

SOUTH AFRICA / JUDGMENT

Mokoena v S (A535/2016) [2017] ZAGPPHC 899 (14 December 2017) [2017] ZAGPPHC 899

COURT

North Gauteng High Court, Pretoria

BEFORE

Munzhelele, Fisher

CASE / FILE NUMBER

A535/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

DIVISION, PRETORIA

Case

Number: A535/2016

In

the matter between:

Bongani
Mokoena Appellant
and
The
State Respondent

JUDGMENT

MUNZHELELE AJ (FISHER J, CONCURRING):

INTRODUCTION

[1] This is an appeal in terms of s 309 of the Criminal Procedure Act 51 of 1977, against conviction and sentence imposed on the appellant by Regional Magistrate, Mr Makamu of the Regional Division; Gauteng held

at Benoni - on one count of contravention of section 3 of Act 32 of 2007 (Rape) read with the provisions of section 51 of schedule 2 of the Criminal Law Amendment Act 105 of 1997.

[2] The appellant was legally represented throughout the trial proceedings and at this appeal.

[3] The appellant was convicted of the charge and sentenced on 02 March 2015 to 10 years imprisonment. He was also declared unfit to possess a fire arm in terms of section 103 of firearms control act 60 of

2000. He is presently in custody.

[4] Leave to appeal the conviction and sentence was denied by the trial court on 2 March 2016, but leave to appeal to this Court was granted on 24 June 2016.

THE

FACTS

[5] As with many matters involving the charge of rape, the main point of divergence between the word of the appellant and that of the complainant is whether the complainant consented to the sexual intercourse.

[6] The complainant and the appellant were acquaintances as they had been learners at the same school. They were both 19 years of age at the time of the incident leading to the charge and conviction. The complainant is the mother of a child who at that stage was under the age of a year.

[7] On the day in question, being 20 August 2013, the complainant was on her way to school with a school friend, Ms A. N. when they met the appellant. The young women were late for school, having missed the bus and thus having resorted to walking to school.

[8] The appellant persuaded them not to go to school as they were already too late, it being approximately 09h30. It was decided that the three of them would go to the appellant's place of residence which was described as a shack. Although the appellant's home was within walking distance from where the three met up - they decided to travel by taxi to the appellant's home. Once there the appellant went to buy brandy and a soft drink to mix it with. At a stage, a friend of the appellant's (also named Bongani) joined them in the shack.

Bongani behaved in a way that was offensive to the women in that he touched them in a way that they found inappropriate. They complained to the appellant and he demanded Bongani to leave which he did.

- [9] The appellant, the complainant, and Ms N. then continued socialising, drinking together, and listening to music in the shack for the rest of the morning and into the afternoon. It was by all accounts a happy gathering during that time.
- [10] The complainant alleges that things then took a sinister turn. The appellant indicated that he wished to have romantic relations with her and when she refused him he became aggressive and threatening towards the women. It is alleged that he intimidated Ms N. into departing the shack so that he could be alone with the complainant. In this regard it is stated that he said he was a devil worshipper and that the spirits of those whom he had murdered were in the shack. He also threatened Ms N. that he would kill her if she did not leave. She fled in fear, on her version and that of the complainant.
- [11] According to the complainant, she continued to resist his advances and he then took out a knife with which he threatened her if she did not submit to sexual intercourse with him.
- [12] It is of concern that there is no description of the knife. There are also different versions given by the complainant in relation to this knife. In chief, the evidence was to the effect that the knife was placed on a table in the room. In cross examination the complainant stated that she knew the knife was in the shack, and in re-examination the version was that the knife had been taken out and "pressed" presumably on her person – although this was not clarified. The appellant says he owns no knife and that there is no table in the shack.
- [13] The complainant then described that he proceeded to take off her stockings and underwear and rape her on the bed in the shack.
- [14] On the version of the complainant, the time of the occurrence of the rape was approximately 14h30. She states that, after the rape, she wished to be given taxi fare to get home.
- [15] At this stage the version of the complainant loses cogency. She testified that she and the appellant stayed together during the afternoon and into the evening. She states that they went to friends of the appellant in a bid to get money and that they were then taken in a vehicle, a bakkie and at some stage they got out of this vehicle and proceeded on foot.
- [16] There is no real indication during this period that she was being held against her will. This impression is underscored by the following part of her version: she states that as she and the appellant were walking near a golf course she noticed a place where metro police vehicles were parked. She states that she told the appellant that she wished to urinate and that she then left him and went to an area where there was a security guard. She approached this guard and told him that she had been raped and that she needed the assistance of the police. The security guard informed her that he could not leave his post but that he would report the matter to the police.

- [17] Incomprehensibly, the complainant states that she then re-joined the appellant and they continued on their journey. At a stage she was picked up by an Avanza vehicle (presumably at her request and a taxi) and she then left the appellant after stating to him through the window of the Avanza that she intended to go to the police to report the rape.
- [18] She then testified that she attended the police station, which was at approximately 20h00, whereupon she reported that she had been raped. The police constable that she spoke to, Ms Batlanalo Makhe testified that she was calm when she reported the rape, although the complainant said she was crying.
- [19] The complainant was then taken to the shack by the police in an attempt to locate the appellant, but he was not at home. At the same time Ms N. also arrived at the shack with police – as she had also, by that stage, made a report to the police. This is a curious coincidence that was never satisfactorily explained.
- [20] The complainant was examined medically, and a J88 report was put into evidence. It was however inconclusive in that it showed no physical evidence of rape.
- [21] Constable Manganyi testified for the State. She confirms that she went out with the complainant in the police van looking for the appellant. The officer further confirmed that she was later telephoned by the appellant as she had left her phone numbers at the appellant's home during the search for the appellant and requested that he call her. Pursuant to this call, he was arrested.
- [22] Although Ms N. confirmed that she had been ejected from the shack by the appellant, she was unable to confirm the rape. What is strange about her version is that she did not raise any alarm immediately after being ejected. This is, notwithstanding that, on her version, she knew that the complainant was in imminent danger and that she encountered others on her leaving, including a younger brother of the appellant. This conduct is inexplicable in this context. At a stage in cross examination when it was put to her that when she left the shack the complainant remained at the shack of her own free will she answered "I do not know Your Worship".
- [23] As to the rape itself, one is left with the evidence of the complainant only. A single witness should, in a criminal case, be relied upon only if his or her evidence is clear and satisfactory in every material respect (see *R v Mokoena* 1932 OPD 79 at 80; *R v Mokoena* 1956 3 SA 81 (A) at 86; *S v Stevens* [2005] 1 ALL SA 1 (SCA) at 5d-h; *S v Gentle* 2005 (1) SACR 420 (SCA) at para 17; *Fletcher v S* 2010 2 All SA 205 (SCA).).
- [24] The evidence of the complainant was deficient and unsatisfactory in many central respects. In relation to the knife used to perpetrate the rape, the evidence is unclear and contradictory as set out above. This is obviously a crucial aspect of the offence. Furthermore there is no proper explanation for the fact that the complainant spent some 5 hours with the appellant after the rape, walking in the open and with no real indication that she was captive during this significant period of time. This position is underscored by her return to the

appellant after having found sanctuary with a security guard. It is surprising that the complainant got a chance to escape from the appellant when she requested to go to the toilet. However, she returned to the appellant, who she regarded as a threat, instead of taking shelter with the security guard or hiding or escaping from the appellant when she was out of sight. The security guard, who the complainant approached, was not called to corroborate her version. The complainant also said during cross examination that her home was not so far away such that she could not walk. Accordingly, if she was threatened why would she not leave without waiting for taxi fare? These issues should have been interrogated further during the trial.

CONCLUSION

- [25] I find that there are grounds to find that the evidence of the State was not sufficient to disprove the version of the appellant to the effect that the sexual intercourse was consented to.
- [26] Given the problems with material aspects of the evidence in the State's case, this Court will interfere with the conviction imposed by the Regional Court. Accordingly the appeal succeeds.

ORDER

I thus make the following order:

1. The conviction and sentence are set aside.
2. The appellant is to be released from prison immediately.

MUNZHELELE AJ

HIGH COURT ACTING JUDGE

GAUTENG DIVISION, JOHANNESBURG

FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING: 07 December 2017

DATE OF JUDGMENT AND ORDER: 14 December 2017

LEGAL REPRESENTATIVES:

FOR THE APPELLANT: Attorney JJ Botha

FOR THE RESPONDENT: Adv. J Cronje of DPP

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Prepared on 23 October 2026 · Esheria