportunity to pursue a sexual encounter with the Appellant.
32. The Appellant did not deny nor confront the Complainant's evidence that there was a bullet on top of his bedroom table, nor did he deny that he threatened to kill the Complainant if he tells anyone of what had transpired.
33. He further does not deny that the Complainant consistently inquired about the party; at their arrival at C[...] and his house while seated on the couch.
34. In my view, the trial court's analysis of the evidence cannot be faulted, nor can it be criticized. The appeal against the Appellant's conviction on both counts of sexual assault must fail and be dismissed

ORDER

Accordingly, the following order is made:

The appeal against the Appellant's conviction is dismissed.

NGM MAZIBUKO

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

B VALLY

JUDGE OF THE HIGH COURT

APPEARANCES

For Appellant: Adv A Nel

Instructed by: Raath Law Inc

For the State: Mr C Ryan

Instructed by: Director of Public Prosecutions

Date of hearing: 29 July 2021

Date of Judgment: 26 August 2021

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