

SOUTH AFRICA / JUDGMENT

Thabang v S (A64/2022) [2023] ZAGPJHC 424 (2 May 2023)

[2023] ZAGPJHC 424**COURT**

South Gauteng High Court, Johannesburg

BEFORE

S Yacoob, W Karam

CASE / FILE NUMBER

A64/2022

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Policy**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH AFRICA****GAUTENG LOCAL DIVISION,****JOHANNESBURG****CASE NO: A64/2022****NOT REPORTABLE****NOT OF INTEREST TO OTHER JUDGES****NOT REVISED****02.05.23****In the matter****between:****THABANG,****MOKOENA****APPLICANT****and****THE****STATE****RESPONDENT****Neutral Citation: Thabang****Mokoena v The State (Case No. A64/2022) [2023] ZAGPJHC 424 (2 May
2023)**

JUDGMENT**YACOOB J:**

1. The appellant was convicted of rape in the Regional Court, Johannesburg, and sentenced to 10 years imprisonment, 4 years of which is suspended for 5 years. He appeals against conviction only, with the leave of the court below. In granting leave the magistrate acknowledged that the guilty verdict was a difficult decision.
2. Much of the factual background is common cause, including the fact that there was sexual intercourse between the appellant and complainant. The difference is that the appellant contends that intercourse was consensual, while the complainant maintains that she never consented. The medical evidence is inconclusive, there being contradictory expert evidence, and the decision boiled down to an assessment of the probabilities.
3. On 26 October 2018, the complainant travelled to Johannesburg with her boyfriend L from Newcastle, KwaZulu-Natal. They reached Johannesburg around 10pm. They met a cousin of L's, B, and went with him to meet the appellant, another cousin of L's, at a place in Braamfontein. All four of them drank alcohol. They then went to the appellant's flat, but did not all go in because there were security restrictions at that time of night. The party of four then drove in one vehicle to Diepkloof to continue drinking. They then went back to the appellant's place, and he snuck them in through the fire escape. He was confronted by a guard who bribed him with R100.
4. On the way back from Diepkloof the complainant was drunk and tired and was drowsy in the car.
5. The appellant offered the complainant his bedroom as she complained she was tired. She unbuttoned her jeans as they were tight, but did not take them off. She pulled the comforter over herself to sleep. It was by then the next morning, and the sun was up.
6. The three men then left the flat, to look for food and apparently to look for sex workers. When they returned, L and B remained downstairs as they had not been registered as visitors, and the appellant went upstairs alone. He was purportedly to fetch the complainant, and then wanted to go to Killarney Mall to get groceries and rent money.
7. The appellant contends that he and the complainant were flirting during the evening, while the complainant's version is that she barely spoke to him the whole evening.
8. It is common cause that the complainant was extremely drunk. According to her, she awoke to find the appellant on top of her, and did not immediately realise that he had inserted his penis into her vagina. She only realised this when she felt pain in her lower body, when she stood up. She pushed him away as soon as she realised he was on top of her. She no longer had her jeans on, and was adamant that she did not take them off herself. She stayed in the bedroom crying while the appellant went elsewhere in the flat.

9. She found him in the kitchen and asked him what had happened and asked where L was. He told her that she should put on her shoes and go. She grabbed at him, crying and asking where L was.
10. The complainant then went into the corridor crying and the appellant followed her asking her what she was doing. She asked him why does he hate her. She then saw L and B outside while she was still crying. They asked her what had happened and she told them. They did not believe it was possible and the appellant told them he had not touched her. L then attacked the appellant and B intervened. There was an altercation about what had happened and the complainant asked to go to the doctor.
11. They then went, at the appellant's suggestion and in the appellant's car, to the police station to report. Family members of the appellant and L also came to the police station and there was an attempt at mediation or intervention to avoid the opening of a case. After the policewoman asked the family to leave the complainant alone, she decided to open a case.
12. The appellant's version differed in certain respects. According to him the complainant flirted with him throughout the evening, and they were often alone and talked alone as B and L went often out to smoke.
13. After Kitchener's they all went to his place, not only the four of them but also the appellant's friends and L's friends. But they were not allowed to go in. Eventually it was only the four of them and they went on to a club in Diepkloof. They did not stay long and on the drive back he sat in the back with the complainant. She was not tired but quite lively and talked to him.
14. After they went back to his place, and ate leftovers, B and L asked him to take them to get more food. When they got to his car they told him they wanted to get sex workers. This was about 5.30 or 6am. He drove them to Hillbrow to various places and eventually they came back to his place without procuring any services. He was then unable to sneak B and L in because the fire escape was closed, and he went up to get the complainant so they could then go shopping.
15. When he got to his flat the complainant was sitting on the bed and drinking beer. He went through the bedroom to the bathroom, and as he passed her he explained that they were going to go shopping at Killarney Mall. They exchanged banter about how there was never a question of the three men having gone to get food. She appeared to be "wise to what was going on". He then sat on the bed and he initiated a kiss, to which she was responsive.
16. They reclined on the bed while they were kissing, and he pulled down her jeans. There was no discussion between them and no objection from the complainant. He had to stand up to pull her jeans off because they were quite tight. They had sex but because he did not have a condom he stopped before ejaculation. In cross examination he gave further reasons for stopping, one was that he thought he might take too long. When it was put to him that it was because he felt guilty about betraying L, he acknowledged that that was part of the reason. This is the reason that was put to the complainant in cross-examination.

17. According to the appellant the complainant did not resist but was an active participant. He pulled his pants up and told her she should shower and he was going to check on the other two. She did not say anything. He went downstairs to the other two but did not tell them what happened.
18. He went upstairs again and the complainant was in the corridor, asking where L was. She was holding his phone. They went together to the lift, and she asked him again where L was, and then became hysterical, asking him why he hated her. Her voice was trembling although she did not shed tears. She refused to go into the elevator with him, or even to take the stairs, and he was confused. So he decided to fetch L and B. According to the appellant he believed L was abusive and assumed the complainant was afraid. As the appellant was going down the fire escape he saw L and B coming up. He told them there was something wrong with the complainant.
19. When they reached the complainant she asked L why he had left her. She was not crying. They went into his flat and then she started crying. L asked her what happened and the complainant told L the appellant had slept with her. The appellant denied having touched her. L then assaulted the appellant. While this was happening L asked the complainant if she was sure and if they should go to the police and she said yes. The appellant then offered to drive them to the police station. He believed that the matter would get resolved before they got to the police station.
20. Three of them went into the police station and B remained outside and called his parents. At some point B's parents arrived and asked them if they did not want to mediate and talk about it and if they still wanted to report it after that they could. The complainant did not say anything but L refused because he did not want the complainant to feel bullied as she did not have any family members there. According to the appellant it is L who decided to open a case at the police station. He had not expected that to happen because he did not think the relationship between L and the complainant was that serious. However the appellant does not seem to have thought that the complainant herself was entitled to open a case against him in her own right.
21. The complainant's boyfriend and appellant's cousin, L M also gave evidence for the state. According to L he did not leave the complainant alone with the appellant numerous times while B smoked, he only left them once, to go and fetch his jacket from the car. He confirmed that he drove back to the appellant's place from Diepkloof, but also confirmed that the complainant was sleeping in the back. He testified that they had to go out to look for food because there was nothing to eat at the appellant's place, only food that needed still to be cooked. He did not recall there being any leftovers to eat. He denied having wanted to go and look for sex workers.
22. According to him the appellant stopped him and B from going up to the flat after the men came back from their excursion. He thought the appellant was taking a long time and was about to try and go up when the appellant came and told them that the complainant did not

want to wake up. L said he would go and get her up and the appellant said no, he told her to take a shower. He went up again, and again L thought he was taking a long time, and decided to go up. While he was on the stairs the appellant told him that the complainant was crying for him. When he got to her she said the appellant had slept with her. The Zulu formulation that she used meant it was a thing that was done to her, not a thing that was done with her. He then began assaulting the appellant. According to L, while he was assaulting the appellant the appellant was calling out “call the police” and the complainant asked him to stop hitting the appellant or he would get arrested, and suggested they go to the police. They were all talking at once and there were suggestions of both the doctor and the police, and eventually they went to the police.

23. The primary argument on the appellant’s behalf is that it is highly improbable that he would have taken advantage of a sleeping woman in his bed and then gone on to suggest going to the police and also in fact take them to the police. However the appellant’s own evidence is that he suggested this and did this because he did not think it would get so far. He thought it would get “resolved” before any case was opened. He conceded that he had lied to L, saying he did not touch the complainant, and he seems to have known that if she was examined it would be obvious that someone did “touch” her. It is clear from his own evidence that taking the party to the police was a form of bravado in the hope of the charges not being

laid because people would believe he could not have done anything if he was willing to go to the police and the doctor. In addition it seems he wanted to go to the police to stop L assaulting him.

24. Either way I do not find the appellant’s behaviour inconsistent with the magistrate’s finding, particularly taking into account the equivocation evident in his version. There was equivocation in his reason for withdrawing early from the sexual intercourse, and in his reasons for saying that they should go to the police, and for taking them there.
25. As far as what happened in the bedroom goes, the complainant and the appellant were single witnesses. As far as their behaviour before and after goes L was also a witness and his version must be taken as corroboration.
26. L’s version was consistent with the complainant’s about how often she was left alone with the appellant, and also about her being asleep or drowsy in the back seat on the way back from Diepkloof. If he was a jealous or abusive type as the appellant suggested in his evidence, he would have noticed if the complainant was lively and flirting in the back seat.
27. Overall, and taking the conspectus of the evidence into account, the magistrate’s decision cannot be faulted.
28. For these reasons, the appeal is dismissed.

S YACOOB

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree.

W KARAM

ACTING JUDGE OF THE HIGH COURT

For the appellant: Mr Ndlovu, Instructed by Nxumalo and Ndhlovu Attorneys For the State: Mr Mthiyane, Office of the Director of Public Prosecutions, Johannesburg.

Date of Hearing: 06 February 2023

Date of Judgment: 02 May 2023

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