

SOUTH AFRICA / JUDGMENT

S v Makhathini (SS294/2004) [2020] ZAGPJHC 344 (9 September 2020)

[2020] ZAGPJHC 344

COURT

South Gauteng High Court, Johannesburg

BEFORE

Labuschagne

CASE / FILE NUMBER

SS294/2004

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

CASE

NO: SS294/2004

DATE:

06/10/2005

DATE

9/9/2020

In

the matter between

STATE

And

JAMES MAKHATHINI

JUDGMENT

LABUSCHAGNE, J: Before this matter proceeded, Mr Dicker, on behalf of the State withdrew Counts 1, 2, 9 and 10. The accused was therefore charged with Count 3 to 8. These counts related to robbery with aggravating circumstances and rape.

- In Count 3 the State alleges that on 14 January 1997 and near Park Station in Johannesburg the accused unlawfully and intentionally assaulted, N[...] M[...] N[...], and with force and violence he took from her possession R150 cash, aggravating circumstances being present.
- In Count 4 it is alleged that at the same time and place the accused had sexual intercourse with Ms N[...] without her consent.
- In Count 5 the allegation is that on 7 December 1997 and at Noord Street, Johannesburg the accused robbed, Elizabeth Fafuri [?], inter alia of a pair of earrings, aggravating circumstances being present.
- In Count 6 it is alleged that at the same time and place the accused had sexual intercourse with Ms M[...] without her consent.
- In Count 7 the allegation is that on 13 June 1999 and at or near Twist Street, Hillbrow the accused robbed, T[...] G[...] M[...], of her earrings, R100 cash and her wristwatch, aggravating circumstances being present.
- In Count 8 the allegation is that the accused on the same and place had sexual intercourse with Ms M[...] without her consent.

The accused pleaded not guilty to all the counts and he elected to remain silent. Mr Shlazo appeared on his behalf.

The first witness called by the State relates to Counts 7 and 8. That is the evidence of T[...] G[...] M[...]. She told us that on 13 June 1999 after approximately 18H00 she was in the vicinity of the OK Bazaars in Hillbrow. She bought vegetables from one of the street venders. As she turned around she was approached by a black male person who bumped into her. This man came to her and asked her why she had bumped him. He also asked her why she had not apologised. Although he had bumped into she apologised.

The accused was not satisfied and grabbed her right arm and turned it behind her back. He whispered to her that she should go with him or else he would shoot her. According to her he pressed the firearm in her back. She did not however see the firearm. He then pushed her in the direction Kotze Street. There were street lights along the way and she looked at his face.

The accused took her into a dark passage where he told her to face the wall. He took her earrings, her watch and cash. After that he pulled down her panty. He pushed her forward and told her to bend down. Thereafter the accused raped her from behind. It was very painful. After he had ejaculated he swore at her and told her to voertsak. She ran away and went to her flat.

She was in an emotional state. She was very traumatised and she was crying. She took a bath and later on met her boyfriend, Sam Mothlapogwane. She told him everything. He is an inspector in the South African Police and the following morning they went to the police where she made a statement. She was also taken to the doctor who examined her. She was still bleeding from her private parts. Later on, on 14 August 2002 she attended an identification parade which was held at Leeuwkop Prison where she pointed the accused out.

As far as the effect of this incident on her was she said that she did not trust men anymore and for two years afterwards she was unable to have a steady relationship with anybody. She was employed at Tiberius Fish Importers in Sandringham where she worked for quite some time.

In cross-examination I was put to her that the accused had met her once before at the Rovo Hotel where she operated as a prostitute. The accused made use of her services. Although the agreed fee was R50 he only paid her R30 for her services and that may be the reason why she had laid this false charge against him.

The second witness was Inspector Samuel Mothlapogwane. He at the time was stationed in the Norwood Police Station. He corroborated the evidence of Ms M[...] in all material respects.

As far as Counts 5 and 6 are concerned, Ms E[...] F[...] [?] gave evidence. On 7 December 1997 at approximately Twenty to 9 in the evening she was in the Joubert Park area. She was on her way to work at the Fontana Supermarket. She worked the nightshift. She went into Bok Street. She thought she was late and she was running at the time. She saw a person who blocked her way. This man asked her why she had bumped against him. She wanted to know where he was because she did not bump into anyone. He then asked her if she did not respect children. He referred to her as “mama”. She then agreed to apologise. The accused was not satisfied and said to her let us go.

She saw the face of the accused very well. When she looked at the accused he had a gun on the left side of his vest and she went with the accused. She saw three boys down the street. They came towards them and they took her bag. These boys also had guns in their hands. She was very afraid and thought that she was going to die. They took her into a dark place where they asked her certain questions. They threatened to kill her if she lied to them.

She heard the voice of the man who bumped into her. It was too dark to see properly. This man asked her if she had money. She only had very little money on her. The men searched her bag. They took her earrings. Thereafter they took down her panty and she was ordered to kneel down or to bend forward, then one of the men raped her from behind.

She identified the man who raped her as the same man who had the same voice as the one who alleged that she had bumped into him. The rape was very painful and afterwards she ran to her workplace. The police were phoned and they came to her workplace where she made a statement.

During August 2002 she attended an identification parade at the Leeuwkop Prison where she positively identified the accused. She said that this incident was a very bad experience for her. She continuously thought that she could be HIV positive. She was so afraid that she never returned to her work where she had worked for seventeen years.

In cross-examination it was again put to her that she also operated as a prosecutor at the Rovo Hotel but the accused did not pay her enough and that may be the reason why she had laid false charges against him. She was very upset because of this allegation and denied it vehemently.

Ms N[...] M[...] N[...] testified in regards to Counts 3 and 4. On 14 January 1997 at approximately Ten past 8 in the evening she was in the vicinity of the Park Station in Johannesburg. She was from her homeland and she wanted to know where Tembisa was. Whilst walking in the street two black men approached her. One stood on her foot. He said to her sister you bumped me and you did not apologise. She said I am sorry I did not see you and she apologised. Then one of the men took out a firearm and she was told to go with them.

She was taken into a dark passage where they demanded money from her. She had R150 in cash on her which was taken. She did not see the faces of these two men properly because she was told not to look at them. Then the one who had tramped on her foot ordered her to bend forward and to put her hands on the wall. Her eyes were covered. A cloth was placed on her mouth. She was undressed and both men raped her from behind. The second man however did not finish as a third man arrived on the scene and told them to go.

Again, she said it was very painful to her and that she was injured. She was left in the dark alley and the men ran away. She went out of the alley screaming. She met a policeman. She told him what had happened to her. The policeman tried to catch the men. He was unsuccessful and he took the complaint to the police station where she made a statement.

She too was examined by a doctor. She was very frightened after this incident. She could not sleep at night and she did not want to see a man. She in fact separated from her boyfriend and could only have a proper relationship approximately five years afterwards. She could not identify any of her attackers, and the policeman who had tried to assist her, his identity could not be established.

Certain admissions were made in terms of Section 220 of the Criminal Procedure Act which were properly recorded. Firstly, it was admitted that the identification parade was done properly. EXHIBIT C, the report of the medical examination of Ms M[...] was also handed in by consent. The correctness of the report is not disputed. EXHIBIT D relates to the medical report of Ms N[...] and EXHIBIT E is the medical report relating to Ms M[...].

It was furthermore admitted that:

1. The swabs and smears taken from Ms F[...] were properly sealed until opened by an analyst of the forensic laboratory in Pretoria.

2. The control blood specimen of the accused was properly taken and sealed until opened by an analyst.

The evidence of Superintendent Thompson, a DNA Analyst, was not disputed and it is not necessary to deal with her evidence in any detail.

Before the State case was closed Superintendent Linde gave evidence and he basically confirmed that the policeman who had come to the assistance of Ms N[...] could not be found.

That concluded the State case.

The accused testified that all three complainants were prostitutes who operated in the Europa Hotel. He admitted having had sexual intercourse with them. According to him their fees were R50 for each case. He however only paid them R30 after he had used their services and because of this fact they must have laid false charges against him. He denied that he had robbed and raped any of the complainants.

The onus to prove its case beyond a reasonable doubts rests on the State. There is no onus on the accused. If his version is objectively considered reasonably true he must get the benefit of the doubt and cannot be convicted. It is this Court's function to consider the totality of the evidence in the light of the probabilities in order to find whether the State had in fact proved the accused.

This approach was confirmed by the Supreme Court of Appeal in *S v Tshabalala* 2003 (1) SACR 134 (SCA) where the following was said at 139 (I-J):

"The correct approach is to weigh up all the elements which point to the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides, and having done so to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."

The complainants in this matter impressed us as honest, decent and credible witnesses. The accused was identified by Ms F[...] and M[...]. Ms N[...] did not identify the accused, but then in his own evidence the accused admitted that he had had sexual intercourse with her.

The evidence of all three complainants are corroborated in all material respects by the objective medical evidence and by some of the other witnesses. We have no hesitation whatsoever in accepting their evidence as credible and reliable in all material respects.

It is clear on the evidence as a whole that the accused is a blatant liar. His version is a clear fabrication and it is so far-fetched and ridiculous that we reject it as false. If any corroboration of the identity of the accused is needed for the evidence of Ms N[...] it can, except for the admission made by the accused also be found in the striking similarity between the modus operandi adopted by the accused.

In Counts 5 to 8 on the one hand and that in Counts 3 and 4 the material similar facts in all instances were the following:

- The crimes were committed in the same area in a radius of approximately three kilometres.
- The accused would bump into a woman then allege that she had bumped into him and he would tell her that she had not even apologised. It did not matter whether they apologised or not as he would grab them at that stage and he would take them at gunpoint to some dark alley.
- There the women were told to face a wall.
- The complainants were robbed of their jewellery and money. Thereafter they were told to bend down.
- Their panties were pulled down and they were raped from behind.

Since the arrest of the accused the incidents stopped.

Mr Slauzi [?] on behalf of the accused argued that they were certain differences in the modus operandi as other people were also involved in two of the instances. That fact, however, considered in the light of the totality of the evidence does not in our view detract from the clear and striking similarity of all the other factors mentioned above.

In any event, as pointed out, the accused also admitted having had sexual intercourse with Ms N[...]. His identity was therefore not seriously disputed. On the totality of the facts and probabilities of this matter we find that the State has proved all the essential elements of the alleged charges against the accused beyond a reasonable doubt.

The accused is therefore CONVICTED on Counts 3 to 8 as charged.

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LABUSCHAGNE, JP

JUDGE PRESIDENT OF THE HIGH COURT

DATE: 9/9/2020

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