

SOUTH AFRICA / JUDGMENT

Munkhambe v The State (A676/2015)

[2017] ZAGPPHC 1274 (12 December 2017)

[2017] ZAGPPHC 1274**COURT**

North Gauteng High Court, Pretoria

BEFORE

M.J Mosopa, C.P Rabie

CASE / FILE NUMBER

A676/2015

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**HIGH****COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA****(1)****NOT****REPORTABLE****(2)****NOT OF****INTEREST TO OTHER JUDGES****(3)****REVISED.****CASE****NO: A676/2015****In**

the matter between:

SAMUEL
MUNKHAMBE
and
THE
STATE

JUDGMENT

MOSOPA,AJ

- [1] The appellant was convicted of rape in terms of the provisions of section 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 read with the provisions of section 51(1) of part 1 of schedule 2 of the Criminal Law Amendment Act 105 of 1997 and sexual assault of N N an 11 year old child and was sentenced to life imprisonment at the Evander Regional Court.
- [2] Following his plea of guilty on the charge of contravening Section 48 and 49(l)(a) of the Immigration Act 13 of 2002, the appellant was found guilty of that charge.
- [3] This appeal is in relation to the count of rape and sexual assault of the complainant which comes on appeal in terms of the provisions of section 309(1)(a)(ii) of the Criminal Procedure Act 51 of 1977 which provides for an automatic right of appeal in the event the Regional Court convicts the accused person and sentence the accused person in terms of Section 51(1) of the Criminal Law Amendment Act 105 of 1007 to life imprisonment.
- [4] The appellant was throughout his trial legally represented. This appeal is against both conviction and sentence.

Conviction

- [5] In R v Dhlumayo and Another 1948
- (2) SA 677 (A) at 705 the following was said by the court:

"A court of appeal is very reluctant to upset the findings of the trial court, a trial judge had the advantage of seeing and having the witness and observing their personalities and demeanor. The trial court is in the best position to even draw inference than the appeal court. The trial judge has an advantage to determine what is probable and what is improbable having observed the witness in the course of the trial."

- [6] Following the passage quoted from R v Dhlumaya supra, it is clear that the appeal court can only interfere with the conviction of the court a quo where the court a quo materially misdirected itself.
- [7] In convicting the appellant the court relied on the evidence adduced on behalf of the state witnesses whose evidence can be broadly set out as follows:

N N (hereinafter "N")

7.1 N testified that she was visiting her grandmother who is staying at [...] (Appellant) touched her breast and private parts. He was not doing that for the first time and she use to reprimand him from doing that. N was taking food to the appellant and the appellant said to her, he want to make her his wife and she replied by saying that she is too young for that. The appellant then grabbed her, locked her inside the room and he raped her.

7.2 She tried to scream out but the appellant covered her mouth rendering her unable to can scream and after raping her she left the room in which she was raped.

7.3 Her grandmother asked her why is she crying and she said to her that is the appellant and her grandmother said that she must not cry and must also not be afraid of the appellant. After this incident she then packed her few clothes and went to [...] to go visit.

7.4 It was when she was staying at extension 2 that she was waked up at 24h00 midnight and was told that she was speaking in her sleep. Her grandmother who is staying in extension 2 then received a call from her aunt whom she told her to come and check N. Her aunt said that they must go to [...] to go and collect her clothes and she refused saying that she is not going to [...].

7.5 Then she related to her aunt what happened to her and that she was raped by the appellant. After that they went to extension 21 to collect her clothes and thereafter went to the police station and her aunt helped her to open up a case against the appellant of rape. The following day she was referred to the hospital for medical examination. All this happened in the year 2010 when she was 11 years.

7.6 The appellant at the time of the alleged rape was renting a room at her grandmother's place in [...]. The appellant fondled her breast and private parts more than once, even though she cannot remember exactly how many times did she fondled her. She did not tell her grandmother what the appellant did to her inside his room. After leaving her grandmother's place in [...] she went to extension 2 and she told her sister, T that the appellant touched her breast and private parts but never told her that she was raped by the appellant as she was scared that she will think she is lying. The incident happened around 17h00.

[8] Under cross-examination N accepted the fact that she did not tell T the whole story but only told her that the appellant said he wanted her to be his wife in Maputo and she never said that to her that the appellant touched her breast and private parts.

8.1 She said further that when the appellant closed the door behind her and told her that she want her to be his wife, she did not scream as she thought that the appellant was playing and not serious.

8.2 It was further put to her what was written in the medical report which formed part of the evidence, being what she actually relayed to the nurse that:

- (a) the appellant said she want to sleep with her;
- (b) she refused and closed her mouth with a sellotape;

- (c) and tie her hand at the back and her feet;
- (d) undress her and raped her and thereafter gave her R50.00, and she confirmed that to be correct.

8.3 That the blood coming out her private part spilled to her panty and the pair of jeans she was wearing

G H

- [9] N is her brother's child, so she is the aunt to N. She told her that while staying in extension 18, the appellant raped her when she was taking food to him. The appellant touched her breast, undressed her and then raped her.
- [10] After hearing of the rape of N, herself together with N went to the appellant's place of residence but he refused to open the door for her and after that they went to the police station to lay charges against the appellant.

She could observe that N was doing funny things and she was not in her mind. As N was relating to her what happened to her she was crying.

T L

- [11] She testified that the conduct of N changed dramatically after telling them about rape as she was doing funny things, acting like she is not in her mind and at night she will behave as if she is seeing something. This kind of behavior was not observed on N before she was raped.
- [12] Under cross-examination she said N never told her how the rape incident occurred and only explained that at the hospital.
- [13] On court's questioning she said N never explained to the police in detail what happened to her, she just said the appellant raped her inside the room. She never mentioned to the police that she was tied with the rope and sellotape. Further that she did not enquire from N as to which month in 2010 did the rape incident happen.

Appellant

- [14] After the close of the state's case the appellant also testified in his defence. To sum up his testimony is one of denial. He denies ever raping N and fondling her breast and her private parts.
- [15] The appellant called Ms B M H as his witness who is the grandmother to N and also the owner of the place where the appellant was renting a room. She confirmed that at the time of the alleged rape N was staying with her and she did confront her about this allegations and N denied ever been raped by the appellant. She also testified that N told her that her aunt said to her that she must agree that the appellant raped her.

Court's witnesses

- [16] The court called Ms T C M who is a forensic nurse employed at Evander Hospital. She confirmed that on the 6 December 2010 she medically examined N for being sexually assaulted. When she examined N she could observe injuries in the hymen and there was bump and cleft. Her conclusion was that the injuries were caused by forced penetration. She further confirmed what N told her as recorded in the medical report she concluded.
- [17] T W N also testified as the courts' witness and confirmed that N is the child of her uncle. She testified that N never informed her of anything awkward or strange happening to her and she never noticed anything strange with her. N never talked to her about somebody touching her private parts.

Analysis

of evidence

- [18] In *S v Van der Meyden* 1999 (2) 79 (W) Nugent J said the following: "The proper test is that the accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of the test is any particular case will depend on the nature of the evidence in which the court had before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored."
- [19] In his judgment the magistrate accepted the evidence of N without applying cautionary rules to such evidence, despite the age of the complainant who was 11 years at the time of the alleged incident and the fact that she was single witness on the rape incident and the sexual assault charge.
- [20] When dealing with the contractions in N's evidence the magistrate acknowledge the fact that when the incident happened N was only 11 years and when she testified she was 13 years old. He further acknowledge that passing of time since the commission of the offence and the time when she testified as factors that can be attributed to such contractions as she testified that some of the things which happened to her she has forgotten about them.
- [21] It must be noted that when N was asked to explain what happened to her in examination-in-chief on that day she did not say that she has forgotten some of the things as the incident took place long time ago. She testified about the events of that particular day if they were still fresh in her mind until under cross-examination when the appellant's legal representative indicated to her that what she told the Doctor/Nurse who examined her is not the same as her testimony in court. After the medical report was read

to her relating to what she told the nurse she confirmed that is what she told the nurse. In her evidence-in chief she never mentioned the fact that her mouth was covered with a sellotape, her legs were bound by a rope and that the appellant gave her R50,00 after raping her. Instead she testified that when she wanted to scream the appellant covered her mouth with his hand. At no stage did she testify that her legs were tied with a rope.

[22] When she testified in her examination-in-chief she said that appellant spread her legs wide when she penetrated her, but looking at the evidence which she told the nurse who examined her about her legs bound, her explanation as to how she was raped is improbable.

[23] N after the alleged rape she never told her grandmother of [...] that the appellant raped her. When asked as to why she did not inform her grandmother that the appellant raped her she said that she was afraid to say as she thought that they will say that she is lying. She also did not tell her other grandmother who is not staying in extension 21 thinking that she will also say that she is lying. At no stage in her testimony did she say that the appellant threatened her not to report the incident to any person. Even though she thought that the people will think that she is lying when telling them that the appellant raped her, she conceded

that there was no a state where her family members accepted her as a liar. The fact that blood from her private parts spilled over to her pair of jeans she was wearing should have drawn the attention of her grandmother who asked her where she was crying.

[24] She said that even though she did not tell the whole story of what happened to her, she told T that the appellant touched her breast and private parts. Under cross-examination she changed her version and said she only told T that the appellant wanted to make her, his wife in Maputo. T was called as court's witness and denied ever been told by the complainant that the appellant touched her private parts. She further testified that she never observed anything strange with N and she never said to her that anything strange happened to her.

[25] The magistrate in his judgment said that the contradiction in the state's are "not very much a contraction" literally meaning that such contradiction are not so severe to disregard the evidence of the complainant. I disagree with the magistrate's finding.

[26] The magistrate erred in not making credibility finding on the evidence of the complainant. Instead the magistrate found that the complainant was persistent and consistent in her evidence.

[27] There is also an important aspect which came out of the evidence relating to the family feud between the maternal and paternal grandparents of N taking into account that N's parent had passed away. This had led N moving from one grandmother's place to another. Even though her other grandmother denies any animosity between the families that has been confirmed by Ms M H who is also N's grandmother who testified on behalf of the appellant. The magistrate did not take proper consideration of the family feud having resulted in a false charge been laid against the appellant.

[28] To confirm that there was an issue with the families, Ms G H testified about the grandmother of N who stays in [...], "that N told her that she gives her to older men to have sexual intercourse with her". It must be noted that the grandmother of N staying in [...] did not stay with the appellant and it was nonsensical of Ms H to connect her to the rape charge. But this clearly shows that not all was right between the families.

[29] The magistrate also considered the version of the appellant and rejected it as falls. The court a quo further remarked that the version of the appellant is not only improbable but improbable beyond any reasonable doubt and the complainant cannot just fabricate a story against the applicant when there was nothing she was going to benefit from afterwards.

[30] Zulman JA in *S v V* 2000 (1) SACR 453 (SCA) at paragraph 3(i) stated that:

"It is trite that there is no obligation upon an accused person, where the state bears the onus, "to convince the court". If his version is reasonable possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not a test. As pointed out in many judgments of this court and other courts the test is whether there is a reasonable possibility that the accused evidence may be true."

[31] The appellant's version when viewed in the light of the totality of the evidence is reasonable possibly true looking at the fact that the complainant's report to Ms G H was not voluntarily made as she testified that she is the one who first probed N about this rape allegations. She also repeatedly asked the complainant as to whether is she sure that the appellant is the one who raped her. The manner in which the complainant was raped was not explained to her in detail, and only heard the detail explanation at

the hospital.

Developments after the appellant was found guilty

[32] The appellant after his conviction before the sentencing procedure requested a probation officer report for purpose of sentencing.

[33] The probation officer visited the complainant with a view of assessing the impact the rape had on the complainant. The complainant informed the probation officer that she was never raped by the appellant, but she mentioned that in court as she was afraid of her aunt. Such probation officer's report was admitted into evidence by the state. The probation officer was not called to come and testify and was never subjected to any form of cross-examination.

- [34] The investigation Officer also deposed an affidavit corroborating what the probation officer said in her report that the complainant said that the appellant never raped her. The affidavit was also accepted into evidence by the state. It is not clear what prompted the Investigating Officer to probe the complainant on this aspect and obtain such affidavit from the complainant.
- [35] Ms Maoke on behalf of the state submitted that the court cannot ignore such evidence but may look at such evidence in totality of the evidence before court.
- [36] It is important to note that such evidence came to light when the court a quo was functus officio in relation to conviction and as a result could not revisit such new evidence.
- [37] Looking at the material contradictions in the states' case and the credibility of the complainant, the new evidence which was established after the conviction of the accused cannot be ignored by the court and it actually lays the basis for the interference with the conviction of the appellant.

Conclusion

- [38] The state evidence against the appellant was not of a magnitude which could have secured the conviction of the appellant and as a result the magistrate erred in convicting the appellant of rape and sexual assault.
- [39] The complainant was not a credible witness and her evidence was tainted with material contradictions.
- [40] Following the finding that the court a quo erred in convicting the appellant it is the end of the matter and we need not investigate whether or not the sentence imposed by the court a quo is appropriated or not
- [41] I therefore make the following order:
1. The appellant's appeal against both conviction and sentence succeeds;
 2. The convictions and sentence are set aside.

M.J Mosopa

Acting Judge of the High Court

I agree

C.P Rabie

Judge of the High Court

APPEARANCES:

For the Applicants:

Adv L. A van Wyk

Instructed by:

Legal Aid South Africa, Pretoria

For the Respondents:

Adv B.E Maoke

Director of Public Prosecutions, Pretoria

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/ZAGPPHC/2017/1274.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/munkhambe-v-the-unknown-topic-agpphc-2017>

Prepared on 23 October 2026 · Esheria