

SOUTH AFRICA / JUDGMENT

# Mxolisi v S (AR483/16) [2017]

## ZAKZPHC 5 (23 February 2017)

[2017] ZAKZPHC 5

## COURT

Kwazulu-Natal High Court, Pietermaritzburg

## BEFORE

ME Nkosi, Seegobin

## CASE / FILE NUMBER

AR483/16

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR483/16

In the matter between:

MXOLISI THABANI DUMISA Appellant

and

THE STATE Respondent

APPEAL JUDGMENT

Delivered on: 23 February 2017

ME NKOSI AJ:

- [1] The appellant was convicted of the crime of rape of an adult woman and sentenced to ten (10) years direct imprisonment. He is now appealing, with the leave of the court a quo, against both his conviction and sentence.
- [2] In essence the appellant has based his appeal on numerous grounds, the most significant of which is that the court a quo had erred in finding that his guilt was proved beyond a reasonable doubt. It was further argued by Mr Pillay on behalf of the appellant that the evidence of the complainant, who is a single witness, was not reliable for a number of reasons. Without going into any detail on the reasons cited by Mr Pillay in support of his argument, I must point out that I find nothing in the evidence given by the complainant which suggests that her evidence ought to have been rejected by the court a quo as unreliable.

[3] In essence, it is common cause that the evidence in this matter consists of two diametrically opposed versions. On the one hand, the evidence given by the complainant is that the appellant had raped her. The appellant, on the other hand, testified that he did not rape her and insinuated that this is all part of a family squabble relating to a certain piece of land he owns. In the circumstances, one needs to determine which of the two versions is more plausible when weighed against the other.

[4] In weighing the two conflicting versions against each other, one of the arguments raised by Mr Pillay is that the evidence of the complainant ought to be approached with caution because she is a single witness. The cautionary approach of a single witness'

evidence was confirmed in a number of judgments, including those cited by Mr Pillay in support of his argument.[1] I think it is safe for one to regard it as trite law.

[5] Needless to say, the crime of rape, by its very nature, is seldom committed in front of other witnesses who may be called upon to testify in corroboration of either party's version of events. In most instances, the testimony of another witness, like in the present case, is limited to such witness' subjective observation of the complainant after the actual act of rape.

Depending on the nature of such evidence, it may nonetheless assist the court in determining a more probable version when confronted with two conflicting versions, such as those of the appellant and the complainant in this appeal.

[6] Besides, even if there is no corroborating evidence, it must be borne in mind that in terms of section 208 of the Criminal Procedure

Act,[2] an accused may be convicted of an offence on the single evidence of a competent witness. Of course, this presupposes the acceptance of such evidence by the court as reliable.

[7] The absence of the word "credible" from the provisions of section 208 of the Criminal Procedure Act was held by Diemont JA in *S v Sauls and Others*[3] to be of "no significance" for the reasons explained in his judgment as follows:

'the single witness must still be credible, but there are, as Wigmore points out, "indefinite degrees in this character we call credibility". (Wigmore on Evidence vol III para 2034 at 262.) There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of RUMPFF JA in *S v Webber* 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy

and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by DE VILLIERS JP in 1932 may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded" (per SCHREINER JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566

(A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.’

[8] In this appeal, it is common cause that the evidence regarding the actual act of rape consists of the single evidence of the

complainant. The court a quo, in its assessment of the evidence led before it, accepted the evidence of the complainant as reliable. It also found the complainant’s version of the actual rape incident more probable than that of the appellant. Based on my own consideration of the evidence led before the trial court, I am satisfied that the court a quo was correct in its findings regarding the credibility of the complainant, as well as the reliability of her evidence.

[9] Insofar as the rest of the evidence led before the trial court is concerned, the complainant’s version was corroborated, to a certain extent, by one Siphiwe Ntokozo Zulu, who is commonly known as Kimi. By the appellant’s own admission, Kimi is his friend and drinking companion and, therefore, had no reason whatsoever to fabricate evidence against the appellant or to collude with the complainant in implicating the appellant in a crime he did not commit.

[10] The appellant, on the other hand, had called one Sboniso Mkhayeleni Biyela (“Biyela”) to testify on his behalf. However, except for confirming that the appellant had collected two blankets from the room in which Biyela and his mistress were sleeping sometime during the night in question, and denying that loud music was playing in the appellant’s bedroom, no other aspects of the appellant’s evidence were corroborated by Biyela.

[11] Therefore, in the light of the two conflicting versions regarding the actual act of rape, the trial court had to consider both versions holistically and weigh them against each other, taking into account any probabilities and improbabilities on both sides. Based on the evidence led before it, as well as the exercise of common sense as suggested by Diemont JA in the matter of Sauls (supra), the finding of the trial court was that the balance of probabilities weighed so heavily in favour of the complainant’s version that it excluded any reasonable doubt about the guilt of the appellant. Based on my own assessment of the same evidence, I am satisfied that the effect of the complainant’s evidence, as corroborated by Kimi’s evidence regarding the complainant’s condition after the actual act of rape, was to prove the appellant’s guilt beyond any reasonable doubt. Consequently, the appellant’s conviction for the crime of rape must stand.

[12] This brings me to the appellant’s appeal against the sentence of ten (10) years imprisonment that was imposed on him by the court a quo. In my view, there is nothing in the sentence imposed by the court a quo upon the appellant which indicates or suggests material misdirection by the trial court as to justify this court’s interference with that sentence.

[13] Instead, I find nothing substantial or compelling in the numerous factors raised by Mr Pillay as supposedly mitigating the appellant’s guilt. The appellant is 28 years old, a first offender and has completed a grade 11 standard of education. He is also a father of three minor

children with three different women, and the children live with their respective mothers. He supports all three children using the income he derives from piecemeal jobs, though the youngest receives a child grant. There is no explanation as to why the other two children are not receiving the same grant. Be that as it may, taken in their totality, these are ordinary factors which are not uncommon amongst persons who are convicted of rape and other crimes by our courts on a daily basis.

[14] All in all, the factors raised on behalf of the appellant in mitigation are totally outweighed by the aggravating factors raised

by the state against him. These include, inter alia, the prevalence of the crime of rape, as well as the appellant's betrayal of the complainant's trust. According to her testimony, the complainant regarded the appellant as her brother and relied on him for protection against any harm. Little did she know that her trust was misplaced on a sexual predator who has no regard whatsoever for family ties.

[15] In conclusion, I see no reason or justification for this court to interfere with the sentence imposed on the appellant by the court a quo. In the absence of substantial and compelling circumstances justifying the imposition of a lesser sentence, the sentence of ten

(10) years imprisonment imposed upon the appellant by the court a quo must accordingly stand.

[16] In the circumstances, I propose that the following order should be made:

- (a) that the appellant's appeal against both his conviction and sentence are dismissed; and
- (b) the appellant's conviction and sentence imposed upon him by the trial court are confirmed.

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ME NKOSI AJ

I agree:

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SEGOBIN J

Date of hearing

: 14 February 2017

Date delivered

: 23 February 2017

Appearances:

For the Appellant

: Adv TP Pillay

Instructed by

: Justice Centre

Durban

For the Respondents

: Adv N Mlotshwa

Instructed by

: The Director of Public Prosecutions

Pietermaritzburg

[1]S v Sauls & Others 1981 (3) SA 172 (a) at 180 E-G; S v Nyembe 1982

(1) 835 (A) at 842 g; S v J 1998 (1) SACR 470 SCA (1998) (2) SA 984; S v MG 2010 (2) SACR 66 (ECG) at para 7 and 8

[2]Act 51 of 1977

[3] 1981

(3) SA 172 (AD)

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