

SOUTH AFRICA / JUDGMENT

S v Nogodama (CC20/2017) [2017] ZAECPHC 49 (13 October 2017)

[2017] ZAECPHC 49

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

M Makaula

CASE / FILE NUMBER

CC20/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION – PORT ELIZABETH

Case No: CC 20/2017

Date Delivered: 13/10/2017
In

the matter between: THE
STATE
and
KWANELE
NOGODAMA
Accused

JUDGMENT

MAKAULA J:

A.

Introduction:

- [1] The accused is charge with two counts of kidnapping, robbery, three counts of rape and pointing of anything which is likely to lead a person to believe it is a firearm.
- [2] The accused pleaded not guilty to all counts. In his plea explanation he admitted having had consensual sexual intercourse with both complainants.
- [3] The offences took place on 19 October 2016 at or near University Way, Summerstrand; at Strand Street, North End and also at Mase Street, in Kwazakele. The two complaints on the day in question at about 18:00 boarded a taxi driven by the accused from Summerstrand to town. The accused dropped passengers at or near Boardwalk. The taxi proceeded towards town. When it was supposed to take the direction to town, the driver took the freeway. They enquired as to why he was taking the freeway. They heard somebody between the driver and conductor responding that they are avoiding traffic officers. In the taxi, it was the accused, his conductor and the two complainants. They took an off-ramp which led them to stop near Pier 14 opposite an Engen garage. The taxi conductor alighted from the taxi. The accused drove away. He weaved through the streets at a high speed. He stopped at a dark spot between two tall buildings. He quickly jumped out of

the driver's seat to the back seat where they sat. He was carrying a short iron rod which was about 30 cm long. It was silverish in colour. He demanded money and cell-phones from them. He threatened as if he was going to assault them. They obliged and gave him two cell-phones and a tablet plus an amount of R20.00.

- [4] Ms M. who is one of the complainants gave the accused one Tablet which she valued at R3000.00 and an iPhone valued at R6000.00.

Having taken the phones, he jumped back to the driver's seat and proceeded towards the freeway taking the Grahamstown route.

On the way Ms M. noticed a board which said Kwazakele. The accused off-ramped and drove through the streets at the location up to a pink house where he alighted for about 5 minutes and came back. As the accused stopped a gentleman came out of the house and stood next to the driver's door as if he was keeping guard on them whilst the accused was away. On coming back, the accused jumped into the driver's seat and proceeded through the streets to an open field. There were bushes on the left side and a tavern which was plus minus 150 meters, as estimated by Ms M., on the right side. It was a deserted spot. There were no people nor houses in the vicinity. He stopped the vehicle and ordered them to move to the back seat. He took out

something like a pipe and poured power in it and started smoking it. Having smoked he took out a firearm and pointed at them asking if they knew what it was. They told him that it was a gun. It was a black firearm. At that stage they were scared to death and had lost hope. They thought that the accused was going to kill them.

[5] He instructed them to take off their trousers and panties, to which they complied. He put the firearm on the seat in front of the one they sat on. He took off his trousers. He ordered Ms M. to move to the edge of the seat thus leaning against the side panel of the taxi.

[6] He ordered Ms C., the second complainant, to open her thighs and penetrated her with his penis vaginally. He had sexual

intercourse with her without her consent. During the intercourse Ms C. was crying and the accused admonished her and ordered her to keep quiet. However, she continued to cry until Ms M. closed her mouth using her hand. The accused looked very

angry and Ms M. was afraid that he would shoot them. Having finished, he wore his trousers and took the firearm from the seat and went back to the driver's seat. The two complaints were busy comforting each other. The accused drove back to town.

[7] As they approach the taxi stop where the students normally board taxis, the accused slowed down. As he was about to stop certain people approached the taxi. He decided to drive off back to the location. On the way to the location the taxi had a tyre burst. He drove to a certain garage. He stopped at the entrance of the garage far from where the people were. He ordered the two complainants to keep quiet and lie on the seats of the taxi so that they should not be visible to people. He went for a very short while and turned back and drove off. They both testified that they could not escape because the period for which the accused left was very short for them to have reacted or raised an alarm. He drove back to the pink house where he ordered them to alight. He took them into a room. Upon entering he told them to watch the television. He took out the pipe and smoked a white power again. After which he ordered them to undress their clothes to which they complied. The accused undressed himself and ordered Ms M. to suck his penis. She complied. Thereafter, he ordered her to lie on the bed on her back and had sexual intercourse with her without her consent. Meanwhile, Ms C. was facing the wall on instructions from the accused.

[8] After the accused had sex with Ms M., he apologized to both of them saying he did not know what got to his mind. He ordered them not to report to the police as he would be sent to prison for a long time. He gave back their cell-phones and the Tablet. They did not respond. Ms M. sent an sms to her mother advising her that she had been kidnapped. Ms C. sent an sms to her friend who was here in Port Elizabeth advising him that he should organise a cab for them. Out of nowhere, as Ms C. testified, the accused demanded their cell-phones back. He switched them off. He instructed them to undress and ordered Ms C. to suck his penis. She complied. The accused was not satisfied with the manner she sucked him and admonished her pointing her with the firearm. Ms M. told her to suck the accused like she had done. The accused raped her. The accused fell asleep thereafter. They testified they

could not escape because they did not know the area and it was during the night. They were also afraid of the gun. The following morning Ms C. woke the accused up and told him they had lectures to attend that morning. He eventually woke up and they left. They walked through the streets until they eventually got to the taxi stop. He pointed across the street and told them that is where the taxis stop. He informed them that he was to

follow them shortly. When they looked back the accused had vanished.

- [9] They walked to a certain lady who was on the street and ask for assistance, having explained their situation. The lady told them that she had no money and told them to proceed straight and would find the police station. They continued walking until they saw a nurse who was driving out of her home. They approached her and informed her of their situation. The nurse was so sympathetic to an extent that she took them to the police station where they reported the matter.
- [10] They were taken to Dora Nginza hospital for medical check-up. They eventually went back to the police station and were asked if they could locate the house. They confirmed. Both of them had noticed that there was a school next to the house which they used as a landmark. The name of the school was Q.. From the school, they were able to trace the house where the accused raped them. The police entered and could not find the accused. They were taken to the accused room. They identified the accused through a photograph found in his room.
- [11] They were both booked to a guesthouse by their parents. I should mention at this stage that in the morning when they got to the police station Ms M.'s brother arrived from Limpopo. He had been able to trace the iphone of Ms M. by using an application called "find my friend". It directed him to the location and he went to the charge office where he met them. On 21 October 2016 they took a flight to their respective homes and never returned to Port Elizabeth again.
- [12] They both testified that they had to abandon their studies and did not write exams last year. They lost the whole academic year. Both of them are enrolled at Limpopo University this year.
- [13] They both testified that they could not at any stage after the accused kidnapped them raise an alarm nor jumped out of the taxi because it was driven at a high speed at all times. They further could not do anything because they were afraid of the accused who was carrying a gun. Even if they tried, they would not have been able to go any far because of their unfamiliarity with the area especially the location.
- [14] Mr Bodlo, on behalf of the accused, criticized both of them for having omitted some of the information which was material to the case in their statements to the police. For example, Ms M. was criticized for not having mentioned that she was ordered by the accused to suck his penis and she was further asked about her referring to the pink house as an RDP house in her statement.

She replied that at the time she made the statement to the police the events were still traumatic to her. It became worse when she met her brother at the police station. She testified further that she could not have mentioned everything in her statement because of the fact that she was not in a right frame of mind. Furthermore, Ms C. was also confronted about some discrepancies in her statement. This same reason was proffered by Ms C. saying that she could not think straight because of the traumatic events which occurred to her. She testified that it was traumatic for her because at the time of the incident she was still a virgin and she never thought that she would lose her virginity in that way. She testified that she was able to now narrate in detail because of the lapse of time and the counselling she received.

[15] Both witnesses corroborated each other on every aspect of their ordeal. They gave a straight forward account of the events.

They never contradicted themselves, they both gave a credible account of what occurred to them from the beginning to the end. Their demeanour was impeccable. I cannot find any fault in their evidence.

[16] The State called the evidence of Fezile Mtini who testified that he is a forensic nurse employed by the Department of Health stationed at Dora Nginza hospital. He holds an Honours Degree in nursing from the University of Fort Hare and an advanced diploma in forensic nursing from the University of the Orange Free State. He started as a forensic nurse in the year 2009. Cumulatively, he had seen about 480 patients involving rape.

[17] On 20 October 2016 he was on duty at Dora Nginza hospital. He examined both complainants in this matter. He completed the J88 medical reports. In respect of Ms M. he testified that he examined her at about 13:00 on the day in question. In respect of the general examination he could not find any physical injuries on her. She appeared to be stable mentally and there was no evidence of use drugs or alcohol. She appeared sober. She reported that she last had consensual sexual intercourse on the 4th July 2016. In respect of gynaecological examination he noted that the complainant had multiple lacerations between five and seven o'clock on her fossa navicularis. She was bleeding. In respect of the hymen he found that there were remnants of the hymen. She had a creamy discharge. He concluded as follows:

"Multiple lacerations at fossa navicularis are consistent with forcefully penetrative sex".

[18] He came to his conclusion based on the fact that if the sexual intercourse was between co-operating partners, the female organ would have sustained bruising at six o'clock where the penis normally lands when penetrating the vagina. He concluded that there was no co-operation between Ms M. and the person she had sex with, due to the multiple lacerations and their position. He testified that if there was co-operation but the male partner was forceful and landed on the vagina at 5 or 7 o'clock, she would have sustained a bruise and not a laceration because the partner would have reacted and guided the male person to the correct spot at 6 o'clock.

[19] He further examined Ms V. C.. There were no physical injuries on her general appearance.

[20] She informed him that she was a virgin before the incident. Her gynaecological examination revealed that the posterior fourchette was inflamed but intact. Even the fossa navicularis was inflamed. The hymen was ruptured, there was swelling of the cleft at seven o'clock and nine o'clock. There were also tears between seven and nine o'clock and she had bruising on her hymen. She also had a yellowish discharge. He concluded as follows:

"The injuries are consistent with penetrative sex".

[21] Based on his examination of Ms C., he concluded that it is true that she was a virgin at the time of the sexual encounter. He testified that if the sexual encounter was consensual or co-operative, the hymen would not have ruptured at seven and nine o'clock. The least that could have happened would be that there would be bruising at six o'clock. The nature of the injuries sustained on the hymen are indicative of the fact that there was forceful non-co-operative penetration by a male partner.

[22] He testified that a human body is made in such a way that when a female is ready to have sexual intercourse there are physiological

changes in the body. Like, for instance, lubrication of the vagina and the female muscles get relaxed and accommodative of the sexual encounter which is anticipated by the body itself.

[23] Siviwe Mbodla testified that he used to work with the accused co-driving the same taxi. The accused used the taxi during the day and he would take over from nine o'clock the evening to take passengers who were contracted to the owner to their various places of employment. On the day in question he telephoned the accused round about six o'clock. He could not get through to the accused because his phone was on voicemail. That necessitated him going to the accused home. On arrival, he found the taxi parked outside the yard with a flat tyre. He called a certain young man and took over his vehicle. He requested him to meanwhile change the tyre. That was the last day he saw the accused. In other words the accused never came back to work.

[24] The next witness that was called is Captain Doreen Goqweni who arrested the accused. Having arrested the accused, she advised him of his constitutional rights. The accused responded by saying that he will consider later whether to employ an attorney privately or through legal aid. She started to ask a few questions about the two complainants. The accused intimated to her that the two complainants were his girlfriends. She raised some queries as to how he would have a relationship with two girls and sleep with them at once. The accused merely stated that he had consensual sexual intercourse with them. Nothing turns on this.

[25] The accused admitted the chain evidence and the results of the DNA performed in respect of both complainants. Buccal samples were taken from the accused. No DNA results were obtained from the swabs taken from Ms M.. However, the DNA results obtained from the swabs taken from Ms C.'s private parts matched the DNA of the accused. The State's case was closed thereafter.

[26] The accused testified in his defence. He testified that he was 29 years old. He resided at Mase Street in Kwazakele since his birth. He testified that he knew both complainants. Prior to the 19th October 2016, he had seen them on three occasions. On one of those occasions he proposed love to Ms C. who rejected his love

proposal. On the day in question he came across the two complainants. They boarded his taxi. At Boardwalk other

passengers alighted. He proceeded with them to town. He confirmed that he did not drive to Norwich but instead used the freeway. He stated that after he dropped the conductor he proceeded to terminus bus stop and dropped the complainants there. He enquired from Ms C. whether they did not want to go the location with him. Ms C. said they would see later on if they happen to meet again. He proceeded to Summerstrand to load passengers. On his way back he came across the complainants at Norwich taxi stop allegedly waiting for him.

[27] He took them along with to Kwazakele location. When he was about four houses away from his home he had a puncture. He stopped at his home got inside the house with both complainants'. They went to his room where they watched television. After some time he asked whether Ms C. would kiss him. The latter agreed and they kissed each other. One thing led to another and that they ended up taking of their clothes and having sexual intercourse on the bed in the presence of the Ms M.. Thereafter, he relaxed on the bed. After sometime he wore his boxer shorts and went to the toilet to relieve himself. He came back sat on the bed and continued to converse with the complainants. He then became interested in Ms M. and requested whether he can't kiss her. Ms M. said what would Ms C. say. He asked whether Ms C. would be opposed to them kissing. The latter said that she had no problem. He started kissing Ms M. to an extent that they eventually had sexual intercourse. The sexual intercourse was consensual. After that he fell asleep for about thirty minutes to an hour. On waking up, he asked Ms C. to have sexual intercourse with him again. She obliged. They had consensual sexual intercourse. After that he relaxed on the bed. He confirmed that the complainants performed oral sex on him willingly. He slept up until the next morning when he was woken up by Ms C. who informed him that they had a lecture to go and attend. He woke up and accompanied them to a taxi rank. He stated that certain streets in his area were blocked by taxi drivers to prevent the unlawful operating taxis to load passengers from those streets. He decided to take them to a taxi stop which was officially manned by the taxis operators. On reaching the stop, he saw them embarking on a taxi and they left. He turned back to his home. He denied that he took their cell- phones with him. He says that the phones went away with the complainants.

[28] In a nutshell he denied the version of the events as testified to by both complainants. He maintained that he had consensual sexual intercourse with the complainants. He denied that he forcefully took them to Kwazakele. He testified that they willingly went there and enjoyed themselves. He did not know why the complainants were lying against him. He further did not know why the complainants alleged that he pointed them with a firearm when he in fact did not.

[29] As alluded to, the two complainants corroborated themselves in all material respects. Starting from hence they boarded the taxi, when they took the freeway, dropped off the conductor or, travelled through the streets to a dark spot, the activities of the accused at that spot, at his home, at the open field and back to the accused's room and the events that took place there up until they parted ways with him in the morning at the taxi rank. There is not a single contradiction in their evidence. To crown it all the sequence of how they were raped, caused to suck the accused penis etc. tallied. There is absolutely no difference in their evidence at all. They were good witnesses with a perfect demeanour. They gave good credible evidence.

[30] The evidence and defence of the accused stands to be rejected. His story or evidence is not credible and therefore cannot be reasonable and probably true. His evidence is full of inconsistencies and improbabilities. If one considers it fully

and in the backdrop of the evidence of the complainants and the probabilities, it is an outright lie. He claims to have known

the complainants before this day having met with them three times. He cordially conversed with them on those occasions to an extent that he unsuccessfully proposed love to Ms C. after they introduced each other. He refers to her as C. as pronounced in Xhosa. Ms C. testified that her surname cannot be pronounced in a Xhosa way because she was Tsonga, and would never have introduced herself as such. The accused lied in this regard. He must have read about her name from the court documents and assumed that it was a Xhosa word, which was not the case.

[31] The accused claims to have had an appointment to take the complainants to the location. He could not tell how they were

going to meet, what time and where. Apart from saying Ms C. said they would come back to Norwich if they decided to go to the location he did not have the contact numbers of the complainants nor did he give them his. There were no specifics about why they would agree to go to the location, and how long they would remain there. No entertainment was provided by him for them as their host. In fact there is no evidence at all that he even offered them something to drink let alone food. It is unbelievable that they would have been interested to go to the location only to have sex with him.

[32] It is inconceivable for the complainants to have agreed to go to the location only to have sex with a stranger. I say so because, according to the version of the accused all they did when they got to his room is to watch TV and have sex with one in the presence of the other vis a versa. That viewed in the light of the fact that Ms C. had kept her vaginalty till that age. Hence, she testified that she was not to keep her vaginalty only to be deflowered that way by a stranger in front of her own friend.

[33] The uncontroverted evidence is that the brother of Ms M. took the earliest flight from Limpopo to Port Elizabeth. Why did he do that if she willingly went to the location and had consensual sex with the accused. Why did she text her mother at the earliest opportunity that evening to say she had been kidnapped. Why did both complainants leave Port Elizabeth for good on 21 October 2016 without writing their examinations and not to come back until this trial began? The simple answer to these questions, which by the way the accused failed to answer when I invited him, is that the accused is lying. His version is false and stands to be rejected. I reject his evidence with the contempt it deserves.

[34] Mr Bodlo, on behalf of the accused pointed out that there are somethings, which aspect of the case do not appear in complainants'

statements e.g. that the accused called upon the complainants to suck his penis. It is trite that a statement is not meant to embrace everything that took place because it is unlike evidence which is more detailed. In this instance, the accused admitted that both complainants' did suck him though he claims that it was voluntary. Be that as it may, the complainants testified that they were still traumatised by the events at the time the statements were obtained, as stated in the above. Nothing turns on the omission and or inconsistencies referred to.

[35] I find that the State has proved beyond a reasonable doubt the charges against the accused and the accused is consequently found guilty as follows:

Count 1: Kidnapping

Count 2: Robbery with aggravating circumstances

Count 3: Rape.

Count 4: Rape.

Count 5: Pointing of anything which is likely to lead a person to believe it is a firearm.

Count 6: Rape.

Count 7: Kidnapping

M MAKAULA

Judge of the High Court

Counsel for the State:

Adv I Cerfontein

Instructed by:

National Director of Public Prosecution, Port Elizabeth

For the Accused:

Mr X Bodlo

Instructed by:

Legal Aid, Port Elizabeth

Dates Heard:

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