IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

C.A. & R.: 411/2014
Date Heard: 29 April 2015
Date Delivered: 13 May 2015

In the matter between:

MPUMELELO MAKELENI Appellant

and

THE STATE Respondent

JUDGMENT

EKSTEEN J:

[1] The appellant was arraigned in the Regional Court for Port Elizabeth on one count of rape. It is alleged that on 26 November 2011 and at New Brighton the appellant had committed an act of sexual penetration with [A…..] [H……] (Herein further referred to as the "complainant") by inserting his penis into her vagina on more than one occasion without her consent. Notwithstanding a plea of not guilty the appellant was duly convicted. The magistrate found that the appellant had raped the complainant twice and he was accordingly sentenced to a period of 20 years

imprisonment. He now appeals against both his conviction and the sentence imposed with leave of the court *a quo*.

[2] The appellant and the complainant had been involved in an intimate relationship for a period of approximately 7 years leading up to 26 November 2011. The relationship had been a volatile one and they had argued frequently, particularly after the consumption of alcohol. On the evening of 26 November 2011 the complainant was at a tavern with a male friend. During the course of the evening the appellant arrived at the tavern. There is some dispute on the evidence as to whether he in fact entered the tavern or whether he remained at the doorway. The complainant and the appellant were, however, involved in an argument at the doorway. It is apparent that the appellant wished the complainant to accompany him and she refused, insisting that she was no longer involved in a relationship with him. As a result of the boisterous argument the owner of the tavern evicted the appellant.

[3] The evidence material to this appeal is set out hereafter. The complainant testified that she left the tavern sometime later in the company of two males, one N…….. and one L…... As the three of them were walking in the street they met up with the appellant. The appellant appeared angry and used abusive language as he insisted that she accompany him. L……. warned the appellant not assault the complainant. The complainant states that she spoke to the appellant asking him where he intended to take her as he was no longer her boyfriend. She does not however state that she told the appellant that she was not prepared to go with him. The appellant, so the evidence goes, then grabbed her by the hair and turned her around before dragging her off. As they moved off, she says, he was still holding her

by her clothing around the waist. She states that she did not run as she feared that he would assault her.

[4] The two of them walked off and en route she again asked him where he was taking her whereupon he again swore at her. Shortly thereafter they went to the home of a friend of the appellant, one M……. They entered the house and sat down where there were a number of other people present. Here the complainant states that she "made a noise trying to attract the attention and show that the two of (them) … are not in good terms" (*sic).* On closer questioning as to the noise she made she states: "I made a noise such as asking what are you coming to do here with me". She does not however state that she advised anyone present that she was being abducted against her will nor did she ask anyone to prevent him from taking her with him. Shortly thereafter, apparently as a result of the noise they were making, they were requested to leave.

[5] The two of them again proceeded in the direction of the appellant's home and passed through an alley behind the T….. School where there was an unfenced shack. There, she testifies, that the appellant asked her to have intercourse with her behind the shack. She declined to do so in the open and proposed that the two of them rather proceed to the appellant's room. This they did.

[6] At the appellant's home there is a main house situated on the property and the appellant's shack is behind the main house. They passed the main house and approached the shack of the appellant. She did not attempt to raise the alarm at this stage as she says that she feared that he would assault her. He opened the door

and the complainant entered followed by the appellant. He then again asked her whether he could have intercourse with her and the appellant states that she refused. At the time she was seated on the bed and she states that the appellant then pushed her and she fell onto her back. He then told her to undress which, she says, she declined to do. Thereafter the appellant first undressed her and then himself. He got on top of her and had intercourse with her. It is common cause that none of her clothing was torn and there is no evidence of any resistance put up against his attempt to undress her.

[7] In respect of the rape itself the following exchange occurred between the complainant and the prosecutor:

> "After he pushed you and he got on top of you did you yourself in any way resist in having intercourse with the accused person? --- By word of mouth. Not by any action.
> If you say by word of mouth what exactly do you mean? What did you say? --- I was asking him why is he doing that because he is not my boyfriend.
> Is that now before, during or after ma'am? --- Before he had sex with me.
> Okay. Did you tell him that you don't want to have sex with him? --- I told him.
> What did you tell? --- I told him that I do not want to have sex with you because you are not my boyfriend.
> At that stage ma'am you were still wearing your clothing. Am I correct? --- Yes."

[8] It is worthy of consideration that her initial response as to what she had said was limited to an enquiry as to why the appellant was having intercourse with her. It was only upon specific prompting that she ventured to say that she had told him that she did not wish to have sex with him.

[9] After the appellant had had intercourse with the complainant, she states that she did not again get dressed and that she lay naked next to the appellant until the morning. She states that she did not sleep and that she was hoping that the appellant would fall asleep so that she could get an opportunity to flee, but he did not.

[10] The following morning the appellant again asked whether he could have intercourse with her. Her evidence then proceeds as follows:

> "And on the second occasion did you then consent to him having sex with you? --- I did not say anything except for do what you have done.
> Why did you say this to him? --- Because I knew that he would not allow me to go out without getting what he wanted and I also agreed because I wanted to go."

[11] She proceeds to state that whilst he was having intercourse with her she tried to push him away and told him to get off. He, however, pushed her hands aside and continued until he had satisfied himself.

[12] The appellant, on the other hand, contended that he was still involved in a relationship with the complainant. He had, however, cheated on the complainant and she had seen him at the tavern with the other woman. He states that on 26 November 2011 he had proceeded to the tavern in order to apologise to her when the argument arose at the doorway to the tavern. He states that he left on the understanding that she was to come up to his home later on her own.

[13] The appellant denies that he met her in the company of L….. and N…… and states that he later met her in an alley near his home. He denies that he grabbed her by the hair or that he dragged her at any stage and states that she voluntarily proceeded to his home with him. He acknowledges that they had intercourse but contends that she undressed herself and that the intercourse was with consent. Although it was put during cross-examination to the complainant that the appellant would contend that both occasions occurred with consent the appellant testifies that they only had intercourse once.

[14] The medical evidence reveals no injuries and no evidence of forceful penetration, although the possibility of rape could not be excluded.

[15] There is some discrepancy between the evidence of the complainant and the appellant as to the circumstances under which the complainant left the shack of the appellant the following morning. It is however common cause that the appellant had risen and departed from the shack leaving the complainant behind. Upon his return the complainant had left. She states that upon her arrival at home she immediately reported the rape to her brother. He accompanied her to the police.

[16] It is, of course, trite that the State bears the onus to prove the guilt of the accused beyond reasonable doubt. In the appeal it is contended that the magistrate erred in finding that the State had proved its case beyond reasonable doubt and that she further erred in rejecting the version of the appellant as not being reasonably possibly true.

[17] In respect of the rape the complainant is a single witness and the cautionary rule relating to single witnesses finds application. There is no corroboration to be found for material portions of her evidence. In this regard the events which allegedly occurred in the street in the presence of L….. and N….. and the events which allegedly occurred at the home of one M…….. are in dispute. There is no suggestion on the evidence that any one of these persons was not available to testify and not one of them was called. In view of the facts of the present matter and the lengthy relationship which had existed between the complainant and the appellant the volition of the complainant in accompanying the appellant to his home is a matter central to the dispute. It is inexplicable why these witnesses were not called where, on the face of it, their evidence could have added considerable corroboration for the complainant's version. The alleged first report of the alleged rape was made to the brother of the complainant that same morning. He too was not called to testify.

[18] The magistrate recognised, however, that the complainant was a single witness in respect of these events and the events which occurred in the shack of the appellant. She had the benefit of observing the complainant in evidence and found her to be an impressive witness. She was steeped in the atmosphere of the trial and is in a far more advantageous position to make a finding on credibility than this court could do.

[19] The magistrate reasoned, however, as follows:

> "The court is satisfied that she (the complainant) told the truth. The same however cannot be said about the version of the accused person. Even when

> the court is looking at the accused version to consider if it is that which is reasonable probable true. The accused version has been proved by evidence in totality and when looking at probabilities to be false. The court is satisfied that the state have proved a case against the accused person." (*Sic*)

[20] Firstly, it seems to me that the magistrate misdirected herself in law. The test is not whether the version of the appellant was "probable" but whether it is reasonably possibly true. Moreover the magistrate clearly disbelieved the appellant because she believed the complainant. To my mind that constitutes a misdirection. The magistrate was required to examine the version of the appellant in the light of all the proven facts and to determine whether it, viewed against the totality of the evidence, is reasonably possibly true. If his version is an exculpatory version and it is reasonably possible when weighed against the proven facts then, even if the magistrate disbelieves him, he is entitled to be acquitted. In this matter the magistrate made no adverse demeanour finding in respect of the appellant and she did not consider the content of the appellant's version as weighed against the totality of the evidence at all.

[21] The appellant's version, which I have set out earlier herein is essentially that intercourse occurred by consent. Even if it were held that the complainant subjectively did not consent to intercourse the complainant's version calls into question the *mens rea* to commit the offence.

[22] In ***R V K*** 1958 (3) SA 420 (AD) at 421F-H Schreiner JA stated:

> "In the ordinary kind of case the absence of consent is proved by the complainant's evidence that she did not consent, supported by proof that her will was overborne by force or by such a threat of force as produced submission but not consent. In such cases the complainant is in possession of her faculties and even when she submits she normally leaves the accused in no doubt that she is unwilling."

[23] In the present case the complainant was in possession of her faculties. Her own evidence establishes that she and the appellant had been in an intimate relationship for years leading up to the event. It is true that she contends that the relationship between them had terminated some time prior to the alleged offence, however, in cross-examination the following exchange occurred:

> "The accused will say that you were still in a relationship at the time you alleged that he raped you. --- Not a relationship as such but he would take me forcefully but then I came to decision.
> What made you change your mind on the 27th? --- I had enough and came to the conclusion."

[24] On a consideration of the evidence it is apparent that a physical relationship between the appellant and the complainant continued to exist up to the time of the alleged rape. There is no evidence of any earlier complaint against the appellant relating to sexual misconduct and no charge of rape was brought against the appellant in respect of any previous sexual encounter. The events must therefore be viewed as against the background of a lengthy intimate relationship, albeit that the complainant had protested earlier that evening at the tavern that it was now over.

[25] On the complainant's own version when the appellant asked permission to have intercourse with her behind the shack it was her proposal that the parties rather

proceed to the appellant's shack. This is a factor which militates in favour of an acceptance of the appellant's version. As to the events which occurred inside the shack there are differences between the defence version and that of the State. On her own evidence, however, the complainant offered no resistance. This is further borne out by the fact that there is no torn clothing nor were there any injuries or evidence of forceful penetration found by the doctor. Even when the appellant committed the act of penetration the complainant states that she offered no resistance and thereafter remained in bed alongside the appellant, stark naked, until the next morning. Whilst the complainant states that she feared that the appellant might assault her there is no evidence that her will was overborne by force or by any threat of assault at this stage or at any stage during the events.

[26] On a consideration of the evidence, therefore, I do not think that the conduct of the complainant could have left the accused in no doubt that she was unwilling. The evidence therefore failed, at the very least, to establish that the appellant had the *mens rea* to commit rape. Rather I consider that, had the magistrate given consideration to the appellant's version, she should have concluded that the appellant's version of these events is reasonably possible and it is reasonably possible, therefore, that the complainant did not articulate her alleged unwillingness at all. It follows, to my mind, that the appellant ought to have been found not guilty in respect of the first alleged act of rape.

[27] I turn to consider the second alleged act of rape. I have set out earlier the evidence relating to these events. The case put to the complainant during her evidence was that both events occurred by consent. This entails an admission on

behalf of the appellant that intercourse did occur twice. This must therefore be accepted and his evidence to the contrary is untenable in the cirucmstances. What emerges from the evidence of the complainant herself, however, is that after she had lain alongside the appellant, naked, throughout the night, the appellant requested consent to have intercourse with her. She gave him consent, she says, because she knew that he would not allow her to go without getting what he wanted. She proceeds to state that she also "agreed" because she wanted to go. There was no suggestion of any threat made to her nor had any violence been applied to her or injury inflicted upon her prior to intercourse occurring. There is clearly no proof on this occasion that her will was overborne by force, or by such a threat of force as produced submission but not consent. On the contrary, on her own version, I think that consent, albeit reluctant consent, has been established. Certainly I do not think that the appellant could have been left in no doubt on this occasion that she was unwilling. I do not lose sight of her evidence that she tried to push him off her while he was on top of her. This, however, occurred after penetration. In these circumstances, to my mind, the magistrate misdirected herself as to the facts in respect of the second alleged rape. In the circumstances I consider that the appellant was entitled to his acquittal on this alleged rape too.

[28] In the result, the appeal succeeds and the conviction and sentence imposed by the magistrate is set aside.

J W EKSTEEN

JDUGE OF THE HIGH COURT

REDDY AJ:

I agree.

V REDDY

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Appellant:	Adv D Geldenhuys instructed by Justice Centre, Grahamstown
For Respondent:	Adv Mdolomba instructed by National Director of Public Prosecutions, Grahamstown