

SOUTH AFRICA / JUDGMENT

Phasha v S (CA 11/2012) [2012] ZANWHC 55 (22 June 2012)

[2012] ZANWHC 55

COURT

North West High Court, Mafikeng

BEFORE

Gutta, R D Hendricks

CASE / FILE NUMBER

CA 11/2012

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NORTH WEST HIGH COURT, MAFIKENG

CASE NO. CA 11/2012

In the matter between:

LEBOGANG PATRICK PHASHAAPPELLANT

and

THE STATERESPONDENT

CRIMINAL APPEAL

GUTTA J

A.

INTRODUCTION

[1] The appellant was found guilty of kidnapping and rape in the Odi Regional Court and sentenced to 3 years imprisonment for kidnapping

and life imprisonment for rape, with the sentences running concurrently.

[2] The appellant appeals both the conviction and sentence.

B. COMMON CAUSE

[3] Facts that are common cause:

3.1. On 01 October 2006, the complainant and her three friends accompanied the appellant and two of his friends in a vehicle that was driven by the appellant. At some stage during the course of the evening, the complainant and her friends ended up at the appellant's residence, where they spent the night;

3.2. The complainant and her cousin, Vanessa, remained in the appellant's room with the appellant and his friend, Barker;

3.3. The appellant slept on the ground with the complainant and Vanessa and Barker slept on the bed. The appellant and the complainant had sexual intercourse;

C. IN DISPUTE

[4] Facts in dispute:

4.1. whether the complainant and her friends went voluntarily with the appellant and his friends to the appellant's house;

4.2. whether the appellant had consensual sexual intercourse with the complainant.

D. EVIDENCE

The Complainant

[5] The complainant's version is briefly that at approximately 16h00, she was in the company of three friends, namely, Thato,

Kamogelo and Vanessa, when the appellant who was driving a motor vehicle and was in the company of two male friends (Barker and

Thabang), stopped the vehicle grabbed her while the second man (Barker) grabbed her cousin Vanessa. Both the complainant and Vanessa

managed to run away. The complainant twisted her ankle and fell down and the appellant caught up with her. Vanessa, who saw that the complainant had fallen, stopped and the second man caught up with her. They told them to enter the vehicle. Thato and Kamagelo on seeing the complainant and Vanessa enter the vehicle, also entered the vehicle. The vehicle stopped at Madidi where the appellant and Barker went in and purchased liquor. The appellant told them that if they do not consume liquor he will not take them back home. The complainant consumed half a bottle.

[6] Thereafter, they went to the appellant's parental home. The appellant parked his vehicle in the yard and they entered the appellant's room. She and Vanessa remained with the appellant and Barker in the one room and Thato and Kamogelo went with Thabang into another room. It was approximately 23h00. The appellant told her to sleep with him on the floor and to undress her clothes. She refused and the appellant slapped her and Vanessa with open hands and pulled their hair. He took an iron rod and threatened to assault them with it. When the appellant was about to assault her with the iron rod, Barker told him not to

do that. The appellant pulled her to the floor and removed her t-shirt, jeans and panty. He opened her legs and she told him that if he was going to rape her, he should use a condom. He slapped her and bumped her against the wardrobe and then he raped her. She testified that she screamed but the appellant put the radio on. The next morning he raped her again.

- [7] The next morning, the complainant told Kamogelo and Thato that the appellant raped her. The appellant drove the complainant and her friends and dropped them near a church where they got a lift in a taxi. The appellant returned the complainant's cell phone to her. The wife to the priest, Mamoruti, called her on her cell phone because she heard that they were not at home and fetched them at the four-way stop at Morula Sun. She drove them to the church. The complainant's aunt arrived and thereafter they went to the police station.
- [8] The complainant made a statement to the police. Although she stated that it was not read back to her she read it in Court and stated that she was happy with the contents of the statement, that the statement was true. The complainant, in her statement, contradicted her evidence in the following respects:

- 8.1 the time when the appellant approached her;
 - 8.2 that Thato and Kamogelo were grabbed by two males;
 - 8.3 the time when they arrived at the appellant's home;
 - 8.4. in her statement, she stated that she removed her t-shirt and left her panty on and got underneath the blankets, while in her evidence she stated that she only removed her jacket and the appellant removed her other items;
 - 8.5. that the appellant wore a condom when he raped her for the second time.
- [9] In cross-examination the complainant mentioned for the first time that she saw a firearm before she was grabbed by the appellant.

The Appellant

- [10] Briefly, the appellant's version is that he was in the company of his friends, Thabang and Barker, when they saw the complainant and her friends. The appellant invited them to go with them. The complainant and her friends told them to call them in 20 minutes and the appellant took the complainant's number. He phoned her after 20 minutes and the complainant told them to wait for about 10 minutes. After approximately 15 minutes they arrived. They were five in number. The complainant said she had to fetch a key at her house and left with one of the ladies. She returned alone and reported that she sprained her ankle when she jumped over the fence at her home. All four entered the car and the complainant told them they should return at midnight. They first went to a filling station at Lebonong, where he filled petrol in his car. They discussed going to a place called Gemini, but they decided not to go there because the complainant said her mother sometimes frequents the place. They then went to a supermarket at Madidi and spent approximately 20 minutes there. At Madidi, they met one Papi, who knew the complainant and he came to greet the

girls.

- [11] Thereafter, they went to a tavern known as Maya's Place, where they purchased liquor and snacks. The appellant and Barker went to buy liquor and on their return Kamogelo asked to go to the toilet. Thereafter they went to Maloka's Tavern. They all consumed alcohol in the car. At Maloka's Tavern, they all entered the tavern and remained there until 24h00.
- [12] On their way back, they experienced car trouble approximately 100 metres from the appellant's uncle's place. They pushed the car and parked it at the uncle's place. Then they walked on foot to the appellant's parental home. They took turns to carry the complainant, whose foot was injured.
- [13] They entered the appellant's room, where they all listened to music. The appellant asked his nephew if Thato and Kamogelo could sleep in his room and he agreed. He and Barker remained with the complainant and Vanessa. Because he and the complainant spent time together that evening and at some stage kissed her, he suggested that the complainant sleep with him on the floor. He denied that he threatened or assaulted the complainant. They both undressed themselves and had consensual sexual intercourse once only.
- [14] The next morning, they waited until his mother had gone to church. He gave them water to bath. Thereafter, they all walked to where the vehicle was parked.
- [15] The appellant's nephew and Kamogelo left to purchase petrol. The others remained at his uncle's place, where his uncle gave them chairs to sit on and cold drinks and snacks. They left between 11h00 and 12h00 because the complainant told them that someone was fetching them at Morula Sun. The ladies told him to leave them there and not to wait as they were going to be reprimanded for not spending the night at home.
- [16] Three witnesses were called by the State, namely Dr Martin Komane, Vanessa Nthabiseng and Kamogelo Mahlangu.

Martin Komane

- [17] Dr Martin Komane was the first witness for the State. He examined the complainant and he noted swelling and a fresh tear to the hymen, that the cervix was intact but bruised. He concluded that there was forceful entry into the vagina. In cross-examination he was questioned about the fact that the complainant was a virgin and he testified that one would expect tears on the hymen and forceful penetration in those circumstances and that it was not extraordinary for bruising and tears in the hymen during normal sexual intercourse, especially in the case of a virgin.
- [18] There were several material contradictions between the evidence of Vanessa and Kamogelo and the evidence of the complainant. I have not provided a summary of the defence witnesses' evidence, but simply highlighted the contradictions.

Kamogelo Mahlangu

[19] Kamogelo to a certain extent corroborated the appellant's version and also contradicted both the appellant and the complainant's versions. She testified that:

19.1. The appellant threatened them that if they want to see the complainant alive, they must get into the motor vehicle.

19.2. She went to the toilet, where the appellant accompanied her there and back.

19.3. The appellant bought beers at the tavern and they all consumed alcohol. The complainant had half a bottle.

19.4. Thereafter, they went to another tavern where they all entered and remained there for a few minutes. Then they went to Thabang's

place, where he fetched something.

19.5. The car had a mechanical problem, and they walked for an hour and a half before arriving at the appellant's place.

19.6. The complainant and Vanessa were made to sleep in the same room as the appellant and Barker and she and Thato slept in another room with Thabang.

19.7. She and Thato screamed and the appellant came to the room and threatened to kill them.

19.8. She could hear the complainant and Vanessa crying in the next room and she heard the appellant ordering the complainant to remove her clothing or else he would take it off and the complainant refused.

19.9. The car was parked in front of the appellant's aunt's house and they walked for an hour and a half to get back to where the car was parked.

19.10. In the morning, they were locked in the room. They only left the house at 20h00 when it was dark and they were transported in the vehicle to a bush where they were left. They took a taxi to Morula Sun, where the priest's wife called the complainant.

19.11. The appellant wanted to wait with them when he dropped them off, but for some reason he left.

Vanessa Nthabiseng

[20] Contradictions between Vanessa's, the complainant and Kamogelo's evidence are the following:

20.1 She was not forced into the motor vehicle she entered freely;

20.2 Kamogelo and Thato also entered the car voluntarily;

20.3. Kamogelo went to the toilet at the place where they purchased alcohol;

20.4. They saw Papi there, but did not talk to him because he was a distance away;

20.5. After purchasing alcohol, they went to Thabang's home and then to the appellant's home. She denied going to Maloka's

Tavern;

20.6 There was no problem with the appellant's vehicle;

20.7 She did not see a firearm;

20.8 They only drank alcohol in the appellant's room.

20.9 The complainant did not take her t-shirt and jersey off.

20.10. The complainant had her top on when they were having sexual intercourse.

20.11. In the morning, the appellant did not take them in a vehicle. They got a lift from someone not far from the appellant's home.

20.12 She did not see a firearm.

[21] In Vanessa's statement she said that the appellant pointed them with a firearm, and that the appellant instructed them to drink Savannah at the place where alcohol was bought. She did not mention an iron rod.

Thabang Malema (Nickname Barker)

[22] Barker corroborated the appellant's version that five girls were together and they left their telephone number. The three girls remained in the car and the complainant and one friend left. The complainant returned with a sprained ankle when she was jumping the wall. They first went to buy petrol. They wanted to go to Gemini but the complainant said her mother goes there and they should go to Madidi village. They first stopped at a market for 10 minutes. Then Papi and the appellant saw some of his friends. From there they went to Maya's Tavern, where the appellant bought liquor and Kamogelo went to the toilet.

[23] After Maya's Tavern, they went to Maloka's Tavern, where they spent two to three hours consuming liquor. He saw the complainant kiss the appellant. They left Maloka's Tavern to take the ladies home when they ran out of petrol. They left the car at the appellant's uncle and walked on foot to the appellant's home and entered the room where they listened to music.

[24] He did not hear any argument between the appellant and the complainant or see the appellant having sexual intercourse with the complainant. He wanted to have sexual intercourse with Vanessa but she told him she was menstruating.

[25] The next morning, they waited for the appellant's mother to go to church. Water was provided for the ladies to bath, whereafter they went to Madidi where the car was parked. Kamogelo and Thabang, the appellant's cousin, left to buy petrol. They spent approximately two hours there and Vanessa bought cold drink and chips. After petrol was bought, the appellant took the complainant to Morula Sun because the complainant had made arrangements for someone to fetch her.

Themba Joyce Nkosi

[26] The Court called Themba Joyce Nkosi, Vanessa's mother, who testified that Vanessa and the complainant would call her if they were out and that Vanessa has slept out in the past out without permission.

Thabang Willy Phasha

[27] The Court also called Thabang Willy Phasha who was in the company of the appellant and Barker. He corroborated the appellant's

version in the following respect:

27.1. There were five ladies whom they met. The parted company and met again after 30 minutes.

27.2 The complainant told them not to go to Gemini.

27.3. The ladies went inside the tavern where the complainant and the appellant were drinking.

27.4. The motor vehicle had broken down and was pushed to the premises.

27.5 The appellant gave the ladies a lift.

E. EVALUATING THE EVIDENCE

[28] When evaluating the evidence as a whole for the State and the defence, it is apparent when considering the credibility of the

witnesses, that the evidence is fraught with inconsistencies and contradictions.

[29] There are contradictions in the time when the events unfolded, how the complainant injured her ankle, how the complainant and her friends came to be in the vehicle, their whereabouts that evening before going to the appellant's home, what transpired in the appellant's room and the next morning before they were fetched by Mamoruti.

[30] There are material contradictions between the complainant and the defence witnesses' evidence, which affects their credibility.

There are also contradictions in the evidence of the appellant and his witness, but those contradictions are not material to conclude

that the appellant is dishonest and is not credible.

[31] In *Nomandela & Others v S* [2007] 1 All SA 506 (E) at 512g, the Court pointed to certain contradictions between the various witnesses. It held that:

“Contradictions per se do not necessarily negate the evidence of a witness. Not every error made by a witness affects his credibility, taking into account the contradictions, their number and importance, as well as their bearing on the parts of the witness’ evidence – S v Mkhohle 1990

(1) SACR 95 (A); see further *S v Jochems* 1991

(1) SACR 208 (A).”

See also *S v Oosthuizen* 1982

(3) SA 571 (T) at 576G–H.

[32] The contradictions in casu are significant and invoke doubt as to whether the complainant was kidnapped and raped by the appellant. The contradictions cast doubt on the veracity of the complainant’s testimony.

[33] The Magistrate was alive to the contradictions which give rise to reasonable doubt in the appellant’s version. The Magistrate

in her judgment states:

“It is quite correctly so as addressed by Adv Kogh there are a myriad of discrepancies in the evidence. The state witnesses contradict

themselves internally in their own evidence varying from evidence-in-chief, cross examination and what was said in the police statement. Externally amongst the evidence there are discrepancies. The same principle applies to the accused and his witnesses and there is a great variation between the version of the accused and his witnesses and that of the state’s version and to some extent the court witnesses added another bent to the tale.”

[34] In *Govender v S* [2006] 4 All SA 449 (N), the Court held that:

“The correct approach where there is a conflict of fact between the evidence of the state witness and that of an accused is for the court to apply its mind not only to the merits and demerits of the state and the defence witnesses, but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt.”

[35] Nugent J in *S v Van der Maden* 1999

(2) SA 79 WLD at 82A stated that:

“A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence . . . at 82C. The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt and the logical --- is that he must be acquitted if it is reasonably possible that he might be innocent.”

[36] The test is whether there is a reasonable possibility that the accused's evidence may be true.
See *S v V* 2000

(1) SACR 453 (SCA) at 455c.

[37] When considering the probabilities, I am of the view that this is clearly a case where the State evidence is neither convincing nor conclusive and does not exclude the reasonable possibility that the appellant's version may reasonably possibly be true.

[38] In view of the contradictions, lack of corroboration and doubt as to the credibility of the witnesses, the State in my view has failed to discharge the onus to prove beyond reasonable doubt that the appellant kidnapped and raped the complainant, and I cannot, in the circumstances, reject the possibility that the accused's version is reasonably possibly true.

[39] Counsel for the State, Mr Munyai, conceded that the contradictions between the evidence of witnesses, the accused's own evidence and between the oral testimony and the previous statements made to the police are so vast that they raise the question of trustworthiness of the evidence and the credibility of the witnesses. Further that the evidence of the medical doctor is not conclusive on whether it was forced penetration arising from rape or from the complainant's first sexual experience as she was a virgin.

[40] He also alluded to the doubt expressed by the Magistrate in her judgment, which he submitted was indicative of the seriousness of the shortcomings in the evidence of the State and that the Magistrate expressed her own personal feelings without evidence supporting the conclusion drawn.

[41] However, what is interesting is that the State, notwithstanding the above concession, relied on a technical irregularity, namely, the failure of the Magistrate to exercise judicious discretion conferred upon her by Section 186 of the Criminal Procedure Act 51 of 1977 ("the CPA") to call the witnesses, Papi and Mama Puthi to testify, instead of considering whether the State discharged its onus to prove that the appellant kidnapped and raped the appellant.

[42] For this reason, the State submitted that the Magistrate's failure to call those witnesses resulted in a failure of justice and prayed that:

42.1. the conviction and sentence be set aside and the matter be remitted to the Magistrate to hear the evidence in terms of Section 322 of the CPA; alternatively

42.2. the conviction and sentence be set aside in terms of Section 324 of the CPA to enable the Director of Public Prosecutions to decide on the institution of proceedings de novo.

[43] Section 186 provides that:

"186 Court may subpoena witness"

The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.”

[44] It is the duty of the presiding officer to see to it that justice is substantially done, especially when the Court is dealing with police officials and prosecutors who possibly received inadequate training. See *S v Van den Berg* 1996

(1) SACR 19 (Nm) at 64g-i.

[45] Section 186 is discretionary, which discretion should be exercised judicially and in a limited manner. See *R v Game* 1958 (1) SA 102 (A).

[46] Normally, the discretion is exercised if the Court deems the evidence essential to the just adjudication of the case and it is the judicial officer’s responsibility to assess whether the evidence is essential.

[47] Only if the Court deems the evidence essential does the obligation to call the witness arise. See *R v Noorblai* 1945 AD 58 at 69; *R v D & Others* 1951

(4) SA 450 (A).

[48] In *R v Damana* 1958

(1) SA 577 (EC), the Court held that although it is mandatory for the Court to call a witness when the witness’ evidence has been found essential,

there can nevertheless be a conviction if the witness cannot be found.

[49] I am not persuaded that the witness’ evidence was essential and secondly, even if it was essential, I am of the view that the Magistrate’s failure to call the witness is not an irregularity as envisaged in Section 324(c) of the CPA.

F. ORDER

[50] In the circumstances, I make the following order:

- a) The appeal is upheld.
- b) The appellant is to be released with immediate effect.

N. GUTTA

JUDGE OF THE HIGH COURT

I agree

R D HENDRICKS

APPEARANCES

DATE OF HEARING : 25 MAY 2012

DATE OF JUDGMENT : 22 JUNE 2012

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COUNSEL FOR RESPONDENT : ADV N.G. MUNYAI

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ATTORNEYS FOR RESPONDENT : DIRECTOR OF PUBLIC PROSECUTIONS

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Prepared on 10 October 2026 · Esheria