

SOUTH AFRICA / JUDGMENT

Msindwana v S (CA&R150/2016) [2017] ZAECGHC 124 (7 December 2017)

[2017] ZAECGHC 124

COURT

Eastern Cape High Court, Grahamstown

BEFORE

NG Beshe, GG Goosen

CASE / FILE NUMBER

CA&R150/2016

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

**personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII**

Policy

IN

**THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION,
GRAHAMSTOWN)**

CASE NO.:

CA&R150/2016

In the matter

between:

SIYASANDA
MSINDWANA
Appellant
And
THE
STATE
Respondent

JUDGMENT

BESHE J:

[1] The appellant was charged with rape in the Queenstown Regional Court. It was alleged that on the 3 July 2011 and at Newvale, in Queenstown he unlawfully and intentionally committed an act of sexual penetration with A. M. by having sexual intercourse with her against her will and without her consent. He tendered a plea of not guilty to the charge. At the conclusion of the trial he was however convicted as charged and sentenced to imprisonment for ten (10) years. He is now appealing against the conviction, leave to do so having been granted by this court on petition.

[2] In a bid to prove the guilt of the appellant the state adduced evidence from the complainant, her aunt Ms N. M. as well as from one M. T.. A medico-legal examination report that was compiled by a forensic nurse, MsT. M. was handed in by consent between the state and the defence. In respect of defence case, appellant as well as Mr B. M. testified.

[3] The magistrate's decision to convict the appellant is assailed on the basis, inter alia that:

He misdirected himself by finding that it was common cause that the complainant was raped on the day in question.

By not applying the cautionary rule relating to evidence of a single witness.

He erred in finding that the evidence of the first report, being complainant's aunt corroborated complainant's claim of having been raped.

[4] The appeal will be considered with the following trite principles in mind:

The required standard of proof in criminal cases is proof beyond a reasonable doubt. The onus to prove the guilt of an accused person rests on the state.

These principles were enunciated by Nugent J in *S v Van der Meyden*[1]as follows:

“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 especially at 373, 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.”

- [5] The complainant was a single witness in so far as the actual rape is concerned. Section 208 of the Criminal Procedure Act[2] provides that “An accused may be convicted of any offence on the single evidence of any competent witness”. It is however trite that the uncorroborated evidence of a single witness should be evaluated with caution before it can be accepted as being reliable. In *S v Stevens*[3] it was reiterated that the evidence of a single witness should be approached with caution. And that the merits of the single witness’s

evidence must be weighed against factors which militate against the witnesses’ credibility. In an earlier decision, *S v Artman and Another*[4], it was stated that what is required before accepting the evidence of a single witness is that the witness’s testimony should be clear and satisfactory in all material respects.

- [6] The complainant testified that during the evening in question she was at a tavern in Newvale with some friends. The appellant, who was known to her, suggested that she should leave the tavern with him. Later, whilst she was chatting to a certain young man, appellant who was in the company of a friend emerged. Together with the friend, they chased the young man with whom complainant was chatting away, slapping him with an open hand in the process. At some stage she went in search of her friend one L. so that they can walk to their respective homes. This was after she had sat down and cried after the confrontation with the appellant. She found L. and accompanied her to her (L.’s) home after which she walked to her own home. As she was walking she came across M.. Together with M. they stood at a street corner and chatted. It was at that stage that appellant and a number of his friends appeared. She indicated to M. that she needed to go to her house because appellant will require her to leave with him. She realised that appellant and his friends were closing in on her as she was approaching the gate of her house, she put the house key back in her pocket and headed back to M.. Appellant reached her and took the house key out of her pocket. One of appellant’s friends was pushing M. away. Complainant protested and asked appellant to return her key. M. did likewise and also asked why appellant and his friends were taking her away from him. Appellant and his friends left and she followed them to a house where one of appellant’s friends stayed. According to the complainant, this happened at around 01h00 in the morning. Once at appellant’s friend’s place, she once again pleaded with the appellant to let her have her house key. She even enlisted B.’s help to try and persuade appellant to hand over the key, but he would not barge. She ended up sleeping at B.’s place in the same bed as appellant and B.. In the morning B. left the room for his parental home. She once again demanded that appellant gives her the key. Instead of handing her the key,

appellant undressed and remained in his underwear, proceeded to undress her against her will and raped her having lowered his underwear. After having sexual intercourse with her, appellant left the room. She got dressed and left the room. Once outside she saw B. who threw her the key to her house. Asked by the prosecutor whether appellant had used protection at the time he had sexual intercourse

with her, she stated that he used a condom which he flushed down the toilet. It was not clear from her testimony at what stage appellant wore the condom or where it came from.

- [7] Later that day in the evening, she called her aunt Ms M. and requested her to come over to the house where she was staying and made a report to her about the rape. Her aunt confronted the appellant asking him what he had done to her. Appellant apologised and explained that he was merely playing with her.
- [8] It emerged during complainant's cross examination that B. came back that morning and offered them some of the coffee he was making. She declined the coffee. She also testified at this stage that B. returned and found her getting dressed which she continued to do at the time B. was making coffee. It also emerged that at some stage after B. had returned from his parental home, she sat next to the heater. She denied that appellant offered to walk her home and she declined the offer and said she will sleep at B.'s place.
- [9] Complainant's aunt testified about the report complainant made to her at about 20h00 regarding the alleged rape and her confronting the appellant.
- [10] T. testified that in the early hours of the 3 of July 2011 she was chatting to the complainant when three male persons and a lady appeared. It is common cause that appellant was one of the three males. Complainant told him that appellant might drag her and take her with him. She then proceeded towards her house but returned to where T. was upon seeing appellant was closing in on her. Indeed appellant grabbed her and they appeared as if they were playing. T. enquired as to what was happening whereupon one of appellant's companions, one Surprise pushed him away. He heard complainant saying something about her key to the appellant. That was the last he saw complainant, appellant and his companions because he walked to his home.
- [11] According to T., when complainant told him appellant might want to take her with him, he got the impression they were lovers.
- [12] Appellant's testimony was to the effect that he met the complainant whom he claimed was her girlfriend at the time, at a tavern earlier that evening. After leaving the tavern at ± 24h00 in the company of friends they came across the complainant

chatting with T.. He hugged her and suggested that she accompanies him. After walking for a short distance complainant said he should let go of her. He felt a key on her pocket and took it out and suggested that they go to B. M.'s place. Complainant did not seem to have a problem with that and they walked to M.'s place where they continued drinking with a number of friends. He placed complainant's key on top of the table and showed complainant where she would get the key when she needed it. At about 04h00 he suggested he walks complainant to her house, she refused saying she was going to sleep over. They shared a bed with M.. Complainant woke up at about seven o'clock and sat in front of a heater. M. also got up, left the house saying he was going to get a kettle from his parental home. He came back within a minute with boiled water and made coffee for the three of them. Complainant declined the coffee after drinking the coffee he

(appellant) left complainant and M. behind to go check if everything was still okay at his house.

[13] It is common cause that he was confronted by complainant's aunt. According to complainant's aunt, she asked him why he assaulted the complainant to which he responded they were just playing. When asked why he raped her, he denied he did, but apologised for having played with her if that caused her pain.

[14] M. who had also been drinking during the course of the evening in question testified that he was brought to his house by friends due to the fact that he was heavily drunk. He woke up in the morning to find appellant and the complainant sleeping in the same bed with him. He got up and left for his parental home to get a kettle. On his return to his house he boiled water and made coffee.

He found complainant fully dressed and sitting on a chair in front of a heater. Only appellant partook on the coffee he made. Complainant declined it.

[15] M. denied that complainant was half naked when he returned with the kettle. He also denied that he is the one who threw complainant's key to her.

[16] The learned Magistrate does not seem to have been alive to the need to treat the evidence of a single witness with caution. This is apparent from the following observations he made regarding the evidence of the complainant[5] in his judgment:

"Now then with regard to the evidence in this Court we are dealing here with a single witness in this regard Section 208 of Act 51 of 1977 provides an Accused may be convicted of any offence on the single evidence of any competent witness. The Court may be satisfied that a witness is speaking the truth notwithstanding that he or she is in some respect an unsatisfactory witness. In brief the evidence of a single witness has to be satisfactory but not necessarily perfect. This is what is what was said in R v Dorham; 1963 (4) SA 163 TPA. The Complainant in this matter gave her evidence in a clear and natural fashion she was detailed in her evidence she stood long cross examination by the Defence and she did not deviate from her version she was at pains when she was giving evidence the State had to bare with her when she gave evidence, she was certain that the Accused was not her boyfriend, she was also certain that the Accused raped her."

[17] Nowhere in the judgment does the magistrate allude to the need to treat / view the evidence of a single witness with caution. There is no indication that he in fact exercised the requisite caution. This in my view was a misdirection on the part of the court a quo. The Magistrate also misdirected himself in other respects as well which may have led to him concluding as he did, that the complainant was a credible witness. He found that it was common cause that the complainant was raped. This he probably based on Nurse Makombe's conclusion in the medico-legal report, that "visual genital injuries are consistent with sexual assault". According to the Magistrate, complainant made a report to her aunt immediately after the rape. This is however not borne out by the evidence. Complainant parted with the appellant

in the morning, it was later that evening that she called her aunt over and made a report to her. That can hardly be said to be “immediately” after the rape. The Magistrate concluded that this showed consistency on the part of the complainant in regard to the rape complaint a factor that serves to rebut any suspicion that she may have fabricated her allegations. But as indicated earlier, the report was not made immediately after the alleged rape as suggested by the Magistrate.

- [18] Had the Magistrate exercised the requisite caution in his evaluation of complainant’s evidence, he would have realised that it was not clear and satisfactory in all material respects. This much was conceded by Mr Els for the respondent, correctly so in my view. M. did not corroborate complainant’s evidence that he also asked the appellant to hand complainant’s keys back. Or that he saw appellant take the key from her pocket. M. testified that appellant playfully hugged the complainant and he got the impression they were lovers. That probably explains why he did not take any steps to rescue the complainant, he simply walked to his house.
- [19] According to the complainant, appellant had throughout that day made his intentions clear that he wanted to forcefully take her with him. At around 01h00 in the morning, granted that appellant had taken her house keys (this became common cause) she decides to follow the appellant and his companions and spend the remainder of the night in the same bed with the appellant and one of his friends B..
- [20] The Magistrate acknowledged that the appellant had been consistent in his version but concluded that although this was a factor to be taken into account, it did not necessarily mean that an acquittal should follow. He found that it seemed “wholly improbable” that the complainant would cry rape and expose herself to the humiliation that flows from reporting the matter to the police. And that the complainant’s version is confirmed by the medical report. I believe this was a misdirection on the part of the Magistrate. The Magistrate did not pay any regard to M.’s evidence, on the basis that he was not present during the alleged rape. In my view he erred in this regard – the evidence must be viewed in its totality. M.’s evidence as to what happened before he left the room, after his return, how long he was away, what the complainant was doing on his return was worthy of consideration together with all the other evidence.
- [21] It is trite that the appellate court is not at liberty to depart from the trial court’s findings of fact and credibility unless they are vitiated by irregularity.[6] In casu, I am of the view as I indicated earlier that the Magistrate erred by not applying the cautionary rule to complainant’s evidence being a single witness. In my considered view, having regard to the totality of the evidence, viewed against the backdrop of the standard of proof applicable in criminal cases, as well as the need to exercise caution in dealing with the evidence of a single witness, the state did not succeed in proving the guilt of the appellant beyond reasonable doubt. In the circumstances, I am of the view that the appeal against the conviction must succeed.

[22] In the result the following order will issue:

1. The appeal succeeds.
2. The conviction and sentence are set aside.

NG BESHE

JUDGE OF THE HIGH COURT

GOOSEN J

I agree.

GG GOOSEN

APPEARANCES

For the Appellant :

Adv: TN Price

Instructed by :

CHANGFOOT VAN BRED A ATTORNEYS

C/o NETTELTONS ATTORNEYS

118a High Street

GRAHAMSTOWN

Tel.: 046 – 622 7149

Ref.: Mr H Van Breda / Mr Nettelton

For the Respondent : Adv: D Els

Instructed by :

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Tel.: 046 – 602 3000

Ref.: Mr Els

Date Heard : 22 November 2017

Date Reserved : 22 November 2017

Date Delivered : 7 December 2017

[1] 1999 (1) SACR 447 (W) at 448 f – g.

[2] Act 51 of 1977.

[3]

[2005] 1 All SA 1 SCA.

[4] 1968 (3) SA 339.

[5] Page 12 – 128 of the record.

[6] S v Lewu 2011 (1) SACR 87 [E].

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2017/124.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/msindwana-v-s-unknown-topic-aecghc-2017>

Prepared on 25 October 2026 · Esheria