

SOUTH AFRICA / JUDGMENT

Mojakisane v S (A18/2017) [2017] ZAFSHC 230 (7 December 2017)

[2017] ZAFSHC 230**COURT**

Free State High Court, Bloemfontein

BEFORE

Mathebula, Phalatsi

CASE / FILE NUMBER

A18/2017

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****FREE****STATE DIVISION, BLOEMFONTEIN****Case****No.: A18/2017****In**

the appeal between:

STEVE
MOJAKISANE
Appellant
and
THE
STATE
Respondent**CORAM:**

MATHEBULA, Jet PHALATSI, AJ

JUDGMENT**BY: MATHEBULA, J****HEARD ON: 13 NOVEMBER 2017****DELIVERED ON: 07 DECEMBER 2017**

- [1] The appeal arises from the conviction and sentence on a charge of rape by the regional magistrate sitting at Koffiefontein. After hearing oral argument this court handed down the following order on 13 November 2017:

1. The appeal is upheld
2. Both conviction and sentence are set aside.

The reasons for the abovementioned order that were reserved now follows.

- [2] The appellant who was unrepresented throughout the trial proceedings pleaded guilty. However a plea of not guilty was noted on his behalf in terms of section 113 of Act 51 of 1977. The basis of his defence was consent. The State led the evidence of Tiekiemeid Walters, Christine Lauw and Mary Maselane in proving its case against the appellant. In addition the copy of the birth certificate of the complainant, J88 and affidavit in terms of section 212 of Act 51 of 1977 deposed to by Johannes Frederick Le Roux were handed in and marked Exhibit "A" "B and "C" respectively. The appellant exercised his right to remain silent and did not testify.
- [3] The evidence in this matter is that on 7 September 2013 the appellant and his live-in lover (Christene) were guests at the home of the complainant on the farm Kalkfontein. The mood was jovial with liquor in abundance and flowing freely. At some stage the complainant's parents fought and her mother sustained an open wound on the head. It appears both her parents as well as the appellant and Christene went to sleep.
- [4] Sometime during the night Christine went outside to relieve herself. She noticed that the appellant was no longer sleeping next to her. She heard the complainant screaming in the dark and uttering the words "Mamma". This prompted her to investigate what was taking place. She saw the appellant and the complainant lying on the ground with the appellant on top. Both their pants were up to their knees. She was unable to see what they were doing there.
- [5] She enquired from the complainant what is it that they were doing. Her response was that the appellant had sexual intercourse with her. The appellant did not proffer any response. She informed the complainant's parents and her mother instructed her to come and sleep with them.
- [6] The following day the matter was reported to the police. The appellant and Christine left for their home at Tafelkop farm. The

appellant requested forgiveness from Christene that he behaved inappropriately for having sexual intercourse with the complainant.

It remains unclear whether this request was accepted or not.

- [7] On 8 September 2013 the complainant was examined and the medical report (J88) completed by the designated health practitioner. Sister Mary Maselane recorded the existence of swelling and bruises in her vaginal area. She concluded that these were consistent with a sexual assault perpetrated against her. An affidavit deposed to by Johannes Frederik Le Roux (Principal Clinical Psychologist) attached to the Forensic Psychiatric Section of the Free State Psychiatric Complex was handed in and admitted. The relevant parts of the affidavit

are that the complainant is mentally retarded on a moderate level. She is also not capable of consenting to sexual intercourse and will not understand court proceedings. The important aspect is that she was examined on 8 May 2014 and the affidavit signed and commissioned on 18 March 2015.

- [8] In both his written heads of argument and oral submissions, counsel for the appellant raised a three pronged argument contending that the court a qua erred in finding that the State has proved its case beyond reasonable doubt and that the conviction should be set aside. Firstly, he submitted that the proceedings were not in accordance with justice because the learned magistrate failed in his duty to assist the appellant to obtain the contents of the docket. As a result the appellant was unable to prepare adequately and conduct his trial. The contention is that he was not afforded a fair trial. Secondly, there was no evidence that the appellant had sexual intercourse with the complainant without her consent. Thirdly, it was not proved that the appellant knew or ought to have reasonably known that the complainant was below the age of 16.
- [9] Initially the State was strongly opposed to the appeal. After careful and extensive oral engagement with us, counsel for the State conceded that the affidavit admitted as exhibit "C" cannot serve as the basis to conclude that the complainant did not consent to sexual intercourse. I endorse the concession.
- [10] The Constitution of the Republic Act 108 of 1996 guarantees every accused person the right to a fair trial. Section 35 (3) reads as follows:-
- "Every accused person has a right to a fair trial which includes the right
- (a) to be informed of the charge with sufficient detail to answer it;
 - (b)
 - (c)
 - (d)
 - (e)
 - (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
 - (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (h) to be presumed innocent, to remain silent, and not testify during the proceedings"

- [11] On 14 January 2014, the learned magistrate informed the appellant about his rights to legal representation. The nature of the charge against him as well as the possible sentence in the event of the conviction was explained. The learned magistrate even solicited the services of one Advocate Diba from the Legal Aid Board of South Africa to explain to the appellant not only his rights to legal representation but the possible consequences too. The appellant was hell-bent that he will conduct his own defence.
- [12] On 29 January 2014, the learned magistrate did not only put the events of 14 January 2014 on record but explained the same process all over again to the appellant. He remained unmoved and informed the court a quo that he will conduct his own defence. He could not be compelled to appoint a legal representative if it was not his choice to do so.
- [13] The learned magistrate explained the different stages of the court proceedings in a lucid manner to the accused. He demonstrated his understanding by participating as best as he could in the circumstances. There are of course blemishes here and there in the manner the court dealt with certain aspects. However, they are not of such a manner that they render the proceedings so unfair that they stand to be vitiated.
- [14] The learned magistrate tried all that was humanly possible to persuade the appellant to change his mind but to no avail. Even the intervention of Advocate Diba did not assist. I disagree with the submission of counsel for the appellant on this issue and find his argument to be unsound.
- [15] In order for a conviction on a charge of rape to stand, the accused person (appellant) must have penetrated the complainant without her consent as contemplated in Criminal Law Amendment Act 32 of 2007.
- [16] In convicting the appellant, the learned magistrate relied on the evidence of Christine Lauw. According to her she saw the appellant and the complainant lying on the ground on top of each other with both their pants lowered to their knees. The complainant was screaming and crying out uMama". The finding of the learned magistrate that it was not normal for a child to cry out "Mamma come help me" (Mamma kom help my) in situations whereby she consented, is inconsistent with the evidence led on this aspect. The added portion was not evidence before him. On enquiring from the complainant about what was going on, she replied that the appellant had sexual intercourse with her. The complainant did not say to her that the appellant had sexual intercourse with her without her consent.
- [17] The learned magistrate also relied on the evidence of the complainant's mother and the affidavit handed in and admitted as

Exhibit “C”. The court cannot rely on the uncorroborated evidence of a lay person to conclude that the complainant was incapable of consenting to sexual intercourse. The affidavit of Johannes Frederik Le Roux that the complainant was incapable of consenting to sexual intercourse was also unhelpful. Counsel for the State correctly conceded that it could not be relied upon as the basis that the complainant did not consent to sexual intercourse.

[18] The complainant was assessed and evaluated by him approximately eight

(8) months after the incident. The affidavit was signed off eighteen (18) months thereafter. The affidavit is seriously lacking in substance in that it does not allege that the complainant was incapable of consenting to sexual intercourse on the relevant date being 7 September 2013. Its admission as part of the evidence was not properly explained to the appellant. He was assured by the learned magistrate that it will not play any role in the decision of the court. The reality is that the court relied on it. The learned magistrate misdirected himself by concluding that the complainant was retarded and thus could not give consent on the relevant date.

[19] The learned magistrate concluded that the appellant had sexual intercourse with a minor aged 14. It was not denied that the

complainant was born on 23 June 1999. On the relevant day of the incident she was a minor. No evidence was tendered that the appellant knew or ought to have known that the complainant was a minor or retarded. The only evidence before the learned magistrate was that he knew her and aware that she was still attending school. This does not advance the case of the State to prove that he knew or ought to have known that she was a minor. It would have been desirable for the learned magistrate to call the complainant to see for himself and assess whether she resembles a minor or an adult. During the proceedings, the appellant testified that the complainant was staying with a man. The impression created was that she was doing so as a partner of some sort. This was not probed to elucidate particularly the issue that she was a minor. The evidence on record is that on that day everybody there was drinking.

It is unclear whether this includes the complainant or not.

[20] It is well within the rights of the accused person to elect not to testify. However there are consequences for such an election. An unrepresented accused must be properly cautioned in this regard. The legal position was stated and reaffirmed in *S v Brown* 1996 (2) SACR 49 (WC) and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC) that the accused will be at risk if he does not produce evidence in rebuttal where the State established a prima facie case. In casu, the state had not done so and therefore there was no obligation on the part of the appellant to testify.

[21] On the basis of the reasons discussed above, I concluded that the appeal ought to succeed.

[22] Accordingly the following order is made:-

22.1 The appeal is upheld.

22.2 Both conviction and sentence are set aside.

MATHEBULA, AJ

I concur.

PHALATSI, AJ

On behalf of the appellant: Adv. V. N. Mayisela

Instructed by:

Leonie Bezuidt Attorneys

C/O/ Taylor Attorneys

BLOEMFONTEIN

On behalf of the respondent: Adv. Lesie-Shale

Instructed by:

Director Public Prosecutions

/roosthuizen

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