

SOUTH AFRICA / JUDGMENT

Papu v S (CA&R302/2016) [2017] ZAECHGC 24 (23 February 2017) [2017] ZAECHGC 24

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem, P T Mageza

CASE / FILE NUMBER

CA&R302/2016

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IN THE

HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. CA & R 302/2016

In the

matter between:

VUYOLWETHU

PAPU

Appellant

and

THE

STATE

Respondent

JUDGMENT

Bloem J.

[1] The appellant was charged in the regional court at Port Elizabeth with rape in contravention of section 3 of the Criminal Law (Sexual

Offences and Related Matters) Amendment Act[1]. Despite his plea of not guilty he was convicted as charged and sentenced to ten years' imprisonment. With the leave of the trial court he now appeals against the conviction.

[2] The state's case is that during the evening of 13 February 2011 and early the following morning the appellant raped the complainant in his shack, which was in the evidence referred to as his room. The appellant did not deny that he had sexual intercourse with the complainant in his room at the times that she alleged. His case is that such sexual intercourse was with her consent. In the circumstances the only issue before the magistrate and now before us is whether or not the appellant had sexual intercourse on those two occasions with the complainant's consent.

[3] To prove its case against the appellant the state adduced the evidence of the complainant and M. F.. By agreement a medical report compiled by a Dr Moodley was handed in as evidence. The complainant testified that at approximately 20h00 on 13 February 2011 she was walking home from her friend's home when she came across the appellant. She had seen him earlier that day at her house when he went to look for her brother, Samkelo, but he was not there. The appellant told her to accompany him to his room. She refused. He assaulted her by using an open hand on her body and when she tried to run away he threw a stone at her back, after which she accompanied him to his room. She did not make a noise to draw attention to her plight because he threatened to stab her.

[4] Upon their arrival in his room the appellant instructed the complainant to undress. She refused whereafter he again assaulted her by using an open hand. She ultimately undressed herself on his instructions whereafter he had vaginal intercourse with her without a condom. When she said that she wanted to go home the appellant said that she must sleep in his room. She slept until she woke up between six and seven o'clock the following morning. She told him that she wanted to go home. He said that he wanted sexual intercourse with her. He threw an axe at her but he missed. He grabbed her, made her to lie on the bed and raped her, again without a condom. After he had raped her she said that she wanted to leave. He allowed her to leave. He did not accompany her. Upon arrival at home she informed Mr F. what had happened to her. She was crying. Mr F. called elderly ladies whereafter they contacted the police. The complainant helped the police to look for the appellant. After he was arrested they went to the police station. The complainant was then taken to Dora Ngiza Hospital where she was examined by Dr Moodley.

- [5] Mr F. testified that he and the complainant are neighbours. On the morning of 14 February 2011 he saw the complainant walking past his house towards her house. She was crying. She left her house and called him. She told him what had happened to her during the previous evening and early that morning. He called some ladies and thereafter contacted the police who arrived. The police left with the complainant in search of the person who had allegedly raped her.
- [6] The medical report compiled by Dr Moodley revealed that he examined the complainant on 14 February 2011 when she informed him that she had been abducted, assaulted and “raped repeatedly on 13 February 2011 at ± 20h00 until 14 February 2011 ±10h30”. She presented with no visible external injury. She was co-operative although traumatised. An examination of her vaginal area revealed bruising of her para-urethral folds and fossa navicularis. Dr Moodley concluded that the above findings were consistent with forced vaginal entry and that rape was not excluded.
- [7] The appellant testified that he had a romantic relationship with the complainant since 2007. However they had a fallout in 2008 when he went to school in Uitenhage. On his return he learnt that the complainant was in a romantic relationship with his cousin, Zanethemba. On the evening of 13 February 2011 he met the complainant at the house of her friend, Zukiswa, who was his neighbour. The complainant asked him for a cigarette. She said that she did not want Zukiswa’s mother to see her smoking. She therefore went over to his room to smoke. She was accompanied by Zukiswa. They left the appellant’s room when Zukiswa’s mother called her. The appellant conversed with the complainant at the fence separating Zukiswa’s premises from the appellant’s. Zukiswa and the complainant went to a nearby shop. Upon their return the complainant and the appellant continued their conversation until they were again interrupted by Zukiswa who called the complainant. Before she left the complainant said to the appellant that she would return. The appellant went to buy dagga. Upon his return he met the complainant who told him that she had been calling for him and did not know where he had been.
- [8] The two of them went to his room on his suggestion. When they were near his room he noticed his mother removing clothing from the washing line. The complainant said that they must approach his room from the back because she did not want his mother to see her entering her son’s room. He assured her that his mother would not do anything and they entered his room through the front gate. He sent his younger brother to buy cooldrink and biscuits. When his younger brother returned the appellant prepared a dagga zol. Zukiswa also arrived. Soon thereafter her mother called her. The complainant requested the appellant to prepare a dagga zol for her too. He did so. His brother then left. The appellant requested her to spend the night with him in his room. She agreed.

- [9] That evening and the following morning they had sexual intercourse. After the sexual intercourse in the morning the complainant asked him why he started an affair with her friend while the two of them had an affair in 2007. He replied that he did so because she had an affair with his cousin. All hell broke loose. She started insulting him and raised her voice. He requested her not to make a noise because he did not want to disturb his parents, who were preparing to go to work. She would not listen. He then assaulted her by clapping her with an open hand across her face. She told him that she wanted to leave. He opened the door and let her out.
- [10] Soon thereafter she returned to his room and said that she did not want Zukisa's mother to see her. He gave her money in the sum of R10.00 whereafter she left through the back. While he was walking with a friend in the street, he saw the complainant as a front passenger of a police van. He was confronted by a policeman who arrested him.
- [11] The magistrate convicted the appellant of rape because he rejected his version as a fabrication and because, in his view, the state proved its case against the appellant beyond reasonable doubt. The magistrate considered the fact that, on the allegation of rape, the complainant was a single witness whose evidence had to be treated with caution. He also considered the contradictions between the complainant's and Mr F.'s evidence for example, they differed as to what time Mr F. met the complainant. Although the complainant did not give a time when she met Mr F., her evidence was that she left the appellant's house between six and seven o'clock that morning. The evidence was that the appellant's house is not far from the complainant's house which created the impression that the complainant would have met Mr F. shortly after seven o'clock. Mr F. testified that he met the complainant between nine and ten that morning. Secondly, the complainant testified that the appellant threatened her with a knife although she did not see the knife whereas Mr F. testified that, when the complainant spoke to the women that he called, she said that the appellant had a big knife.
- [12] The magistrate found that it would be unfair towards the complainant to use Mr F.'s evidence, insofar as it differs from her evidence, to discredit her on the basis of those minor discrepancies. The magistrate found that, apart from the above discrepancies, Mr F.'s evidence corroborated the complainant's evidence insofar as she made a report to him shortly after she told him that she had been raped. Mr F. testified that, when the complainant made the report to him, she was crying and upset.
- [13] In my view, the magistrate cannot be faulted for the finding that the state proved its case beyond reasonable doubt against the appellant. The appellant's version is that, despite the fact that he and the complainant broke up when they became involved in relationships with other persons, he met with the complainant from time to time and conversed with her. However, it was for the first time since they broke up that they spoke about the reason for the break-up of their relationship. That, in my view, is highly improbable especially if regard is had to the complainant's evidence that she was at no stage in a love relationship with the

appellant. Furthermore, although there is no duty on the appellant to give a reason why the complainant would falsely implicate her,[2] I find it improbable in the circumstances of the case, that the complainant, who is the sister of the complainant's friend and the friend of the appellant's neighbour, would falsely accuse the appellant about a break-up that occurred some time ago.

[14] Furthermore, the appellant's version, that they enjoyed cooldrink and biscuits, that he prepared a dagga zol for himself and one for the complainant, that they indulged in consensual sex, all turned ugly because he told her that he started an affair with her friend, because she had an affair with his cousin. If the appellant's evidence is true then it means that the complainant must have known that the appellant started an affair with her friend after she had started an affair with his cousin. Why would she become angry when she was told what she already knew? In my view his version was correctly rejected as false.

[15] The evidence that was correctly accepted by the magistrate was that the appellant had sexual intercourse with the complainant without her consent. He was accordingly correctly convicted of rape.

[16] In the result, the appeal against conviction is dismissed.

G H BLOEM

Judge of the High Court

Mageza AJ,

I agree

P T MAGEZA

Acting Judge of the High Court

For the appellant:

Adv D P Geldenhuys of the Grahamstown Justice Centre, Grahamstown.

For the state:

Adv D Els of the office of the Deputy Director of Public Prosecutions, Grahamstown.

Date of hearing:

1 February 2017

Date of delivery of the judgment:

23 February 2017

- [1] Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007).
- [2] S v Ipeleng 1993 (2) SACR 185 (T) at 189c-d.
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Prepared on 24 October 2026 · Esheria