

SOUTH AFRICA / JUDGMENT

Nonkombana v The State (CA231/2017) [2018] ZAECHGC 98 (9 October 2018)

[2018] ZAECHGC 98**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

Plasket, Lowe, Brooks

CASE / FILE NUMBER

CA231/2017

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****EASTERN****CAPE DIVISION, GRAHAMSTOWN****Case no. CA231/2017****Date heard: 17/9/18****Date delivered:**

9/10/18

Not reportable

In

the matter between:

NKOSINATHI

NONKOMBANA

First

Appellant

VUYOLWETHU

ZWELIBANZI

Second

Appellant

and

THE

STATE

Respondent

JUDGMENT

Plasket J:

- [1] Eksteen J, sitting in the Eastern Cape Local Division, Port Elizabeth, convicted the first appellant, Mr Nkosinathi Nonkombana, (Nonkombana) of three counts of rape and sentenced him to life imprisonment in respect of each. He convicted the second appellant, Mr Vuyolwethu Zwelibanzi, (Zwelibanzi) of one count of rape and sentenced him to life imprisonment. He granted Nonkombana leave to appeal against his convictions and the sentences imposed on him, while he granted Zwelibanzi leave to appeal against sentence only.
- [2] Nonkombana was charged with five counts of rape while Zwelibanzi was charged with three counts of rape. It was alleged by the State that on the night of 9/10 November 2013, Nonkombana raped the complainant, who I shall refer to as SG, twice (counts 1 and 2) before he and Zwelibanzi took turns to rape her (counts 3 and 4) and then penetrated her anally and vaginally simultaneously (count 5).
- [3] While both appellants chose not to give an explanation of their pleas of not guilty, they both admitted having had sexual intercourse with the complainant on the night in question, their defences being that they had done so with SG's consent.
- [4] At the conclusion of the trial, Eksteen J acquitted both appellants of count 5, Nonkombana of count 3 and Zwelibanzi of count 4, but convicted them of the other counts in the manner that I have outlined in paragraph 1 above.

Background

- [5] SG and Nonkombana met by chance and exchanged contact details. An electronic flirtation then ensued via text messages. On the evening of 9 November 2013, however, they made contact telephonically and it was arranged that Nonkombana would come to SG's house to fetch her and that they would spend the evening together. He took her to a 'shisanyama' – an establishment that Eksteen J, in his judgment, likened to an English bistro pub. There she met Zwelibanzi, a friend of Nonkombana.
- [6] After a while the three of them left the shisanyama and walked to a tavern. Zwelibanzi entered the tavern but SG and Nonkombana remained outside. They then walked to Zwelibanzi's flat, which was nearby. His flat was in the yard of a larger house where his parents lived.
- [7] Thus far, the background facts were largely common cause and the discrepancies between the versions of the parties were, with one exception that I shall deal with, minor and of little consequence. Once SG and Nonkombana set off for Zwelibanzi's flat, however, the versions of the parties became increasingly divergent.

- [8] SG testified that Nonkombana had told her that they were going to his house in order to fetch a bottle of whisky. Nonkombana's evidence was that he had told SG that they were going to Zwelibanzi's flat and that the purpose of going there was to engage in sexual intercourse, which they had discussed and agreed upon.

The versions

SG's version

- [9] When they entered Zwelibanzi's flat, according to SG, Nonkombana made his intentions clear. SG resisted but Nonkombana slapped her in the face, drew a knife, undressed her and then raped her.
- [10] Thereafter, they got dressed. A while later, Nonkombana said that he wanted to have sexual intercourse again. On this occasion, he first penetrated SG vaginally, then anally and then vaginally again.
- [11] While this was happening, Zwelibanzi arrived home and entered the flat. He asked SG why she was crying. She told him that she was crying because Nonkombana had had sexual intercourse with her without her consent.
- [12] Nonkombana suggested that she have sexual intercourse with Zwelibanzi, who agreed with this suggestion. He lay on his back and ordered her to mount him. She complied. While SG was engaged, in this way, in sexual intercourse with Zwelibanzi, Nonkombana ordered her to suck his penis, which she did.
- [13] The two men then changed their positions: Nonkombana lay on his back with SG on top of him, while she sucked Zwelibanzi's penis. She testified that thereafter Nonkombana and Zwelibanzi penetrated her simultaneously, the former anally and the latter vaginally.
- [14] A short time after this, SG asked Nonkombana's permission to go to the toilet. He granted it. Dressed only in a T-shirt, she left the flat's bedroom. She heard Nonkombana saying to Zwelibanzi, in so-called tsotsi taal, that they should kill her because if they did not, she would get them into trouble. She forced the sliding door to the flat off its rails and ran out of the flat. She ran to the main house in the yard, screaming that she had been raped and begging for

help. A woman, apparently Zwelibanzi's mother, looked out but did not offer her any help. She ran to the next door neighbour's

house, still screaming that she had been raped. Nonkombana followed her, took hold of her and began to drag her. He let her go when the neighbour, Ms Ntombomzi Mama, and her two daughters intervened. They took SG into their house and called the police. In the meantime, Nonkombana and Zwelibanzi dropped SG's clothes and cellphone in Ms Mama's yard.

- [15] SG was taken to the police station where she made a statement. She was then taken to hospital where she was examined. The doctor who examined her found injuries, albeit relatively minor injuries to her private parts that were, according to his evidence, consistent with forceful penetration. While at the hospital, SG was asked by a policeman to identify Nonkombana, who had been arrested. He was sitting in a police car. She confirmed that he was one of the men who had raped her. He then asked her for forgiveness.

Nonkombana's version

- [16] Nonkombana's version differs from SG's version from as soon as they arrived at Zwelibanzi's flat. He testified that on their arrival, there they had consensual sexual intercourse. He then decided that they should leave the flat. They could not go to his home because his girlfriend could find them there. He decided to go to the home of a friend who, he hoped, would allow them to spend the night there. They set off on foot.
- [17] Having set out for this destination, Nonkombana changed his mind and they returned to Zwelibanzi's flat where they had sexual intercourse once more. Later, Zwelibanzi returned home and entered his flat. They drank a bit, as it was Zwelibanzi's birthday. Nonkombana suggested that SG have sexual intercourse with Zwelibanzi, which she then did.
- [18] After this, and on the pretext of going to the toilet, SG forced her way out of the flat and ran away, dressed only in a T-shirt and raising a hue and cry. Nonkombana followed her and saw that when Ms Mama and her daughters opened their door, one of the daughters, armed with a broomstick, wanted to assault SG and accused her of crying rape when she had knowingly gone drinking with Nonkombana.
- [19] Nonkombana admitted that SG had identified him at the hospital but denied that he had asked her for forgiveness.

Zwelibanzi's version

- [20] Zwelibanzi's version differs fundamentally from the versions of SG and Nonkombana. He testified that at the shisanyama, when he had just met SG for the first time, and when Nonkombana had gone to buy drinks, he and SG agreed to have sexual intercourse. He offered her payment of R150. He said that they went into a women's toilet, had sexual intercourse and were seated at their table again when Nonkombana returned with the drinks.
- [21] While seated at the table, and in the presence of Nonkombana, SG rubbed her fingers together to indicate that she required payment. Zwelibanzi dropped R100 on the floor. SG bent down, picked up the money and pocketed it.

Eksteen J's

judgment

[22] The versions that I have outlined have one common feature – that both Nonkombana and Zwelibanzi had sexual intercourse with SG. The central issue for determination was whether SG consented to that sexual intercourse. In order to decide that issue, it was necessary for Eksteen J to decide which set of facts, if any, was true. As Zwelibanzi was denied leave to appeal against his conviction, there is no need to consider his version any further except to say that Eksteen J was undoubtedly correct in finding that his version was not reasonably possibly true.

[23] Eksteen J was, of course, alive to the fact that SG was a single witness concerning the events that took place inside Zwelibanzi's flat – and of the consequent need to consider her evidence with caution. In this regard, he cited *S v Sauls & others*,^[1] in which Diemont JA had said:

‘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.’

[24] He then proceeded to consider SG as a witness. He said that while she had made a favourable impression on him, had testified with confidence and appeared to have a sound recall of the sequence of events, her evidence was ‘not without blemish’.

[25] He listed the blemishes as a number of contradictions between her evidence and a statement taken from her by the police; the fact that despite testifying and stating in her statement that she had been penetrated anally more than once, she made no mention of this to the doctor who had examined her, and who consequently did not examine her anus; the physical impossibility, on her account, of the acts attributed to Nonkombana and Zwelibanzi in respect of count 5; and the physical impossibility of the oral sex she described as part of counts 3 and 4.

- [26] SG was interviewed, and a statement taken from her, shortly after her escape from Zwelibanzi's flat and while she was, on the evidence of everyone who saw her, in a traumatised state. Eksteen J concluded that, in these circumstances, the same weight could not be attached to SG's failure to mention that Nonkombana had wielded a knife when raping her, as would ordinarily be the case; and that 'it is to be expected that there would be contradictions and omissions in the statement taken at that stage'. I would add too that the purpose of, and practical problems associated with, police statements in general should not be lost sight of.[2]
- [27] Eksteen J dealt with the remaining difficulties in respect of SG's evidence as follows:
- 'For the reasons which I have set out earlier I do not think that the complainant's version of events in count 5 are capable of acceptance. I have no doubt that in this respect she has embellished somewhat in her evidence. Mr Canary correctly conceded that the accused could not be convicted on count 5. He conceded too that in the absence of medical evidence and with reference to the usual height of a bed as compared to a man standing up the evidence in respect of the oral sex has not been proved beyond reasonable doubt. The evidence of anal penetration too is not supported by medical evidence and Mr Canary accepted that the State had not proved this aspect beyond reasonable doubt.'
- [28] While despite the blemishes in her evidence, Eksteen J was favourably impressed by SG as a witness, the same cannot be said of Nonkombana and Zwelibanzi: neither 'made a favourable impression in the witness box'.
- [29] In determining the central issue in dispute – the presence or absence of consent to sexual intercourse – Eksteen J considered the facts that were common cause; sought corroboration for the version of SG before accepting it; and took into account the evidence of SG's escape and traumatised state.
- [30] It was common cause that Nonkombana had sexual intercourse with SG on two occasions prior to the arrival at Zwelibanzi's flat of two noisy drunks who demanded entry, which was refused before they were told to leave by Zwelibanzi. That version of events – as opposed to Nonkombana's evidence that the drunks entered the flat – was corroborated by Zwelibanzi's evidence.
- [31] It was also common cause that Zwelibanzi entered the bedroom after chasing the drunks away. His evidence corroborates the evidence of SG that when he entered the bedroom, she was crying. This evidence, Eksteen J held 'provides some measure of corroboration for the complainant's version that she had been raped'. Furthermore, the refusal to allow the drunks into the flat accorded with SG's version that 'she was held hostage'.
- [32] Eksteen J held too that the evidence that Nonkombana instructed SG to have sexual intercourse with Zwelibanzi was confirmed by the latter 'albeit in slightly different terms'. Nonkombana's evidence supported SG's evidence that Zwelibanzi then had sexual intercourse with her. Eksteen J then stated:

'I have remarked earlier on the explanations by accused 1 for his passively standing by and observing the event. In view of the preceding events I consider that the version of the complainant to the effect that he too participated in the activity thereafter and that he too had further intercourse with her is more probable. Indeed on a consideration of all the evidence I accept her version of these events.'

- [33] It was common cause that after both men had had sexual intercourse with her, SG sought the permission of Nonkombana to go to the toilet. This, Eksteen J held, was 'indicative of her having been held captive'. It supported a conclusion too that she regarded Nonkombana 'to be in control of proceedings'. It was also common cause that SG escaped by 'violently breaking down the sliding door' and that she was in a half-naked state when she did so. On escaping, she immediately stated that she had been raped when she sought help. It was common cause that Nonkombana pursued SG after she had escaped, that he caught her and tried to drag her back to the flat.
- [34] A number of witnesses confirmed that after SG had raised a hue and cry, and had claimed to have been raped, she was in an extremely traumatised state. These witnesses included Ms Mama, who had given her refuge in her home and called the police, the policeman who responded to her call, the policeman who took her statement and the doctor who examined her. Eksteen J accepted this evidence, stating that 'the uncontested evidence establishes that the complainant was severely shocked and traumatised' and this evidence was strong corroboration that SG was raped.[3] He was satisfied that the shock and trauma were not feigned.
- [35] Finally, Eksteen J took into account the evidence of the doctor that the injuries he had noted in the J88 form were consistent with forceful penetration. The doctor's evidence was criticised because, in the J88 itself, his conclusion had been that a sexual assault could not be excluded. I do not believe that this criticism is warranted. The doctor used what appears to be the usual formula when injuries consistent with sexual assault are found. In his evidence, however, he expressed his opinion in positive terms and his opinion was justified by him with reference to the injuries he had recorded. Eksteen J found that the doctor's evidence 'finds strong support in the complainant's own evidence, and her obvious shock and trauma'.
- [36] On the basis of all of the evidence, Eksteen J was satisfied that, 'save for the features set out earlier herein', there was sufficient corroboration for the evidence of the complainant to justify a finding that the appellants' guilty had been established.
- [37] The power of a court of appeal to interfere with a trial court's factual findings is limited. In *S v Francis*[4] Smalberger JA stated:

'This Court's powers to interfere on appeal with the findings of fact of a trial Court are limited. Accused No 5's complaint is that the trial Court failed to evaluate D's evidence properly. It is not suggested that the Court misdirected itself in any respect. In the absence of any misdirection the trial Court's conclusion, including its acceptance of D's evidence, is presumed to be correct. In

order to succeed on appeal accused No 5 must therefore convince us on adequate grounds that the trial Court was wrong in accepting D's evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial Court's evaluation of oral testimony.'

[38] I can detect no hint of a misdirection in Eksteen J's factual findings. It is clear that he did a great deal more than merely pay lip service to the cautionary rule: indeed, his approach to the evidence of SG, given its blemishes, is a case study in how the cautionary rule should be applied. His factual findings cannot be faulted with the result that Nonkombana's appeal against conviction must fail.

Sentence

[39] Eksteen J imposed sentences of life imprisonment on both Nonkombana and Zwelibanzi. He did so because Nonkombana raped SG more than once (counts 1 and 2) and both he and Zwelibanzi took part in a so-called gang rape when they raped SG in turn (counts 3 and 4).[5]

[40] In *S v Malgas*, [6] Marais JA held that the minimum prescribed sentences provided for in the Criminal Law Amendment Act were to be considered to be ordinarily applicable unless there were weighty reasons – substantial and compelling circumstances – to justify a departure from the prescribed sentence. Furthermore, in assessing whether substantial and compelling circumstances were present, the usual approach to sentencing – the application of the Zinn triad [7] – is to be applied with a view, as Eksteen J said, of arriving at a sentence 'which fits both the crime and the offender while giving recognition to the interests of society'.

[41] Eksteen J considered the personal circumstances of Nonkombana and Zwelibanzi, most of which were favourable, but he also took into account the extremely serious nature (and prevalence) of the offences that they committed – particularly that SG was held for a number of hours against her will, that she was threatened with a knife, and that she was raped repeatedly, including by Zwelibanzi who was a complete stranger to her. He considered too that the experience had resulted in a 'lasting psychological scar' and held that this was a factor to which 'the interests of society demand that the courts' give due recognition.

[42] It was also clear to Eksteen J that given the way in which the appellants conducted themselves throughout the trial, neither was remorseful for what they had done.

[43] In balancing the interests of the appellants, the nature and seriousness of their conduct and the interests of society, Eksteen J found that no substantial and compelling circumstances were present to justify less severe sentences than those prescribed by the legislation.

[44] In my view, Eksteen J has not misdirected himself in any way in his consideration of sentence and neither can it be said that the sentences he imposed were disproportionate to the crimes, the criminals and the legitimate interests of society. The appeals against sentence of both Nonkombana and Zwelibanzi must therefore fail.

The order

[45] I make the following order.

- (a) The appeal of the first appellant against his convictions is dismissed.
- (b) The appeals of the first and second appellants against their sentences are dismissed.

C Plasket

Judge of the High Court

I agree.

M Lowe

R Brooks

APPEARANCES

For the appellants:

S J van der Spuy

Instructed by

Port Elizabeth Justice Centre

For the respondent:

V Makasana

Director of Public Prosecutions, Port Elizabeth

[1] S v Sauls & others 1981 (3) SA 172 (A) at 180E-G.

[2] See S v Bruiners & 'n ander 1998 (2) SACR 432 (SE) at 437h-i.

[3] S v Hammond 2004

(2) SACR 303 (SCA) paras 21-22; S v Kruger 2014 (1) SACR 647 (SCA) para 9; Fletcher & another v S [2010] 2 All SA 205 (SCA) para 13; S v AL ECG 23 November 2015 (case no. CC71/15) unreported para 17.

[4] S v Francis 1991

(1) SACR 198 (A) at 204c-e. (References omitted.) See too R v Dhlumayo & another 1948 (2) SA 677 (A) at 705-706; S v Hadebe & others 1998

- (1) SACR 422 (SCA) at 426a-c.
- [5] Criminal Law Amendment Act 105 of 1997, s 51(1), read with Part I of Schedule 2.
- [6] S v Malgas 2001
- (1) SACR 469 (SCA) paras 8, 9 and 25.
- [7] S v Zinn 1969
- (2) SA 537 (A) at 540G-H. ('What has to be considered is the triad consisting of the crime, the offender and the interests of society.')
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