

SOUTH AFRICA / JUDGMENT

# Mjwara v S (AR80/15) [2021]

## ZAKZPHC 57 (3 September 2021)

[2021] ZAKZPHC 57

## COURT

Kwazulu-Natal High Court, Pietermaritzburg

## BEFORE

Mngadi, Mlaba

## CASE / FILE NUMBER

AR80/15

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU

-NATAL DIVISION, PIETERMARITZBURG

AR

No: 80/15

In

the matter between:

SCELO

EMMANUEL

MJWARA APPELLANT

and

THE

STATE RESPONDENT

ORDER

On

appeal from: The Regional Court, Durban (M.  
Hlophe sitting as a court of first instance)

1. The

entire proceedings in State vs Scelo Emmanuela Mjwara, Durban

Regional Court, Case No:

41/303/2012 are, due to a fatal  
irregularity, declared to be a nullity.

2. The

conviction and sentence are set aside.

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**JUDGMENT**

Mngadi, J (Mlaba AJ concurring)

- [1] The appellant, with leave of the trial court, appeals against conviction. The State charged the appellant with one (1) count of rape in contravention of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997.
- [2] The appellant faced a charge of rape before the regional court sitting in Durban. The charge against the appellant alleged that on or about 24 December 2011 and at or near Botanical Gardens, Durban the appellant did unlawfully and intentionally commit an act of sexual penetration with [S...Z...M...] the complainant by inserting his penis into her vagina without the consent of the complainant. The appellant, who was legally represented, when the charge was put to him, pleaded not guilty. As basis of defence through his legal representative he stated that he had sexual intercourse with the complainant with her consent. The learned regional magistrate after hearing evidence convicted the appellant as charged. The court sentenced the appellant to eight (8) years imprisonment.
- [3] The complainant testified that she was with five friends. They were out for a night visiting night clubs. The appellant who was unknown to them joined them in the last night club they visited. In the early hours of the morning they left the night club which was closing. The appellant invited them to his place promising them more alcohol. They proceeded to the appellant's flat by a taxi and the appellant paid the taxi fare for all of them at the request of Zandi.
- [4] The complainant testified that they arrived at the appellant's flat. The appellant offered them places where to sleep, others slept on the sponges on the floor. She and one Anele went upstairs. Anele slept on a bed in another room. The appellant showed her a bedroom with a double bed on which to sleep. She took off her leggings and she loosened her bra. She had no underwear. She slept wearing a short dress. She fell asleep. She woke up when she felt the appellant on top of her and he was having sexual intercourse with her. She struggled with the appellant pushing him off her. He placed his hand over her mouth stopping her from screaming. She managed to escape. She ran out to the balcony. She screamed for help. The appellant grabbed her and he pushed her back to the bedroom. There was a knock on the door. The appellant put on shorts and underwear. He picked up a condom and he opened it. He opened the door and he met her cousin Sthe. He told her that he was sorry, he did not know that the complainant did not want to have sexual intercourse without a condom. The complainant reported to Sthe what happened. She then went and she reported the matter to the police.

[5] The complainant under cross-examination testified that she slept in a double bed. The appellant during the course of the evening talked to her by sending messages through others, in particular, through Zandi. She did not know why he did that. She did not think of locking the door of the bedroom before she went to sleep. Some of her friends she was with were males. It was three females and two males. Sthembiso Mkhize slept with Zandi, although it was their first time to meet. Sthembiso and Zandi did not have sexual intercourse with each other. She normally did not wear underwear because it caused rash on her. She did not see whether the appellant was wearing a condom or not when she woke up. She did not know how much alcohol they consumed that night but it was a lot. She admitted that she was under the influence of alcohol since all of them had drunk alcohol. Zandi told

him to pay for them. She denied that she went to the appellant's place because there was a romantic relationship between them. Zandi passed messages between her and the appellant at the club. She did not directly consent to the appellant to a relationship. She first refused that they go to the appellant's place for more alcohol but Zandi continued begging her until she agreed. It was early in the morning when she went to sleep because they had not slept for the whole night. She argued with the appellant about taking and opening a condom before opening the door, and about him closing her mouth with his hand.

[6] Sthembiso Mkhize testified. He stated that when he went to the bedroom, after hearing the complainant screaming, she was saying 'you are trying to rape me. I am going to get you arrested for what you are trying to do.' He entered the bedroom and the appellant was in his underpants. The complainant had a broken mirror in her hand and she was threatening to stab the appellant if he came closer. The complainant told him that the appellant wanted to rape her but he did not succeed to rape her, he failed to rape her.

[7] The State as a last witness called a Dr Singh. He testified that he examined the complainant and he completed a medical examination report (J88). He found on the complainant a creamish discharge in her vagina.

[8] The appellant testified for the defence and he did not call any witness. He testified that he met the complainant and her friends at the nightclub. He danced with her and he proposed love to her. Zandi one of the complainant's friends assisted him to talk to the complainant. The complainant did not show that she was rejecting his proposal. She told him that she was with her friends. It was then agreed that they would all go to his place. He paid the taxi fare for all of them. At his place, it was agreed that they would sleep first. He showed all the others where to sleep. The complainant went with him to his bedroom upstairs. He took out the condom. The complainant opened the condom and she put it on his penis. He started having sexual intercourse with the complainant. All of a sudden the complainant started screaming. There was a knock at the door. He went and opened the door for her brother. The complainant told her brother who saw a condom on the floor that they did not do anything. The behaviour of

the complainant confused him.

[9] The learned regional magistrate stated that the incident took place at 7 am by then the complainant was not under the influence of alcohol. He found that it is not consistent with a person who consented to sexual intercourse to scream during sex. The court said that there were two scenes. The first scene is when the complainant woke up and the appellant was on top of her having sexual intercourse with her. The second scene is when she the complainant was brought back to the bedroom and an attempt made to rape her. The complainant, found the court, in her first report reported the second scene and she did not report the first scene. The court found that the appellant was not a good witness. He contradicted himself and he made his case as the

time went along and he did not show any confidence in his version. He stated that the complainant maintained that the door was locked.

[10] It is not correct that the incident took place at 7am. The complainant told the doctor that it took place at 1am. The club closed at 4am and the taxi took about 45 minutes to the place of the appellant. They may have gone to sleep at about 5am. If they were consuming alcohol for the whole night, the complainant was still under the influence of alcohol at 5am. The complainant admitted that when she went to sleep she was still under the influence of alcohol. It does not make sense that the complainant would report to her her the attempt to rape her but not report the actual rape although both happened in as single continuous incident by the same perpetrator. In fact, Sthe testified that the complainant told him that the appellant did not succeed to rape her.

[11] The complainant wanted the court to believe that she did not agree to a romantic relationship with the appellant but she admits that the appellant wanted her to go with him to his place because he was interested in her. She stated that she initially refused but the appellant through Zandi persuaded her to go to his place. She went to sleep in the appellant's bedroom whilst her companions slept in the other room. She slept on a double bed aware that the appellant was around. She had no underwear, she took her leggings off, and she loosened her bra. She slept in a short dress. She did not ensure before going to sleep that the door to the bedroom was locked. If she did not actually consent to sleep with the appellant, she created an opportunity for the appellant to sleep with her. Once the appellant took the opportunity to sleep with her, sexual intercourse would follow as a matter of course except if she objected to it. There is no evidence that before the appellant engaged in sexual intercourse with her she told him that she did not want to have sexual intercourse with him. It is correct that her screaming in the circumstances was out of context. It simply conveyed that she did not want to have further sexual intercourse with the appellant. There was no evidence that the appellant proceeded to have sexual intercourse despite her screaming.

[12] The circumstances do not show that before the appellant started to have sexual intercourse with the complainant he knew that she had not consented to sexual intercourse. There is no such finding by the learned regional magistrate and there were no factual grounds for such a finding. The conviction of the appellant, as a result, is not sustainable and it falls to be set aside. The onus is on the State to prove the guilt of the appellant beyond reasonable doubt.

Where the appellant raises consent the onus is on the State to negate consent. The appellant has no onus to convince the court of his version, if his version is reasonable possible true he is entitled to an acquittal. If there is doubt, an accused person is entitled to the benefit of the doubt. See *S v V* 2000(1) SACR 453 (SCA) at 455B.

- [13] The appellant's counsel as a point in limine contends that the person Sizwe Sphiwe Cele who legally represented the appellant during the trial had no right nor authority to represent a person in a criminal trial before the regional court at the relevant time. The trial commenced before the regional court on 9 May 2013 and it was finalised on 28 October 2013. The record of the proceedings shows that in the application for leave to appeal heard on 4 November 2013 and in the application for release on bail, pending outcome of the appeal finalised on 4 November 2013 the same Mr Cele represented the appellant.
- [14] The KwaZulu-Natal Provincial Office of Legal Practice Council, the successor to the Kwazulu Natal Law Society, has furnished an affidavit made by Mr. Cele in his application to this court for admission and enrolment as an attorney, which was supported by an affidavit of Thembalakhe Benedict Mbili. Mr. Cele in the affidavit stated that he served under a contract of service of articles to Mr Mbili from 15 March 2009 to 15 March 2011. Therefore, it shows that when Mr. Cele represented the appellant he had completed serving of articulated and he had not been admitted and enrolled as attorney. A letter dated 22 November 2017 by the Kwazulu-Natal Law Society indicates that Mr. Cele was admitted as an attorney on 17 January 2017.
- [15] The abovementioned affidavit by Mr. Cele (supported by the Mr. Mbili) stated that during the period 15 March 2011 to 30 September 2016 Mr Cele was employed by Thembalakhe Mbili attorneys as an administrator. In *S v Mkhize, S v Mosia, S vs Jones, S v Roux* 1988 (2) SA 868 (A) it was held that a defence in a criminal trial in the high court can only be undertaken by a person who has been admitted to practise as an advocate in terms of the Act . Further, it was held the lack of such authorization must be regarded as so fundamental an irregularity as to nullify the entire trial proceedings. In my view, the same parity of reasoning applies to legal representation in the regional court.
- [16] The actions of Mr. Cele and Mr. Mbili would appear to be fraud to the appellant (supposing that he paid for the services of Mr. Cele). Further, they may constitute statutory contraventions and the crime of defeating the ends of justice as well as unprofessional conduct. The Deputy Director of Public prosecution KwaZulu-Natal is urged to investigate the matter and consider constituting the necessary prosecutions. The KwaZulu-Natal Provincial Office of Legal Practice Counsel is also urged to investigate the matter with a view to take the necessary action, in particular, against those admitted as officers of this court.
- [17] In the result, I proposed the following order:
1. The entire proceedings in *State vs Scelo Emmanuela Mjwara*, Durban Regional Court, Case No: 41/303/2012 are, due to a fatal irregularity, found to be a nullity.

Mngadi j

I agree, it so ordered.

Mlaba AJ

## APPEARANCES

Case Number: AR 80/15

For the Appellant: E.M. Chiliza

Instructed by: Legal

Aid South Africa DURBAN

For the respondent: S.I. Sokhela

Instructed by: Deputy

Director of Public Prosecutions PIETERMARITZBURG

Heard on: 20

August 2021

## Judgment

delivered on: 03 September 2021

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Prepared on 9 October 2026 · Esheria