

SOUTH AFRICA / JUDGMENT

Rasemeni v S (A12/2021) [2021] ZAFSHC 111 (15 April 2021)

[2021] ZAFSHC 111**COURT**

Free State High Court, Bloemfontein

BEFORE

Opperman, Daniso

CASE / FILE NUMBER

A12/2021

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****FREE****STATE PROVINCIAL DIVISION****Appeal No:**

A12/2021

In

the matter between:

MORAMANG

PETER

RASEMENI

Appellant

and

THE

STATE

Respondent

Coram:

Opperman, J et Daniso, J

Heard:

12 April 2021

Delivered:

The

judgment was handed down electronically by circulation to the

parties' legal representatives by email and release to SAFLII

on 15 April 2021. The date and time for hand-down is deemed to be 15

April 2021 at 15h00.

Judgment:

Opperman, J

Summary:

Appeal - rape -
conviction and sentence - evaluation of evidence
order
On
appeal against conviction and sentence
by Regional Court Magistrate, Mr. C Nekosi, Bloemfontein Regional
Court, Free State on 3 July 2017.
(Court a
quo case no.: 27/14/16, Appeal A5/2021,
A19/2017)
ORDER
The conviction and
sentence are set aside

JUDGMENT

- [1] “There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true.” (S v Sithole and others 1999 (1) SACR 585 W at 585) The judgment goes on to state, aptly so, that these are not two independent tests, but rather the statement of one test, viewed from two perspectives. There must be no reasonable doubt. When the version by the State and the version put forward by Appellant is diametrically opposed conviction is in order if the version of the State is accepted as true beyond reasonable doubt. If, however the version of the Appellant is found to be reasonably possibly true, the conviction should be set aside.
- [2] The Appellant, accused two in the trial a quo, enjoys an automatic right to appeal in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 (CPA). The appeal lies against conviction and sentence. He was sentenced to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 for rape in the Regional Court.
- [3] The sentence was based on a conviction that had the elements as prescribed in Part 1 Schedule 2 in that the circumstances that prevailed were: “where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice or by more than one person where such person acted in execution or furtherance of a common purpose conspiracy”.
- [4] The two accused allegedly raped the complainant the one after the other knowing about each other’s conduct and condoning such. The appeal on conviction and sentence by the other accused, Thuso Emmanuel Hoffman, was heard on 11 November 2019 and it succeeded. The then conviction and sentence were set aside and rightly so.

- [5] The fundamental principle on the evaluation of evidence on appeal is that an appeal court is not inclined to disturb the findings of the trial court on the evaluation of the evidence. The advantage of seeing and hearing the witnesses is difficult to surpass. The Supreme Court of Appeal reiterated this stance in its judgment on 31 July 2020 in *AM and another v MEC Health, Western Cape* (1258/2018) [2020] ZASCA 89:

Such findings are only overturned if there is a clear misdirection or the trial court's findings are clearly erroneous. That has consistently been the approach of this court and the Constitutional Court as reflected recently in the following passage from *ST v CT*:

'In *Makate v Vodacom (Pty) Ltd* the Constitutional Court, in reaffirming the trite principles outlined in *Dhlumayo*, quoted the following

dictum of Lord Wright in *Powell & Wife v Streatham Nursing Home*:

"Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case."(Accentuation added)

- [6] Courts of appeal have greater liberty to disturb findings of a court a quo when dealing with inferences and probabilities (*Minister of Safety and Security v Craig* 2011 (1) SACR 469 (SCA) at [58]).
- [7] Counsel for the State, aptly so and with constitutional wisdom, does not support the conviction. He conceded the appeal on the following:

The complainant is a single witness and her evidence calls for caution and corroboration.

2.4 The evidence of the complainant, SGM[1], fell far short of being satisfactory in all material aspects and lacked corroboration in order to sustain a conviction of rape against the appellant and the appellant's co-accused.

2.5 It is the complainant's evidence that the appellant's co-accused was grabbing her and forcefully taking her away, that Naledi witnessed all this but simply walked away. The complainant who indicated she was fearful did not ask Naledi to seek help or alert her relatives. It is submitted that this boils down to improbability in the complainant's version.

2.6 What compounds the matter even further, is that from her testimony it is apparent that she met with the appellant who was cordial with her, despite being late at night agreed to accompany the appellant, the appellant's lady friend, the appellant's co-accused and met numerous people along the way and walked in the vicinity of her place of residence but still did not seek assistance.

2.7 After the appellant's co-accused already expressed that he essentially wants to have sexual intercourse with the complainant, an opportunity availed itself when this lady was fetched by a male person but complainant failed to ask for assistance.

2.8 There is a contradictory account between the evidence of the complainant and that of Naledi, as to whether the complainant's mother was home on the day of the incident. She testified that her mother was at her aunt's place whereas Naledi testified that they left the mother behind at the complainant's place of residence.

2.9 There is a stark contrast between her evidence, her police statement and the medical report regarding the date of the incident. According to her evidence the incident took place on 04/01/2016, a report made to the medical practitioner states that the incident took place on 03/01/2016, whereas her police statement records the date of the incident as 07/01/2016.

2.10 According to her evidence the time could have been 18h00 when she met the appellant's co-accused contrary to her police statement which reflects the time as 00h15.

2.11 In her evidence the complainant said that she met with the appellant's co-accused whilst walking in the street accompanying Naledi and this aspect differs with her police statement wherein she stated she was on her way back from accompanying Naledi. This contrast may as well explain why Naledi did nothing because she was actually absent and did not witness the grabbing or pulling.

2.12 It is her evidence that she proceeded to the appellant's place and they sat outside, contrary to her witness statement wherein she said they proceeded to appellants co-accused's shack instead.

...

2.14 What compounds the matter even further is the manner of reporting the incident to the first report witness Ms Poohonyana, after it was suggested to her by the report witness that she was raped she shook her head in disagreement. Only after further probing she answered in the affirmative that she had been raped.

2.18 Having regard to the evidence in totality, it cannot be said that the complainant's evidence is satisfactory and reliable in all material aspects.

[8] The version of the Appellant when compared with that of the complainant becomes reasonably possibly true.

[9] In light of the above the appeal must succeed on conviction and subsequently sentence.

[10] ORDER

The appeal is upheld and the conviction and sentence are set aside.

M OPPERMAN, J

I concur.

N.S. DANISO, J

APPEARANCES

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[1] Abbreviation used to protect the complainant that was a minor at the time of the incident and the trial.

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Prepared on 23 October 2026 · Esheria