

SOUTH AFRICA / JUDGMENT

S v Ntsizi (CC17/2020) [2020] ZAECHGC 146 (17 November 2020)

[2020] ZAECHGC 146

COURT

Eastern Cape High Court, Grahamstown

BEFORE

NG Beshe

CASE / FILE NUMBER

CC17/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

Case

No: CC17/2020

Delivered:

17 November 2020

In

the matter between:

THE

STATE

And

NDUMISO

NTSIZI

JUDGMENT

BESHE J:

[1] The accused is a 51 year old male person. He stands accused of 4 counts, namely:

1. Rape.
2. Attempted murder.
3. Assault with intent to do grievous bodily harm.
4. Assault.

He is legally represented by Mr Solani of the Legal Aid South Africa. He pleaded not guilty to all the charges, except count three (3), assault with intent to do grievous bodily harm. It was apparent from his explanation of plea in terms of Section 112 and 115 of the Criminal Procedure Act that he was admitting all the elements of this offence and did not have any justification to act in the manner he did. The state was then required to prove counts 1, 2 and 4. Which it was required to do beyond reasonable doubt.

[2] The offences are alleged to have been committed against accused's stepdaughter Ms L[...] L[...] hereinafter referred to as the complainant. The following are the allegations against the accused:

That during the period spanning from February 2008 to September 2018 at Ezibeleni Township and Sabata Dalindyebo Township in the Queenstown area, on diverse occasions he unlawfully and intentionally committed acts of sexual penetration with the complainant by having sexual intercourse with her per vaginam and by inserting his fingers into her vagina without her consent and against her will.

In count 2, it is alleged that during August 2016 to September 2018 at or near Sabata Dalindyebo Township he attempted to kill the complainant by having sexual intercourse with her knowing that he was HIV positive (Acquired Immune Deficiency Syndrome).

In respect of count 3, being the charge accused pleaded guilty to, the allegation is that on 9 September 2018 at Sabata Dalindyebo Township, he unlawfully and with intention to cause serious bodily harm, assaulted the complainant by hitting her repeatedly with a piece of wood.

In count 4, the allegation is that on the same date as in count 3 at or near a Queenstown Shopping Mall, he unlawfully and intentionally assaulted the complainant by hitting her on the face with his hands.

[3] It is common cause that the complainant was born on the 30 January

1997. At the time she testified in connection with this matter, she was twenty three (23) years old and a constable in the employ of South African Police Services. In addition to the complainant's evidence, the following witnesses also testified: Ms N[...] her friend and colleague with whom she met when they were both receiving training at the Police Academy in Bhisho. Reverend Sam who is a Chaplain at the said Police Academy. Ms V. Nwabisa Taleni, a former neighbour. Ms V[...] L[...], complainant's mother as well as Forensic Nurse Nombulelo Solwandle. In respect of the defence case, accused testified and called Warrant Officer Songca who used to be his neighbour to testify in support of his case.

[4] It became common cause that complainant moved in with her mother who was in a relationship and sharing a house with the accused during

2008. How this all started, according to the complainant, is that after she had moved in with the accused and her mother, the accused called her to the garage, fondled her by touching her between her thighs and breasts. Lowered her panties and inserted his hand into her vagina. Thereafter they both went back to the house. She however did not report the matter to her mother realising that accused was looking after her mother and fearing that her mother would not believe her. This happened again the second time after accused had asked her to wash his car which was inside the garage. One Saturday, her parents had attended a funeral, she was visited by Ayabonga Songca, a boy who stayed next door to her home. Her three younger siblings were playing outside. They heard the children shouting that accused was coming. She also saw him through the window. Ayabonga left the house hurriedly through the back door. Apparently that was not before accused saw him leave the premises. Accused became angry

asking what Ayabonga had come to do in his house. This earned the complainant a beating. Accused questioning her as to how long she had been sleeping with Ayabonga. He then took her to the toilet where he raped her whilst her siblings were playing outside. She however did not report the matter to her mother when she arrived later for fear that she would not believe her. The matter concerning Ayabonga's visit was brought to his parents' attention and accused insisted that she be taken to the clinic to get contraceptives. The following day on a Sunday, accused and Ayabonga's father took her to the clinic for this purpose. This was during the year 2014. She testified that they did not go straight to their house from the clinic but walked to what she referred to as an "open farm" behind their house where Accused had erected a shack. There accused once again had sexual intercourse with her without her consent. Afraid they would lose the roof over their heads, once again she did not report this to her mother. After starting contraceptives, accused raped her regularly. During the 2015 December during the summer holidays, her mother travelled to Port Elizabeth to re-unite with her family with whom she had lost touch. She took complainant's siblings (who are accused's biological children) with her. Complainant remained behind, in other words she did not travel with them on the understanding that she would be travelling to Bloemfontein to meet accused's brother. That however did not happen. She remained with the accused throughout the period her mother was away in Port Elizabeth. Every day during that period accused would rape her. Since the Ayabonga incident, she

was precluded from playing outside with other children.

- [5] After matriculating, Ms T[...] tried to get her to enrol at a nurses college but accuses dissuaded her from doing so. Instead encouraged her to register at Ikhala College in Queenstown. Every morning irrespective of what time her classes started or ended, she commuted with accused using public transport and would wait at his workplace at South African National Defence Force premises in town when her classes had finished or had not started. They would then return home after accused had knocked off duty. At some stage in 2016 they moved to an area known as Sabata Dalindyebo. There, accused continued to rape her. Also at Sabata Dalindyebo accused and her mother started sleeping in separate rooms. She had been aware for some time that her mother was HIV positive. As time went on she observed that the accused was also taking the same medication as her mother and realised he was also HIV positive. Accused did not use protection when he raped her though.
- [6] In 2018 she got admitted to Police Training Academy in Bhisho. During weekends that she came home accused would continue to rape her. She also recounted incidents when they were still staying at Ezibeleni and would spend the night with the accused at the house they ultimately moved to at Sabata Dalindyebo because accused claimed he did not have taxi fare for them to travel to Ezibeleni. There accused would rape her.
- [7] Regarding the events of what led to the assault with the intention to cause grievous bodily harm in respect of which accused pleaded guilty, complainant's evidence revealed the following:

That weekend when she was on a home visit from the police academy, accused saw that her phone had the photo of a young man as a screen saver. He questioned the complainant about the young man. She ultimately admitted that it was the image of her friend. On the following day, a Sunday after accused had woken her up at 06h00, he took her to a forest behind their house. There he assaulted her until she admitted that that was her boyfriend. He also picked up a piece of wood and used it to assault her fracturing her wrist and causing bruises on her body. At the time telling her to end the relationship with the young man on her phone and effectively banishing her from his house telling her to go and stay with her boyfriend. Complainant pleaded with him and promised to end things with the young man.

Back at their house she once again did not report the matter to her mother. When she later told him that her arm was sore, he asked her mother whether complainant told her that she fell. Accused later assisted her to wash her body. Later that day he accompanied her to catch her transport back to the Academy. On the way, he smacked her on the face with open hands and told her to break up with her boyfriend. Upon arriving at the academy, she could not attend the parade as required because of the injuries she had sustained maintaining that she had fallen. Ms N[...] appeared to not have been believed her explanation and kept pressing her about what happened to her, remarking about how bad her face looked. Ultimately, after they had moved to an empty classroom, she started opening up saying accused assaulted her. Ms N[...] felt this was beyond her and suggested they involve an older person. The following day after taking pictures of

the injuries, she took her to the Wellness Centre. Ultimately she opened up about what had been happening to her to the Chaplain who in turn broke the news to her mother.

- [8] Given the length of her testimony and the serious allegations she made against the accused the complainant was cross-examined at length. It was during this stage that it emerged that complainant's mother was abandoned by her family and brought up by an adoptive family where she was ill-treated until she was rescued by the accused who took her in. Complainant later stealthily left the said home and joined her mother after some time. She was questioned at length about her failure to disclose what was happening to her to anyone. She was adamant that she was scared her mother would not believe her and she would jeopardize the family life they were enjoying. Feared for their welfare. Had lost trust in human beings after what accused whom she regarded as a father did to her. She also explained that she had not felt ready to disclose what accused was doing to her before he assaulted her. It was a big secret. She denied that she made the allegations because they want to take his house. It also transpired that accused was domineering and would always interfere when she tried to talk to her mother.
- [9] In her evidence, Ms N[...] confirmed what complainant said about her involvement. She also testified about instances when she would speak to the accused over the phone when accused suggested she spies or watches complainant's movements. Which the accused denied.
- [10] The same applies to Warrant Officer Sam, the Chaplain. He confirmed what the complainant said about his involvement in the matter and about his consultation with the complainant on the 10 September 2018. During which the complainant told him what accused had been doing to her over the years. Abusing her sexually. How he counselled her and her mother after breaking the news to her. And also arranged for further interventions to take place.
- [11] Forensic Nurse Solwandle examined the complainant on the 10 October 2018. At that stage she still had a sling on her left arm. She concluded that the absence of the hymen is consistent with the history complainant gave of having been sexually assaulted by her stepfather since age 11.
- [12] Ms T[...] as indicated earlier, stayed in the same area with complainant's mother at Ezibeleni, was a neighbour and recruited complainant's mother to join the church she attended. She was aware that accused was not complainant's biological father but observed that they were always together and that complainant kept inside the yard seldom playing with other children. She became concerned when she became aware that she had remained behind when her mother and siblings visited Port Elizabeth and never ventured out of the house. That did not sit well with her. She would emerge from the house with the accused and both would walk towards the shop. Even in instances when she would ask complainant's mother to let her come and do her hair, her mother would rather do so herself. When she shared her concerns and suspicions with her about the abnormal relationship between complainant and her stepfather, she would simply say she has noted what she said. In a bid to rescue the complainant she tried to

get her enrolled at a nursing college. We know that accused dissuaded the complainant from enrolling at the said college. She tried to get other women in church to intervene but in vain. She was advised against reporting the matter to police or social workers because should the complainant not be forthcoming about what was happening to her, she would be in trouble.

[13] Complainant's mother confirmed that they were HIV positive with the accused. By the year 2014 this was already the case and they are both taking medication for this condition. She confirmed that she did not have a close relationship with the complainant who she described as reserved and that accused would intervene / interrupt them whenever she tried to create space for them to talk. It concerned her that complainant was closer to accused than her. After the birth of their twin children in 2011 accused suggested that they sleep in separate rooms because of their health condition also that for their children to grow up well. They should not be intimate. Complainant would at times sleep in the same room with accused and this did not bother her. She testified that the reason complainant did not travel with her and her other children to visit her long lost family was because accused said she would be going to his family in Bloemfontein to find a holiday job. She only became aware that she had not left for Bloemfontein when she was called by Ms T[...] worried that complainant was always indoors and not seen outside. She however did not call her house because she did not have airtime. Accused would also take issue with her for involving other people in their family affairs. It transpired from complainant's mother's evidence that she paid very little attention to what was happening regarding the complainant with accused playing an active role in all matters concerning her. Accused would even preclude them from watching certain programs on television asking what those were meant to teach the complainant. She also stressed that accused was everything to her, the only family she had – mother, father, sister everything. That he was also very persuasive. She denied that she supported the laying of charges against the accused because she wants to take over accused's house. But that she was told to remain at the house because she was staying with their children. She denied that she turned a blind eye to what was happening because accused was everything to her.

[14] In his evidence and in keeping with his tendered pleas, accused denied that he ever raped the complainant. He confirmed that complainant was closer to him than she was to her mother. He confirmed that he took the complainant to get contraceptives after the Ayabonga incident with the latter's father. He however denied that he was present during complainant's consultation with the nurse at the clinic. Denied he ever visited the shack in the "open farm" with only the complainant. Confirmed he was HIV positive. Denied that he ever spoke to Ms N[...] although he knew she was friends with complainant. He contended that complainant made allegations of rape against him because he chastised her because of the image of a boyfriend on her phone. Denied he kept her clinic card and bank card, contending that she kept her card in the container where he kept his important documents which he kept locked.

[15] Mr Warrant Officer Songca who is Ayabonga's father confirmed the incident concerning his son's visit to accused's house and the subsequent visit to the clinic. According to him, from the clinic he dropped accused and complainant next to their house. Complainant had testified that from the clinic they found their own way with accused who took her to the open farm and raped her. Mr Songca told court he last saw them proceeding towards their gate. He confirmed that he took complainant and accused to the clinic on a Sunday. He suggested as accused would at times seem to suggest that they left before they could be attended to. According to the clinic card or client visit log sheet, complainant was seen on the 24 November 2016 which fell on a Sunday and an injection was administered to her. Her return date was to be the 19 January 2017. There is no indication of her being attended to on the following day. That in a nutshell is the evidence I should evaluate to determine whether the state has met the test that is applicable in criminal cases.

[16] As was pointed out by both Mr Mtsila for the state and Mr Solani for the accused, the state bears the onus of proving the guilt of the accused beyond reasonable doubt. The test and all its components was once again restated in *S v Van der Meyden*[1] aptly as follows:

TO READ FROM THE REPORT

I will be alive to this approach when evaluating the evidence before me.

[17] Both representatives have also drawn my attention to the fact that the evidence regarding the actual rape(s) is that of a single witness, the complainant. It is so that in terms of Section 208 of the Criminal Procedure Act[2] a conviction for any offence can be founded on the evidence of a single competent witness. It is however trite that for evidence of a single witness to suffice it must be satisfactory in all material respects. It is also trite that the evidence of a single witness requires to be treated with caution, it must be evaluated with a great deal of caution.[3] TO READ FROM REPORT

It is usually helpful and desirable if the court can find a safeguard that reduces the risk of a wrong finding based on unreliable or suspect evidence.

[18] Not much criticism was levelled at complainant's evidence, save for two contradictions that were highlighted by Mr Solani and conceded by Mr Mtsila:

1. Complainant suggested that Mr Songca left them at the clinic and they walked to the "open farm" where accused raped her inside the shack.

Mr Songca on the other hand testified that he transported them back to their house and dropped them next to the premises. He however did not testify to having seen them enter the house confirming that it was already dark with not much light.

2. The second contradiction was as regards complainant having told court that they never visited the shack at the farm with her mother and children. According to her mother, there were instances where they would go to the farm with accused in the company of the children.

But the probabilities are that the accused, if he did rape the complainant, would not do so on the occasions when her mother was there. That the times when accused would rape her stood out for her. There would be nothing notable or remarkable about the occasions when they would visit as a family.

[19] I am inclined to agree with Mr Mtsila that the evidence of a witness or single witness does not have to be flawless to be reliable or truthful. Even though complainant's evidence was highly charged with motions with her breaking down repeatedly. She gave evidence in a clear and coherent manner. She did not just paint a negative picture of the accused. She testified about how good he was to her and her mother. How he seemed to love and care for her (the complainant). How she regarded him as her father and how she got the impression accused was treating her as her child. Another criticism that was levelled at complainant's evidence was her failure to report what she alleged accused did to her. More about this later.

[20] I have alluded to the need to the need to evaluate all the evidence in totality – when complainant's evidence is viewed together with all the evidence, inter alia that apart from the sexual acts, not much of her evidence is disputed.

[21] The following can be discerned from the evidence:

The manner in which accused related with the complainant – clearly avoiding that she forms a bond with her mother. Making sure she spent as much time with him as possible and as little time as possible with her mother.

All the opportunities he created to be alone with the complainant – e.g. summer holiday, sleeping away from complainant's mother, spending nights with her at the house in Sabata Dalindyebo and so on.

Preventing her from socializing or playing with other children.

Actively excluding her mother from matters concerning the complainant.

[22] As indicated, accused denied that he committed acts of sexual penetration with the complainant. If, as complainant's evidence suggests, he was not treating the complainant as his sex object or partner, why was he so controlling of her. To the extent of taking her to the clinic for contraceptives when her mother was available. Why would he be so incensed at discovering that complainant had a boyfriend? That he woke complainant up at 06h00 and took her to an open veld where he thoroughly beat her up. If he was merely

chastising her, why did he not inform her mother of such but suggest that she fell.

[23] I appreciate that there is no duty resting on the accused if he suggests that a witness is falsely implicating him, to proffer a reason why the witness is doing so. It was put to the complainant and her mother that she was falsely implicating the accused because they want to take his house over. But I do not see how this could be. The fact that he is accused of rape does not mean he will lose his house or they will take over his house. This does not make sense to me. He was staying in the same house with complainant's mother and their three

children. Complainant is no longer at home. She has a place of her own which she is renting and comes home to visit. This can hardly be a reason for complainant to put herself through what she went through. It must be borne in mind that it took a lot of persuasion for her to open up about the alleged abuse. When she did she was not even home. Her mother did not know she was assaulted by the accused. All she knew was that she fell. When would they hatched this conspiracy against the accused? This does not seem to accord with probabilities.

- [24] The abnormal manner in which the accused treated or related with the complainant was observed by Ms T[...]. Was she also part of the conspiracy even though complainant and her family were no longer staying in the same area with her having moved therefrom years ago?
- [25] Unlike the complainant, the accused cannot be characterized as a good witness. He professed to have been so pre-occupied with protecting the complainant by taking her to the clinic for contraceptives even though her mother was available. Surprisingly, he does not seem to have followed up with her whether she did attend at the clinic the following day if according to him they were not attended to on the Sunday and she was told to come back the following day. He said he expected the complainant to have a boyfriend at twenty one (21). Yet he claims to have been chastising her when he found out she has a boyfriend. In his evidence, he suggests that it was complainant's mother who suggested they sleep in separate room. Yet this was not put to her. It is also not clear why he kept complainant's bank card who was away in Bhisho in his trunk. When her stipend was paid into that card / account
- it is not difficult to conclude that this was yet a means of controlling the complainant. It was also not put to the complainant that she had access to her banking account. He even took the complainant to a witchdoctor and threatened her that if she were to be with a man something would happen to her – he would be sick and die after taking the medicine she was given by the witchdoctor.
- [26] Mr Solani amongst the submissions he made as to why according to him the state had not proved the case against the accused beyond reasonable doubt, was that there was a delay of many years before the complainant made the report in question. This suggests that she made

this up in a bid to chase the accused out of his house.

- [27] The complainant has in my view given weighty reasons why she did not report what was happening to her at the hands of the accused. She had to be coaxed into making the disclosure. I will however take cognisance of the fact that failure to make a complaint within a reasonable time after the event is not fatal to the state's case.[4] The complainant did not allude to the fact that it was not easy for her to make a disclosure of what was happening. It was according to her a big secrete. She was not ready. I can imagine that after not disclosing the first incident it must become increasingly difficult to open up when the same thing happened time after time. Also given her age and situation – e.g. relationship with or lack thereof with her mother.

[28] Having considered all the evidence in its totality, I am satisfied that the evidence of the complainant is reliable, that the truth has been told. That on the other hand accused's version is not reasonably possibly true. It is rejected as being untrue. I am satisfied that the evidence proves beyond reasonable doubt that accused is guilty of the offences charged.

[29] He is accordingly found guilty as charged in respect of:

Count 1: Rape.

Count 2: Attempted murder.

Count 4: Assault (common assault).

He has already been found guilty of assault with intent to do grievous bodily harm on the basis of his plea of guilty in respect of count 3.

NG BESHE

JUDGE OF THE HIGH COURT

For the State : Adv: Mtsila

For the Defence : Adv: Solani

[1] 1999

(1) SACR 447 W at 448 f – h.

[2] Act 51 of 1977.

[3] S v Stevens 2005 (1) All SA 1 at 5 [7] -

[4] S v Cornick and Another 2007 (2) SACR 115 at ==.

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