

SOUTH AFRICA / JUDGMENT

Take v S (A112/2017) [2017] ZAFSHC 197 (17 November 2017) [2017] ZAFSHC 197

COURT

Free State High Court, Bloemfontein

BEFORE

Mathebula, Phalatsi

CASE / FILE NUMBER

A112/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case

No.: A112/2017

In

the appeal between:

PHALADI
LAZARUS
TAKE
Appellant
and
THE
STATE
Respondent

CORAM:

MATHEBULA, Jet PHALATSI, AJ

JUDGMENT

BY: MATHEBULA, J

HEARD ON: 13 NOVEMBER 2017

DELIVERED ON: 17 NOVEMBER 2017

- [1] This is an appeal against a conviction for rape. The appellant was refused leave to appeal by the court a quo and same was granted by members of this Court.
- [2] The complainant testified that on the 30th November 2014 she was at [...] Tavern situated at T., H.. She was consuming alcoholic beverages. Around 21H00 - 22H00 pm she left the tavern with the appellant. She did so because she was afraid of him not that they had a love affair. They arrived at the shop and the appellant entered it. This availed her an opportunity to escape and she did.
- [3] The appellant gave chase and caught up with her. She was able to free herself and run away. She found sanctuary at the home of her aunt's friends. Later she left her hideout and went to Club Chess Tavern to continue her drinking spree. This was followed by another visit to Monateng Tavern. While in conversation with a friend called M., the appellant caught up with her.
- [4] The appellant pulled her and started assaulting her with open hands, fists and kicks on the face and body. He even threatened to stab her. She was unable to scream because it was noisy and she had contracted the flu virus. She became dizzy and lacked strength to do anything about the assault. She was dragged into an unknown erf with an RDP house and a shack.
- [5] In the shack the appellant gave her a choice to undress herself or he does it himself. She elected the former because she did not want him to touch her. At that time, he was standing at the door. Once she was done, the appellant had sexual intercourse with her against her will. Thereafter she slept next to the appellant until the next morning.
- [6] In the morning, while the appellant was still asleep, she left the premises. On her way home she met an inebriated woman and it occurred to her that she had forgotten her cellphone at the shack. She requested the said woman to accompany her which she did. On arrival there, she proceeded to the main house. The door was opened by the sister of the appellant's friend. She told her to request the appellant to hand over her phone. The sister was furious that the appellant had slept with her there. She entered the shack and took her cellphone and T-shirt.
- [7] On the way to her house she called the police. On arrival at home she threw herself on the bed and cried. She was later

taken to the hospital by the police for examination. As a result of the assault, she sustained a swollen face, scratches (abrasions) on the right hand and had pains on her abdomen.

- [8] Under cross-examination she denied the existence of any love affair between her and the appellant. She further denied that she was drinking with the appellant in the company of other person(s). She vehemently disputed any previous sexual encounters alleged to have occurred in November at the same place. Further because of her sexual orientation as a lesbian she was uninterested in heterosexual relationships.
- [9] The appellant had sexual intercourse with her while she was on her periods. She did not tell the appellant about her physical condition because he was able to observe it on his own. Inside the shack it was dark but light was provided through the holes on the corrugated irons by the floodlight in the street.
- [10] Pressed further, she testified that she undressed herself but the appellant removed the underwear. While walking to the shack with the appellant she was dragged on the ground and at some stage she walked on her own. There were also times when she was grabbed and pulled. Describing the sexual intercourse she testified that the appellant ejaculated in her and continued to assault her when she tried to free herself. She did scream but it was in vain as help was not forthcoming.
- [11] The complainant's neighbour S. M. testified that the complainant came to her and informed her that she was raped by the appellant. It was the morning of the 30th November 2014. She appeared emotional. Her face around the eyes was swollen and hands had abrasions. She looked as if she was crying and did not notice any injuries. According to her she has not seen the complainant ever in the company of a boyfriend.
- [12] She denied it that when she met the complainant she was drunk because she had just woken up. Also that she accompanied the complainant to the scene of crime because she did not ask for such assistance. Although she showed her the abrasions on her arms, she did not inform her how she sustained them.
- [13] I turn to the appellant's version of events. He testified that he was in a love relationship with the complainant. On the 30th November 2014 he started drinking alcoholic beverages from around 10H00 am until very late. The complainant was also in and out in his space. Later that evening they left together to spend the night at his friend's shack. The friend was sleeping in the main house. The reason why he went there was because his grandmother was not going to open for him whilst drunk.
- [14] Together with the complainant they were extremely sloshed. They entered the shack which was unlocked. Lighting was provided by her cellphone. After ensuring that the blankets were in good condition, they climbed on the bed. They did not engage in sexual intercourse because she was on her menstrual cycle. He denied that the complainant was a lesbian interested only in other women. They both fell into deep sleep and he was awoken by the complainant when she was looking for her cellphone in the company of P..

[15] According to him they last engaged in sexual intercourse the beginning of November but had done so several times before that

occasion. Their relationship was fraught with misunderstandings because of his work commitments. The problems were also compounded by his roving eye. He could not think of any reason why the complainant would falsely implicate him. This left him puzzled.

[16] He denied ever raping her or laying a hand on her. The only explanation for her injuries could be attributed to some assault at her parental home or the taverns she visited that day. P. M. testified for the defence and confirmed that the appellant and her brother are friends. On the 1st December 2014 while preparing to go to work she heard a knock at the door. It was the complainant who asked her brother where was his "brother". She intervened almost immediately.

[17] The complainant told her she was there to fetch her cellphone because she slept in the shack with the appellant. The complainant told her that she was locked in the shack but she denied it because the shack was always unlocked. She was angry that the appellant and the complainant slept there.

[18] She kicked the door open and found the accused sleeping on the bed. The complainant entered the shack and took her cell phone and left. She did not narrate anything to her about the rape that took place neither did she hear anything to that effect. She observed that the appellant, complainant and the woman accompanying her were all under the influence of liquor. She pertinently asked the appellant about any sexual intercourse taking place and he denied it.

[19] She has never seen the appellant and the complainant in the company of each other. She had only heard about their affair from their colleagues. The conduct of the appellant to bring a woman at her parental home angered her and she slapped him.

[20] Counsel for the appellant argued that the court a quo erred in its evaluation of the evidence led in this matter and that the conviction and consequent sentence must be set aside. He pointed at material contradictions in the evidence of the complainant which he submitted that cannot sustain a conviction on rape. Initially the complainant had testified that she undressed herself while the appellant was standing at the door. Later her version was that she undressed herself and did so slowly much to the annoyance of the appellant. The latter intervened and removed her underwear. Further he alluded to the aspect that the complainant testified that she was dizzy and frustrated thus clouding her memory.

[21] He contended that the complainant testified that she does not know whether the appellant ejaculated or not. This is contrary to what was contained in her statement with the police where she confirmed that indeed he ejaculated in her. Initially in her statement it was recorded that she did scream but nobody came to her rescue. In her testimony before court she recanted that she was unable to scream because she was attacked by a flu virus.

- [22] Counsel further referred to the lack of corroboration of the version of the complainant. She did not make any report to the drunk woman she met on the street and/or P. M. when she went to fetch her cell phone. In addition, the medical report is inconclusive whether penetration indeed did take place or not. No witnesses were called to testify on the aspect that the appellant forcibly dragged the complainant away.
- [23] Counsel for the state submitted that the court a quo did not err and that the conviction was in order. In her written heads of argument she relied on the testimony of S. M. as corroboration of that of the complainant that she reported the matter on the first possible moment. At the time of their encounter the face of the complainant was swollen and she had scratch marks on the hands. This is confirmed and recorded in the medical report. Accordingly, those are indicative of non- consensual sexual intercourse and rebut the version of the appellant that the allegations against him were trumped up. The version of the complainant is fortified by the poor nature of the evidence of the appellant.
- [24] In evaluating the correctness of the conclusions reached by the court a quo it will be apposite to examine the reasons thereof. The finding of the court a quo is that S. M. corroborated the complainant because she arrived at her residence crying with visible facial injuries. This was indicative of the allegations that she had been raped. The appellant could not explain what was the motive of the complainant to falsely implicate him if they were in a love relationship. The court also found that the fact that the appellant testified that he does not know the reason why he is falsely implicated and later said that she is angry of his womanising demonstrates that he was misleading the court. Further that his failure to call his friend to testify on the existence of their affair indicate that the version was a concocted tale. As a result he rejected his evidence and returned a verdict of guilty as charged.
- [25] The court a quo was confronted with evidence of a single witness. Section 208 of Act 51 of 1977 provides that the accused person can be convicted of any offence on the evidence of a single witness. The cautionary rule was developed requiring the courts to approach such evidence with caution. See *S v Mokoena* 1956
- (3) SA 81 (A) at 85. The requirement confirmed in a number of decided cases is that such evidence must be clear and satisfactory in every respect. The reasoning behind the rule is that the court must be alive to the danger of relying on the evidence of only one witness because it cannot be checked against other evidence.
- [26] It is common cause that the appellant and complainant had imbibed alcoholic beverages and were drunk. Their compromised state of sobriety was even apparent to P. M. the next day on the 1st December 2014. The complainant conceded that she could not remember certain occurrences because she was dizzy and frustrated. In essence she does not know exactly what happened. She does not remember whether the appellant ejaculated in her or not and the surrounding

circumstances as to her undressing to join the accused on the bed. It appears that no assault whatsoever took place in the shack. After the intercourse the complainant slept beside the appellant until the morning. This is contrary to common sense and logic. There is also contradiction regarding screaming whether she did so or not which was raised by counsel for the appellant.

- [27] The basis of the defence was that no sexual intercourse took place between the appellant and the complainant. The accused does not bear any onus to convince the court of his innocence. The principle is that his version must be reasonably possibly true. On achieving that threshold, he is entitled to be acquitted even though his explanation is improbable. See *S v V* 2000(1) SACR 453 (SCA) AT 455 A-C.
- [28] The complainant could not remember whether he ejaculated or not. She could of course remember that he penetrated her. According to the appellant he did not have sexual intercourse with her because she was on her menstrual cycle. This is consistent with the medical evidence contained in the J88. Even the swabs obtained for DNA did not yield any positive results to confirm sexual intercourse. Given her state of sobriety the complainant appeared doggy and an unsatisfactory witness. Her uncorroborated version in my view, is open to serious doubt and insufficient to sustain a conviction. I do not find anything inherently untrue with the version of the appellant. Both his defences are supported by proven facts. First he was too drunk and secondly that she was on her menstrual cycle thus could not engage in sexual intercourse. His version is reasonably possible true and he is entitled to be acquitted on the charge of rape. It stands to reason that an acquittal, the consequent sentence stands to be set aside.
- [29] According to the complainant she was relentlessly assaulted by the appellant with open hands, clenched fists and kicks. These were administered on the face and other parts of her body. Her injuries as she described them are consistent with the recordings of the medical personnel in the J88. The uncontradicted evidence is that they were inflicted by the appellant. The court a quo was correct in rejecting his version on this aspect. The only person who was with the complainant at all times was the appellant. He should have been convicted of assault with intent to do grievous bodily harm.
- [30] It will be an injustice to remit this matter to the court a quo to sentence the appellant afresh. The appellant has been incarcerated for approximately twenty four (24) months and the Presiding Magistrate has passed away. However, the record is adequately detailed that I can impose an appropriate sentence. The accused was thirty (30) years old with no previous convictions. He was gainfully employed earning R720.00 per week. He separated from his customary wife with whom they had three minor children aged ten (10), seven (7) and five (5). His scholastic achievement was Grade 12. It is common cause that alcohol played a primary role in the commission of the offence.

- [31] It is aggravating that the appellant assaulted a defenceless woman. As stated in *S v Chapman* 1997 (3) SACR 341 (SCA), women must be free to enjoy their rights like everybody else without any hindrance or fear. This is also emphasised in the Constitution of the Republic that safety is guaranteed to all.
- [32] I take into consideration that no weapons were used in the commission of the offence. This does not in any way downplay the prevalence of this offence and the abhorrence of society for matters of this nature. I am mindful of the elements of the triad requiring the balancing of the equilibrium and that one element should not be unduly accentuated at the expense of and to the exclusion of the others. See *S v Banda and others* 1991 (2) SA 353 (BG) at 355 A-C.
- [33] Accordingly I make the following order:
1. The appeal is upheld.
 2. The conviction in respect of the charge of rape and the sentence imposed is set aside.
 3. The appellant is convicted of the charge of assault with intent to do grievous bodily harm.
 4. The appellant is sentenced to twelve (12) months imprisonment half suspended for three (3) years on condition that the appellant is not found guilty of assault with intent to do grievous bodily harm or similar offence committed during the period of suspension.
 5. The sentence is deemed to be imposed on 1 December 2015.

MATHEBULA, J

I concur.

PHALATSI, AJ

On behalf of the appellant: Adv. P. Nel

Instructed by:

Justice Centre

BLOEMFONTEIN

On behalf of the respondent: Adv. Lesia-Shale

Instructed by:

Director: Public Prosecutions

/roosthuizen

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Prepared on 9 October 2026 · Esheria