

SOUTH AFRICA / JUDGMENT

Tete v S (CA&R216/14) [2017] ZAECHGC 39 (30 March 2017)

[2017] ZAECHGC 39

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S M Mbenenge, S Tilana-Mabece

CASE / FILE NUMBER

CA&R216/14

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CA&R

216/14

In

the matter between:

LONWABO

PCYRIAAN TETE

Appellant

and

THE

STATE

Respondent

JUDGMENT

MBENENGE J:

- [1] The appellant was convicted of one count of rape[1] for which he was sentenced to undergo 10 years' imprisonment by the Regional Court, Port Elizabeth. With leave of this court, the appellant appeals against his conviction.
- [2] It is common cause that the appellant and a certain S. N. (the complainant) had sexual intercourse on the 27 August 2007. The issue that fell to be determined by the court a quo, which is the subject of this appeal, was whether the sexual intercourse has been consensual. The court a quo rejected the appellant's version that on the night in question the complainant voluntarily accompanied him to a certain flat in Central where she had consensual sexual intercourse with him, finding that such version was, upon a careful consideration of the evidence "in its totality", not consistent "with probabilities."
- [3] The record is incomplete to the extent that portions of the testimony of a certain Ms N. S. to whom the first report of the alleged rape was allegedly made are missing. On the authority of *S v Chabedi*,[2] the parties, through their legal representatives, agreed that, rather than set aside the proceedings merely on the basis of the record being incomplete, the matter proceed as, even without the testimony of Ms S., the record is adequate for the proper consideration of the appeal.
- [4] According to the complainant, after enjoying herself, having been in the company of some friends all of whom had taken some drinks on the night of 27 August 2007, the hour came for her to part with the jubilation and return to her place of abode at about 02:00. That wish was, however, thwarted. The appellant, whom she knew as a neighbour and with whom she had interacted, volunteered to organize transport for her. In no time, she and the appellant ended up joining the appellant's friends and girlfriend in a motor vehicle with other passengers who were dropped off along the way, leaving the vehicle occupied by herself, the appellant, the appellant's friend and his girlfriend. When they were in the vicinity of certain flats where the appellant's friend and girlfriend reside, the appellant said he wanted to charge his battery which had "two bars" remaining. At that point the appellant's friend and his girlfriend alighted from the vehicle. She and the appellant were left in the vehicle by themselves. The friend soon returned saying he wanted to lock the vehicle. They ended up being locked out of the vehicle. Realizing her predicament, the complainant mentioned that she would call a cab to transport her homeward. A quarrel thereupon ensued between the appellant and herself.
- [5] She said the appellant dragged her up the stairs to a room in the flats, whilst at the same time beating her with clenched fists and choking her, saying he would kill her. She responded that if he were to kill her it would be known as he had been seen in his company. Even though she cried loudly, no one came to her rescue. He eventually overpowered her, demanding that she undress herself, and she succumbed. She undressed her top. The

appellant took over and undressed her denim pants and her underwear. After undressing himself, the appellant then had sex with her. In the course of that he ejaculated and did not use any condom. Thereafter, the appellant slept, whilst she remained crying. She was approached by a lady (“a friend of the appellant”) who asked whether she and the appellant were dating. She responded in the negative, adding that they knew each other and stayed in the same street. The lady gave her a place to sleep. Attempts to organize a cab to transport the complainant homeward yielded naught. The lady also begged her not to lay a charge against the appellant, as the appellant was not a violent person. The complainant was taken aback at this, in light of the treatment meted out to her by the appellant. She spent the rest of the night with lady.

- [6] At 07:00 on the following morning, she woke up and made contact with one of her friends, N. S.. The complainant ended up being at N.’s place, where they were later joined by her (the complainant’s) sister. The two ladies accompanied her to the police station where the incident was reported. The police transported the complainant to Dora Nginza hospital where a medical report based on the examination of the complainant was generated. She said she sustained a sore throat and her eyes were swollen, resulting from the assault on her by the appellant. She was given pain tablets and discharged.
- [7] Under cross examination the complainant stated that she reported the assault and the rape to N. telephonically immediately after it had occurred, whilst still at the place where she slept.
- [8] What follows is an excerpt from the relevant transcript demonstrative of how part of the appellant’s case was put to the complainant, and her responses thereto:

“MR DAUBERMAN: And he will say that at his friend’s place you had consensual sex with him. --- No. Your Worship it is not so.

And he will deny that he assaulted you in any way whatsoever. --- I took some photos of myself Your Worship and even as far as the medical report is concerned it is illustrated there I did have... in fact my eyes were swollen.

He will say that he heard subsequently that you were assaulted by your boyfriend after your boyfriend had been told that you had gone off with him from the club. That you had been at the club dancing with him and that you had left the club with him and had sex with him after that. --- I left the flat of his friend swollen as I was and then went to the police in New Brighton

COURT: Were you assaulted by your boyfriend? --- No, Your Worship.”

- [9] In pursuit of his defence to the charge, the appellant testified that he had been present at the clubs. There she met the complainant, whom he said he did not know. They initially met at the tavern in New Brighton. They danced and exchanged cellphone numbers. Even at the second venue – the club at Cleary Park – they enjoyed themselves and danced. He said they had agreed to have a love affair, and the complainant agreed to spend the night with him and only return home in the morning. He denied that he stayed at the same street as the

complainant, he having relocated and rented a flat at Boon.

- [10] According to the appellant there is a club closer to the flat where he slept with the complainant; if he had dragged the complainant into the flat club bouncers would have intervened and come to her rescue. The sexual intercourse they had was consensual. They spent the night together and the complainant left in the morning between 08:00 and 09:00. When his friend “Sade” was not willing to lend him his vehicle so as to drive the complainant home, he gave the complainant taxi fare, and she left. He said the complainant bore no injuries when she left; he denied having assaulted the complainant.
- [11] In so far as the complainant was a single witness, the provisions of section 208 of the Criminal Procedure Act 51 of 1977 were of application and her evidence had to be clear and satisfactory in all material respects. At the same time it is incumbent on the court to consider the merits and demerits of the evidence and to decide whether it was trustworthy and whether despite the fact that there were shortcomings or defects or contradictions in the testimony, the truth has been told.[3]
- [12] The complainant’s testimony that she had been assaulted found corroboration from the J88 medical report according to which the complainant had been assaulted with a fist, and sustained swollen and painful eyes. The evidence of Ms B. K. who testified to having seen the complainant bearing no injury when they parted at the first club gave support to the complainant’s version that the injuries she sustained had been inflicted within a relatively short period before the medical examination. All this belies the appellant’s version that he never assaulted the complainant. Little wonder that the “defence case” that “the [complainant’s] boyfriend found about the fact that [the complainant] had been with the [appellant]” simply waned and no suggestion was made as to how the complainant had sustained the swollen and painful eyes.
- [13] The appellant could also not seek to gain mileage from the portions of the evidence of Ms S. which did not support the case of the State. Ms S.’s evidence, having been eschewed, can indeed not also be used to attack the credibility of the complainant as a witness.
- [14] There are other factors which render the version of the appellant improbable, and not reasonably and possibly true. The appellant testified that he did not know the complainant, having met her for the first time at the tavern on the night in question. However, the complainant’s testimony that she had known the appellant since childhood and the two used to greet one another was not questioned under cross examination when she testified. It would have been for the same reason that she accepted a lift from him – the belief that they lived in the same street. It is also improbable that the complainant would, if they had been on good terms with the appellant who is also alleged to have favoured her with cab fare, lay a charge of rape against the appellant. According to the complainant, her cellphone was in her bag and she took it out when reporting the rape. The appellant’s version was that she gave him the cellphone for safekeeping. This version was however not put to the complainant when she testified.

[15] In these circumstances, I am satisfied that the court a quo's rejection of the appellant's version and the conclusion that the State proved its case beyond reasonable doubt is unassailable.

[16] In the result, the appeal is dismissed.

S M MBENENGE

JUDGE OF THE HIGH COURT

I agree

S TILANA-MABECE

ACTING JUDGE OF THE HIGH COURT

Attorney for the appellant:

P Daubermann

Instructed by:

Peter Daubermann Attorneys

Counsel for the respondent:

S Hendricks

Instructed by:

The Office of the DPP

Grahamstown

Date heard:

22 March 2017

Date delivered:

30 March 2017

[1] It had been alleged that on or about 27 August 2007 and at or near Central, Port Elizabeth, the appellant unlawfully and intentionally had sexual intercourse with the complainant without her consent.

[2] 2005 (1) SACR 415 (SCA) paras [5] and [6]; also see *Machaba and Another v The State* (20401/2014) [2015] ZASCA 60 (8 April 2015) and *S v Zondi* 2003 (2) SACR 227 (W) at para [9], where it was held: "The adage that 'an appeal is a retrial on the record' is more descriptive than definitive and is subject to qualification. Thus, eg. the ambiguity of the 'retrial' is limited to the issues raised by the appellant and an appeal does not necessarily require

consideration of a complete record of the entire proceedings in the court a quo, but merely such part thereof as may be required to enable the appellate tribunal to properly consider the particular grounds of appeal in the context of the trial proceedings.”

- [2] 2005 (1) SACR 415 (SCA) paras [5] and [6]; also see *Machaba and Another v The State* (20401/2014) [2015] ZASCA 60 (8 April 2015) and *S v Zondi* 2003 (2) SACR 227 (W) at para [9], where it was held:

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- [3] *S v Sauls & Others* 1981 (3) SA 172 (A) at 180 f – h.

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