

SOUTH AFRICA / JUDGMENT

Nqweniso v S (CA&R23/2013) [2016] ZAECHGHC 107 (17 October 2016)

[2016] ZAECHGHC 107

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S Rugunanan, M J Lowe

CASE / FILE NUMBER

CA&R23/2013

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

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE NO : CA&R

23/2013

Date

heard : 27 July 2016

Date

delivered : 17 October 2016

In

the matter between :

SITHEMBISO

NQWENISO

Appellant

and

THE

STATE

Respondent

JUDGMENT

RUGUNANAN, AJ :

[1] The appellant stood trial in the Regional Court, Grahamstown on the following charges :

Count 1 - Housebreaking with intent to commit an offence unknown to the public prosecutor, alternatively Trespassing;

Count 2 - Rape;

Count 3 - Attempt to commit a sexual offence;

Count 4 - Assault with intent to commit grievous bodily harm; and

Count 5 - Rape.

[2] The charge on count 1 alleged that on 8 December 2008 the appellant broke and entered the house of 'LVM' (who is also the complainant in count 2). Counts 2 and 3 were separate incidents that occurred on 8 December 2008 and 2 May 2010 and involved two female complainants 'LVM' and 'PM' aged 63 and 41, respectively.

[3] The charge on count 2 alleged that the appellant contravened section 3 read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, (Act 32 of 2007), and further read with the provisions of the minimum sentencing scheme prescribed by the Criminal Law Amendment Act, (Act 105 of 1997).

[4] On Count 3, the charge alleged that the appellant contravened section 55(A) read with Chapter 2, 3, and 4 and sections 1, 55, 56, 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, *supra*.

[5] The appellant was legally represented at his trial and pleaded not guilty to all 5 counts. He did not tender a plea explanation.

[6] Having correctly found that there would be a resultant duplication of convictions in the event of a conviction on count 2, the trial magistrate convicted the appellant on count 1 of 'housebreaking with intent to rape and rape' for which a sentence of 12 years' imprisonment was imposed. Count 3 was followed by a conviction for committing a 'sexual assault' in contravention of section 5(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act and attracted a sentence of 3 years' imprisonment.

[7] In respect of counts 4 and 5 the State led no evidence. This resulted in the appellant being acquitted on these counts.

[8] This appeal, with leave granted on petition, is directed against the convictions only.

[9] Given the conclusion arrived at in this judgment it is considered unnecessary to recapitulate full detail of all the evidence contained in the record of the trial proceedings. In assessing the evidence to determine if the State has discharged the onus, it is acknowledged that a court must look at all the evidence holistically to determine whether the guilt of the accused is proved

beyond reasonable doubt. Breaking down the evidence in its component parts is not excluded as a convenient aid to a proper evaluation and understanding thereof. *S v Shilakwe* 2012

(1) SACR 16 (SCA) at paragraph [11], sounded the following caution :

“But in doing so, (breaking down the evidence in its component parts) one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in the trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood from the trees.”

See also *S v Hadebe & Others* 1998 (1) SACR 422 (SCA) at 426 F-H and *S v Mbuli* 2003 (1) SACR 97 (SCA) at 110, para [57].

[10] It is also trite that no onus rests on an accused to convince the court of the truth of any explanation which he gives. He should be acquitted if there exists a reasonable possibility that his evidence may be true (*R v Difford* 1937 AD 370 at 373; and *S v Kubeka* 1982

(1) SA 534 WLD at 537 F- G).

[11] The thrust of the dicta emanating from the cases referred to is that the approach adopted when assessing the evidence entails a weighing of all the elements

pointing towards the guilt of the accused against those elements which are indicative of his innocence. In this process, the inherent

strengths and weaknesses, probabilities and improbabilities on both sides must be properly considered, and once having done so, it must be determined whether the balance weighs so heavily in favour of the State such that it excludes any reasonable doubt that the accused is guilty (*S v Chabalala* 2003

(1) SACR 134 (SCA) paragraph [15]).

THE EVIDENCE ON COUNTS 1 & 2

[12] On these counts the complainant is a single witness. Section 208 of the Criminal Procedure Act 51 of 1977 (‘the CPA’) provides that an accused may be convicted of any offence on the single evidence of a competent witness. There is no rigid formula for considering the

credibility of a single witness. The trial court should weigh the evidence of a single witness and consider its merits and demerits and once having done so, should decide whether it is satisfied that it is truthful despite shortcomings or defects (*S v Sauls and Others* 1981 (3) SA 172 (AD) at 180E-G followed in *Director of Public Prosecutions v S* 2000 (2) SA 711 (TPD) at 714 F). Put otherwise, a trial court may accept the evidence of a single witness if it inspires confidence that it is clear and satisfactory in every material respect. (see *S v Letsedi* 1963

(2) SA 471(AD) at 473F-G and *S v Khumalo en Andere*

[1991] ZASCA 70; 1991 (4) SA 310 (AD) at 327J).

[13] In argument counsel for the appellant submitted that the issues for determination are whether the appellant broke into the house of the complainant ('LVM') and whether sexual intercourse took place with her consent.

[14] Detailing only the relevant portions of the evidence, the complainant testified that before retiring to bed she properly closed the windows of her house and that she had locked the back and front doors. She stated that she was asleep and was awoken at about 02h00 when she felt something heavy lying on top of her and pressing her down. She initially thought that it was her paramour. When she realised that the person was heavier than him, she moved and felt a penis penetrating her vagina. Shocked by this, she screamed and the person immediately jumped off her and put his hand on the side of her face forcing her head to turn away from him so that she could not see him. The person whose identity was unknown to her at that stage jumped up and ran off into the house. She also ran off fearing that there might have been other strangers in the house. Somewhere in the dining room and from the street lighting that filtered through the curtains she was able to observe that the unknown person wore a green and white tracksuit top. The complainant stated that she eventually exited the house through the back door and went to her neighbour Bulelwa for assistance.

[15] After telling the neighbour what had happened and requesting that the police be called, the complainant, while waiting at a spot between her house and that of her neighbour, noticed someone coming past her. The person stopped for a moment and looked at her. She noticed that the person wearing the same top as did the person she encountered in her house moments before. She also recognised him as someone known by the nickname 'Stingray' who lives a few houses away in the same street as she does. It is understood from the complainant's evidence that she was able to identify Stingray from the light being shed by a high mast lamp in the vicinity.

[16] Later when the police arrived it was discovered that entry into the complainant's house was gained through her bedroom window. The window had an insecure handle which she fastened with a lace from the inside. The police found the lace lying on the inside floor of the complainant's bedroom. The window was not broken. Under cross-examination the complainant explained that it would have been possible to gain entry through that window by shaking it without necessarily breaking it. In this she regarded she was adamant that

breaking the window was not the only means of gaining entry.

- [17] While the police were about, a male undergarment was found inside the complainant's house. Given the nature of the appellant's defence to count 2 (i.e. sexual intercourse by consent), it is unnecessary to deal with the DNA evidence linking the undergarment to the appellant. This evidence was admitted under section 212(4) of the CPA. Similarly, a J88 medical report was also admitted into evidence. The report does not take the matter any further. Except for indicating old bruises to the vaginal wall and bruising of the hymen, the finding is that there was "no clear evidence of recent traumatic vaginal penetration" of the complainant.
- [18] Prior to these incidents it is common cause that the previous night the complainant and the appellant were attending a traditional function at the house of a neighbour, the aforementioned Bulelwa. The appellant's case is that while he attended the function the complainant sent him to buy liquor and requested him to return to her place where they would consume it. Having made the purchase, the appellant went to the complainant's house. This was at about 19h00 or 20h00. The appellant's evidence is that she ushered him in through the door. Both he and the complainant consumed the liquor, spent the night together and had consensual sex. The appellant stated that he left the following morning at 06h00. During cross-examination the complainant denied these assertions. She stated that the appellant had left before the arrival of the police. She protested that she would not have laid charges against the appellant had sexual intercourse been consensual.
- [19] The neighbour Bulelwa testified as a state witness. The gist of her evidence is that she confirmed that the complainant approached her in the early hours of the morning and requested assistance in calling the police. She stated that the complainant appeared shocked, was tearful and disclosed that she was awoken by somebody lying on top of her and who had raped her. The magistrate correctly reasoned that the evidence of the traumatised state in which the complainant arrived at her neighbour Bulelwa was corroborated by the latter's evidence. Bulelwa also confirmed that the police arrived, that the night before both the complainant and the appellant were present at her home where she hosted a traditional function, and that at no stage did she see them in each other's company because the men and the women were entertained separately according to custom. She stated that the function ended at 19h00 and that the complainant left at about 20h00 unaccompanied by anyone.
- [20] When subjecting the evidence on these counts to the scrutiny envisaged by the dicta and employing the caution sounded in the authorities referred to, it is highly improbable that the appellant's version lends itself to the existence of a reasonable possibility that his evidence may be true. It is common cause that both he and the complainant are known to each other. The complainant regards him as a 'child'; he grew up in front of her and they live in the same street. There is no history of discord between them. It is also highly improbable that the complainant would have consented to having sexual intercourse with the appellant. The evidence indicates that the complainant was asleep, that she awoke because she felt

something heavy lying on top of her pressing her down, that upon moving she felt a penis penetrating her vagina, that she was shocked by this, she screamed and the person immediately jumped off her, put his hand on the side of her face forcing her head to turn away from him so that she could not see him. It would be fanciful to conceive that this evidence comes anywhere close to establishing consent or that the complainant willingly submitted or acquiesced to sexual intercourse. There are clearly positive indications that she offered resistance when she moved and screamed. Furthermore, conduct detracting from consent is also indicative by the fact that the perpetrator immediately jumped off the complainant when she screamed. Another consideration arises from parties' age. At the time of the trial the appellant was 26 years of age. The disparity in age between him and the complainant renders it improbable that the complainant would have consented to sexual intercourse.

- [21] The complainant's evidence indicates that once she arrived home she locked up, went to bed and fell asleep. In these circumstances it is improbable that she would have waited for the appellant and opened the door for him. The probabilities overwhelmingly indicate that the appellant entered the complainant's house through the bedroom window without her permission and with the sole intention to rape her. The absence of physical damage to the window is irrelevant. The offence of housebreaking may be committed without causing physical damage of any kind (Milton, *South African Criminal Law and Procedure*, 3rd ed, page 798). In the circumstances the magistrate correctly convicted the appellant for housebreaking with intent to rape and

rape.

THE EVIDENCE ON COUNT 3

- [22] On the night in question the complainant 'PM' was socialising at the home of a friend, Mthuthuzeli along with one Thandosi. Because she had been consuming wine she felt that she was unable to go home and decided to sleep over in a spare room. Sometime during the night she was awoken by the sound of a knock on the kitchen door. When Mthuthuzeli opened the door, the appellant known to her as Stingray enquired from Mthuthuzeli of the whereabouts of Thandosi. Mthuthuzeli replied that Thandosi was asleep. The complainant stated that the spare room in which she was asleep lies directly opposite the kitchen door and is separated by a passage. She could therefore clearly see Stingray when he communicated with Mthuthuzeli because the kitchen light was switched on when Mthuthuzeli went to answer the door.
- [23] The complainant stated that Stingray, pretending to leave, sneaked past Mthuthuzeli, (presumably, taking advantage of the fact that Mthuthuzeli is partially sighted), and entered the spare room occupied by her and immediately dragged her into the passage and proceeded to undress her lower body of the trouser, tights and panty she was wearing while simultaneously assaulting her with his fists. Proof of the complainant's injuries sustained in the assault was in the form of J88 medical report that was admitted into evidence in

accordance with section 212(4) of the 'CPA' without objection from the appellant. The report depicts injuries to various parts of the complainant's body notably her face, chest and left arm. During the ordeal the complainant believed that Stingray wanted to rape her and while the assault had been proceeding she screamed out to Mthuthuzeli for assistance.

Mthuthuzeli got to the scene, followed by Thandosi a short while thereafter. It appears from the complainant's evidence that Mthuthuzeli chased Stingray and grabbed him by the arms but Stingray managed to get free when he 'peeled' himself out of his jersey. While making his getaway Stingray seized a cell phone belonging to Thandosi. By the time Thandosi arrived her lower body was naked.

- [24] During cross-examination the version of the appellant was put to the complainant. It was to the effect that the appellant was the fourth person in the company of the appellant along with Mthuthuzeli and Thandosi; and furthermore that a physical fight broke out when the appellant was accused of having stolen a cell phone belonging to Thandosi. On the appellant's version, he was assaulted by the complainant when she struck him in the face with a broken bottle neck. After the assault he left and did not return. The complainant denied the appellant's version in its entirety.
- [25] Thandosi was called as a state witness. His evidence, shorn of peripheral detail, is that the appellant was not among the company that had been visiting at Mthuthuzeli's on the night in question. He stated that was asleep in another room but was awoken when he heard the complainant screaming. He investigated and observed a panty lying in the passage leading to the kitchen where he saw Mthuthuzeli involved in a struggle with the appellant. After the appellant had gotten away he attended the complainant and observed that she was 'swollen' and that her lower body was naked. He stated that the complainant told him the appellant wanted to rape her.
- [26] When assessing the evidence on this count it is highly improbable that there is a reasonable possibility that the appellant's version may be true. It is common cause that both he and the complainant are known to each other through a mutual acquaintance Thandosi. There is no history of discord between the complainant and the appellant and this renders it improbable that the complainant would fabricate a charge against him. In any event, she also regards him as a 'child'.
- [27] The complainant's belief that the appellant wanted to rape her correctly supports the conviction for a 'sexual assault' in contravention of section 5(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.
- [28] In the circumstances there is no reason for disturbing the findings in the magistrate's judgment on conviction. The judgment reflects that the magistrate give meticulous consideration to the evidence before him. Accordingly, the appeal against the conviction on count 3 fails.

[29] In the result the appeal against the convictions on counts 1, 2 and 3 is dismissed and the sentence on each count confirmed.

S RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

I agree.

M J LOWE

JUDGE OF THE HIGH COURT

Appearances:

For Appellant : Adv H Charles instructed Grahamstown Justice Centre

For Respondent : Adv D Els instructed National Director of Public Prosecutions, Grahamstown

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/2016/107.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/nqweniso-v-s-unknown-topic-aecghc-2016>

Prepared on 10 October 2026 · Esheria