

SOUTH AFRICA / JUDGMENT

Motepe v S (Appeal) (CA25/2021)

[2025] ZANWHC 95 (2 June 2025)

[2025] ZANWHC 95**COURT**

North West High Court, Mafikeng

BEFORE

J T Djaje, W Malane

CASE / FILE NUMBER

CA25/2021

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH WEST DIVISION –****MAHIKENG****APPEAL****CASE NO: CA 25/2021****Reportable:**

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In

the matter between: MOOKETSI
MOTEPÉ
Appellant
And
THE
STATE
Respondent
CRIMINAL
APPEAL
DJAJE
DJP & MALANE AJ

Heard: 4 APRIL 2025

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses.
The date for the hand-down is deemed to be 02 JUNE 2025.
ORDER
The following order is

made: 1.
The appeal against conviction is dismissed.

JUDGMENT

DJAJE DJP

- [1] The appellant in this matter appeared in the Regional Court of Tlhabane in the North West on a charge of rape. It is alleged that the appellant on 1 February 2015 had sexual intercourse with the complainant more than once and inflicted grievous bodily harm on her by assaulting her. The appellant admitted the sexual intercourse, pleading that it was consensual. After conviction, he was sentenced to 15 years imprisonment. He now appeals against the conviction only.
- [2] The complainant testified that on the date of the incident she was at a tavern with her friend M[...] and M[...]’s boyfriend N[...]. They were consuming alcohol. They were later joined by N[...]’s cousin, the appellant herein. When the tavern closed, they all went to N[...]’s place to sleep. When they arrived there, the spare room in which the complainant was to sleep was a mess and she decided to clean it first. At that time the appellant suggested that she can go and sleep at his place in the spare room. She enquired from M[...] her friend and N[...] if it was safe to go to the appellant’s place. They both confirmed that she would be safe with the appellant as he was known to them and not staying far.
- [3] When they arrived at the appellant’s place, she asked the appellant to borrow her some pants to sleep in as she did not want to sleep in her dress. The appellant gave her boxer shorts to sleep in and she put them on. She went into the blanket and fell asleep. She woke up and found a strange man on top of her having sexual intercourse with her without her

consent. That man ran off when she woke up and she asked the appellant who that stranger was. The appellant responded that it was his cousin. The appellant informed her that he also had sexual intercourse with her before that stranger. The complainant was not happy about that and threatened to lay charges against the appellant and that stranger. The appellant threatened to expose her naked photos on social media if she reported. He went on to throttle her and assaulted her before having sexual intercourse with her. When the complainant was threatened and assaulted, she gave in. After the intercourse the appellant fell asleep and that is when she escaped from the appellant's place. She ran out to her friend M[...] and informed her what transpired. She was injured on her cheek with a swollen reddish eye from the assault.

- [4] M[...] testified and confirmed that they were indeed together with the complainant on 1 February 2015. After leaving the tavern they proceeded to her boyfriend's place. The complainant eventually left with the appellant as she could not sleep in the spare room at N[...]’s place. In the morning, she saw the complainant coming to N[...]’s place crying and her eye was red and swollen. The complainant reported that she was raped by the appellant. The matter was eventually reported to the police.
- [5] The doctor who examined the complainant on 1 February 2015 at 20:50 testified that she noted a small subconjunctival bleeding on the left eye and a swollen left cheek of the complainant. Her conclusion was that the injury sustained was consistent with injury caused by a blunt object. On gynaecological examination she did not note any injuries. Her conclusion was that No injury does not exclude penetration. The doctor explained her conclusion that it is possible that there can be forced penetration and no injuries as the complainant had delivered one child in normal birth.
- [6] The appellant testified in his defence and called N[...] as his witness. According to the appellant, he had proposed love to the complainant, and she agreed. When they arrived at his place they had sexual intercourse with consent. In the morning the complainant asked him to take her halfway, but he said it was still too early they could leave later. The complainant was not happy, and she left. Later, the appellant went to N[...]’s place and found the complainant

drinking cold drink. The appellant left to attend a meeting in the village and at 18:00 he went to the tavern with his friends. At 22:00 he received a call from his neighbours that the police were looking for him. He was subsequently arrested.

- [7] N[...]’s evidence was that the appellant and complainant were in love and left together peacefully. The next morning the complainant arrived at his place, and she had cold drink with M[...]. The appellant arrived after some time and went to get money to buy alcohol. He did not come back, and they decided to go look for him, but he was not at his parental place. They gave up and went back to N[...]’s place. A certain man named Willy arrived and N[...] learnt that he was the complainant’s boyfriend. According to N[...], the complainant never mentioned anything about the appellant

raping her.

- [8] It was argued on behalf of the appellant that the court a quo erred in accepting the evidence of the complainant and rejecting his version as being improbable. The respondent argued in support of the conviction being set aside on the basis that “the probabilities and improbabilities in this case creates doubts as to whether there was no consent on this sexual encounter”. It is not clear on which facts was this submission by the respondent based. The respondent’s heads were poorly drafted and did not in any way advance the argument on behalf of the state.
- [9] Rape is defined in section 3 of the Sexual Offences Act 32 of 2007 as “Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”) without the consent of B, is guilty of the offence of rape”.
- [10] The state bears the onus to prove the accused’s guilt beyond a reasonable doubt and the accused version cannot be rejected only on the basis that it is improbable but once the court has found that his explanation is false beyond reasonable doubt. See: *S v V* 2000(1) SACR 453 (SCA) at 455B. In order for a conviction of rape to be sustained the state must prove beyond a reasonable doubt that all the elements of the offence are present and that the offence has been committed by the accused. The following was said about cautionary rule in *S v Jackson* 1998(1) SACR 470 (SCA) at 476 e-f:

“In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainant in sexual assault cases (overwhelmingly women) as particular unreliable. In our system of law, the burden is on the state to prove the guilt of the accused beyond reasonable doubt- no more no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.”

- [12] Evidence should be assessed in its totality in determining whether the state succeeded to prove the guilt of an accused person beyond a reasonable doubt. Nugent J (as he then was) in *S v Van der Meyden* 1999 (2) SA 79 (W) held that “it is wrong to adopt a mechanical, compartmentalised approach of examining the state case in isolation and thereafter consider the defence case discreetly. This may likely result in the illogical conclusion that the state case is acceptable and at the same time the accused version is possibly true. The conclusion whether to convict or acquit depends on the totality of the evidence and must account for all of it.” See also *S v Aswegen* 2001(2) SACR 97 (SCA).

- [13] The Supreme Court of Appeal in *Otto v S* [2017] ZASCA 114 held that:

“The onus rests on the State to prove all the elements of the offence of rape, including the absence of consent and intention. That is so even where, as in this case, the version put to the complainant by the appellant’s legal representative was a denial of any sexual contact with her.”

- [14] It is common cause in this matter that the appellant had sexual intercourse with the complainant on 1 February 2015. The complainant was honest enough to state that she went to the appellant’s house voluntarily and she trusted him. Whilst at the appellant’s house she

asked for his boxer shorts to sleep in. She voluntarily got into the blankets on the bed. When she realised that she was being taken advantage of by the appellant and his cousin, she threatened to report them. In her evidence she explained that when the appellant first had sexual intercourse with and the stranger, she was asleep and could not feel or see anything. It was only after she woke up and the appellant assaulted her that she gave in. Her giving in to sexual intercourse was because of being threatened that her naked photos would be exposed on social media. She was at the same time assaulted.

- [15] The complainant's action of giving in should be examined as to whether it gave rise to consent to sexual intercourse with the appellant. She testified that at that time she was assaulted by the appellant. She has a swollen cheek and bleeding eye. This injury was corroborated by her friend M[...] in the morning and the doctor who examined her later that day. M[...] further stated that when the complainant arrived in the morning, she was crying.
- [16] The appellant and his witness on the other side give the impression that the complainant was fine and was sitting drinking cold drinks in the morning. Firstly, if indeed the complainant had consented to the sexual intercourse with the appellant, she would have no reason to report to her friend crying and having injuries. There is no explanation from the appellant how the complainant could have injured herself at the time they had consensual intercourse. If the complainant was being malicious and falsely implicate the appellant, she would have testified about the first sexual intercourse that the appellant had with her. However, she testified that she was asleep and did not see or hear or feel anything. She openly told the court that she had consumed alcohol on that day but could not appreciate what was happening.
- [17] The actions of the appellant in the morning when he arrived at N[...]’s place were very suspicious. He indicated that the complainant had agreed that they should have a relationship. He was aware that the complainant was unhappy that she refused to take her halfway, he nevertheless decided to disappear to a meeting without informing his newly found lover. After the meeting he goes to the tavern with his friends and not check on the complainant. This is behaviour of guilt on the appellant of what had transpired.
- [18] Looking at the evidence in total the appellant's version that he had sexual intercourse with the complainant by is improbable. In my view the court a quo was correct in finding that the state had proven the guilt of the appellant beyond a reasonable doubt and his version rejected as being false.
- [19] As stated above this appeal is only against conviction and it will not be necessary to deal with sentence in this appeal
- [20] Having considered the submissions on behalf of the appellant and the respondent the appeal against conviction stands to be dismissed.

Order

[21] Consequently, the following order is made:-

1. The appeal against conviction is dismissed.

J T DJAJE

DEPUTY JUDGE PRESIDENT

NORTH WEST DIVISION

MAHIKENG

I AGREE

W MALANE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 4 APRIL 2025

DATE OF JUDGMENT

: 02 JUNE 2025

COUNSEL FOR THE APPELLANT : MR T THUWE

COUNSEL FOR THE RESPONDENT : ADV T MUNERI

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