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**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

Case Number: A41/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES

_____ DATE	_____ SIGNATURE
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In the matters between:

**NGUBANE, NKOSIBANTU**

Appellant

and

**THE STATE**

Respondent

This judgment is delivered by being uploaded to the digital database of the High Court of South Africa, Gauteng Division, Johannesburg and by transmission by email to the parties and is deemed to have been delivered at 10h00 on 23 day of December 2024.

Coram: **Yacoob J and Bokako AJ**

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**JUDGMENT**

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**YACOOB, J**

[1] The appellant, Mr Ngubane, was convicted of one count each of rape and kidnapping in the Regional Court, Johannesburg. He was sentenced in 2017 to an effective seven years' imprisonment. He approaches this court with the leave of the court *a quo* to appeal his conviction only.

[2] The court *a quo* granted the appellant leave to appeal only on one ground, that is, whether the complainant contradicted herself regarding whether there was another person in the room when Mr Ngubane came to "kidnap" her. However, the notice of appeal identifies much broader grounds of appeal.

[3] The State did not object to this broadening of the appeal. The same grounds of appeal were argued before the magistrate in the application for leave. Considering that the grounds of appeal to a great extent are related to how the court *a quo* evaluated the evidence of the complainant, and that it is trite that evidence has to be evaluated as a whole, rather than on one specific issue, we consider that it would not have been in the interests of justice to limit the appellant to the single point identified by the court *a quo*.

[4] In any event, as long as the same grounds were raised before the magistrate, this court has the power to consider those grounds if they appear to be meritorious since it would have had the power to grant leave on those grounds.<sup>1</sup> It would be artificial, and contrary to the interests of justice, to insist on holding the appellant to the ground on which the magistrate granted leave in those circumstances, particularly if that approach would lead to the preservation of an incorrect conviction.

[5] The grounds of appeal set out in the notice of appeal are that the magistrate erred or misdirected himself in the following ways, by:

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<sup>1</sup> See in this regard *Legal Aid Board v The State and Others* 2011 (1) SACR 166 (SCA) at [19] – [22] and *S v Pretorius* 2013 (1) SACR 261 (WCC) at [9] – [12].

- i. considering that he had to determine whether a child was born from the relationship between the appellant and the complainant;
- ii. accepting the complainant's evidence when it was uncorroborated, improbable and contradictory;
- iii. rejecting the appellant's evidence, which was corroborated;
- iv. holding against the appellant that he did not mention in evidence in chief that he was maintaining the child, when he had done so;
- v. placing a burden on the appellant to prove his innocence, by saying he ought to have called a specific witness;
- vi. drawing a negative inference from evidence that the appellant tried to evade arrest, which was not put to the appellant;
- vii. rejecting the evidence of Mr Kobone who corroborated the appellant's version regarding his relationship with the complainant, and
- viii. accepting the complainant's evidence on the count of kidnapping, when she had contradicted herself regarding what happened in her room.

[6] The state called five witnesses, the complainant (CD), the nurse who examined her, the constable who took her statement, the investigating officer and the forensic scientist who examined the sexual assault kit taken from the complainant and the DNA samples taken from the accused and the child of the complainant.

[7] The accused gave evidence in his own defence, and called one witness in corroboration, his cousin, Mr Lucky Kobone.

[8] The complainant, CD, testified that she knew the accused because they live in the same yard, although in different rooms. She had been with her friends (A[...], K[...], N[...] and M[...]) at a party on 17 January 2015, they had all been drinking. At about 20h00 she arrived at her home with her friends. She also had her baby with her. The accused, whom she knew as "Pat", or "Nkosibantu Xhosa" or "Xhosa" was at the gate with some others (Nkanyiso, Bow, and another whose name she did not know), drinking, and he insulted her as she passed. She went to her room, and in

her own space there was no-one else there, although someone was there in the other room. She was trying to put the child to sleep so she could go out with her friends again.

[9] The accused then came to CD's room, accusing her of lying about him, saying he had killed someone. She told him she did not know about that, whoever said that must come and tell them when she said that. The accused then took a knife out from his waist and said she must go with him, he would show her this person. She said it was a silver table knife. She wanted to take the baby and he told her to leave the baby, which she did. She then followed him to his house. When she arrived at his house, he told her to undress herself to finish things. There was no-one else at his house. She tried to reason with him and he slapped her. She then undressed as she was afraid.

[10] The accused then also undressed his bottom half, told her to lie on the bed, climbed on top of her, and inserted his penis in her vagina. He continued until he ejaculated. This was all without her consent. She did not say anything but she was crying. He then told her to dress and gave her R50 which she refused, saying she was not selling her body. He said if she told anyone he would kill her and run away to Kwazulu-Natal.

[11] She went back to her room, and another person, A[...], who stays next to her room saw her crying and asked her why she was crying. She told him that "Pat slept with me by force" and A[...] told her to go to the police station. She told A[...] she was afraid and that she wanted to sleep, but A[...] forced her and took her to the police station, as far as the gate.

[12] When she got to the police station she was drunk. She was taken to another room where she was told her statement would be taken. When she got to that room, they told her to sleep on the bench and they would take her statement when she woke up and was sober. When she woke up she began giving her statement. After her statement was taken she was then taken to the Clinic to be examined. After that she told the investigating officer she was afraid to go home because the accused will come and rape her again. The investigating officer took her to her place around

05h00 and they could not find the accused. She was afraid to stay alone, she left with the police and came back again around 06h30, when they found the accused sleeping in his room. They then arrested him, and he told them that it was by consent and that she was his wife. She told the police he was lying.

[13] Under cross examination she explained that her child that had been with her was three years and seven months old. She had two children. She denied that she had a child with the accused. CD explained that she had known the accused since 2012. They stay on the same yard at the same address, but in different parts of the property. She had been at the party all afternoon, it started at 14h00 but she had left home at 12h00.

[14] In cross examination CD said that A[...] and the child were with her when the accused came to her room, while in the bedroom, Freeman was there. It was clear that the bedroom was another room. She said that A[...] saw the accused and left when he saw the accused. By the time the accused began talking to her she was alone with him, apart from the child.

[15] During the rape, CD said that the accused left the knife on top of the table. Although she did not mention this in chief, she was not asked. In cross examination, she said she told the accused not to do what he is doing.

[16] The version put to CD in cross examination was that she was doing washing in the morning when the accused saw her, and she called him to her, and asked him why he was no longer coming to her, as they had been in a love relationship since 2012. She denied this. She said she was residing with the father of her child. It was put to her that he will say he had a child with her. She denied it, and said she thought he was joking when she said her child was his, a child born in 2014.

[17] It was further put to CD that after she finished her washing she went to the accused's room, as they had agreed, and they had consensual sex. She denied this. He gave her R50 because she told him she was hungry, she denied this.

[18] It was put to her that she met him later when he was washing cars and she asked him to go to the party with her, and he said no, who will look after the child. She denied this, and said she was with her boyfriend the whole day. She also said she knew him as Nkosubantu Xhosa, which is the name he gave when she got him arrested in 2013.

[19] CD said in re-examination that the child's father was L[...] M[...].

[20] The nurse, Ms Kubayi, testified that she examined CD at 04:12 in the morning of 18 January 2015. She was stable and calm and showed no injuries. This did not mean there had been no rape since CD had had two babies before this and was sexually active. CD was not smelling of liquor. Her examination led to the conclusion that vaginal penetration was not excluded. However, there was no positive evidence of recent sexual activity.

[21] After this the matter was postponed, in part for the state to conduct paternity tests, as a result of the version put to CD. From discussions between the magistrate and counsel, it appears that the paternity test was at least partly at the request of the accused.

[22] Constable Sigasa confirmed that she had taken the statement of CD on the night of 17 January 2015. She commissioned it at 23h00. She testified that when CD came to report the matter she looked stressed but was not crying, She did not smell liquor and could not say whether CD was drunk. The magistrate did not allow the accused's representative to question Constable Sigasa about CD's testimony that she had been so drunk that she was told to take a nap before her statement was taken. He assumed that someone else in the police station first told CD to take a nap and then took her to Constable Sigasa. However this was entirely inconsistent with CD's evidence. The magistrate ought to have allowed Constable Sigasa to be asked about it. Constable Sigasa did testify that when CD came to the trauma centre she was alone, but that she did not know if anyone had been with CD when she arrived at the charge office.

[23] Sergeant Chaka, the investigating officer, testified that she took the accused for collection of a buccal sample for the DNA testing, and then took CD and her child for collection of a sample. She then took the samples to the forensic laboratories for testing. She also testified that she could not find Mr M[...], who was A[...], to serve the subpoena on him.

[24] Warrant Officer Reynolds who conducted the DNA analyses, testified that there was insufficient male DNA in the sexual assault kit for any testing. She also testified that the paternity tests excluded the accused as the father of the child.

[25] The accused testified that he and CD had had a romantic relationship since 2012. He denied having kidnapped her and he denied having raped her. He testified that on the day in question he saw CD in the morning washing clothes in front of where she lives. She called him to her. They greeted each other and she asked him what was going on because they had not seen each other for a long time. He responded that there was no problem because he had been busy. He said that when she had finished doing her washing she should come to his place because he would like to see her. This she did. They then kissed for a long time and then had consensual sexual intercourse. All this happened between around 9 and 10 or 11 in the morning.

[26] He did not see CD's child that day, CD had been with her friend when he saw her. He did not know anything about CD's version and said that she was lying. He testified that he had a relationship with CD and that she had told him the child she had was his. He knew the child's birthday, 12 May 2014. This was only one day away from the day on which CD said the birthday was. He asserted that he gave CD money for the child whenever she wanted. About R650 or R700 per month. A certain Lucky Kobone knew about the child, as did the accused's mother. However neither of them had seen the child, nor had his mother seen a photograph of the child. When CD had been arrested soon after the child's birth, he had sent M[...] to Leeuwkop to fetch the child, and he had asked M[...]’s mother to help take care of the child. It is unclear whether this was the same M[...] who was with CD on 17 January 2015. Neither M[...] nor her mother testified.

[27] Mr Kubone testified that he was the accused's cousin and had lived with him for a short time in 2012. During that time, the accused and CD had had a romantic relationship and would use Mr Kubone's room to be alone together. After Mr Kubone had moved to live somewhere else, the accused had informed him that he had had a child with CD. Mr Kubone had never met the child because CD had been in prison and the child was with M[...]. He did not know why he did not meet the child while it was with M[...]. He did not know Mr M[...] by any of the names given but knew a person by the name of Pompeni who might be that person.

[28] The court found that, although CD was a single witness, her evidence was given in an honest and reliable fashion and was consistent throughout, and she did not contradict herself. He found that the nurse's evidence supported CD's version that she was sexually penetrated but did not sustain any injuries. This is inaccurate. The nurse's evidence only supported the conclusion that CD did not sustain injuries. The magistrate also found that the nurse confirmed that CD appeared stressed. However, this was not the case.

[29] The magistrate found that CD's denial of the accused being the father was corroborated by the result of the paternity test. However this is flawed reasoning. The fact that the child is not the child of the accused is neither here nor there. It does not demonstrate that the state's case has been proved beyond a reasonable doubt. Nor does it show that there was no history between CD and the accused. CD herself said that she had the accused arrested in 2013, two years before this incident, and a year before the birth of the child.

[30] The magistrate did not analyse the state's case to determine whether it had been proved beyond a reasonable doubt, but instead only performed an analysis of the defence's case. This is not an acceptable method of dealing with a criminal trial when the onus is on the state. Although the decision has to be made on a conspectus of all the evidence, in this case the magistrate examined only the evidence of the accused in detail, as if to find fault with it. He criticised the accused for not calling M[...] as a corroborating witness, and also for not putting all aspects of his version to CD. These are valid criticisms, but where criticism and analysis is one-sided, this has the effect of casting the onus on the accused.



[31] The magistrate also intervened unnecessarily, preventing questioning which showed inconsistencies in the state's case. As pointed out above, he did not allow the accused's representative to question Constable Sigasa about CD having been so drunk that she had to take a nap before she could give her statement, despite it being CD's evidence that she was taken to the place where her statement was taken, then took a nap in that place, then woke up and gave her statement. Nevertheless, from the little Constable Sigasa was permitted to say, it is clear that her evidence contradicted that of CD, to the extent already set out above.

[32] Further, the magistrate found that both Ms Kubayi (the nurse) and Constable Sigasa testified that CD showed signs of being stressed. This was not the case. Ms Kubayi's evidence was that CD was stable and calm. Constable Sigasa did testify that CD looked stressed like something had happened to her.

[33] Had the magistrate examined the state's case through as clear a lens as he examined that of the accused, he may have identified the following shortcomings:

- a. The inherent improbability in someone walking behind a person who is ostensibly forcing them to go with them at knifepoint. If that was the case, there was nothing stopping CD from simply not going with the accused, and going back to her room.
- b. The contradiction between the evidence of CD and Constable Sigasa regarding CD being drunk and having to take a nap in the place in which she gave her statement, which, according to Constable Sigasa, was the trauma centre.
- c. The fact that the rape, according to CD, happened at around 20h30, and the statement was commissioned by Constable Sigasa at 23h00. In between these times, CD got to the police station, was so drunk that she had to have a nap to sober up, woke up, gave her statement, had not had any shower or change of clothes, yet did not show any signs or smell of having consumed alcohol. Assuming she got to the police station by 21h00, and it took at least half an hour for her statement to have been taken, although taking into account the length of it, the fact that it was handwritten, that it was given in isiZulu and taken down in English and

had to be read and confirmed before it was signed it probably took more time than that, she would have been with Constable Sigasa at least by 22h30. In that hour and a half, CD spoke to someone at the charge office, slept on a bench in the trauma centre, and recovered from her drunkenness to such an extent that she not only was sober in her senses, but did not even smell of alcohol. In my view, this is inherently improbably.

- d. That, when examined by the nurse in the early hours of the morning, the DNA sample taken did not show sufficient male DNA for a useful analysis. This does not support the state's case. If it supports any case at all, it supports the accused's version that intercourse happened early the previous day.
- e. That the nurse's report was inconclusive. If there is doubt, that benefit must redound to the accused.
- f. That the state did not call any of CD's friends who were allegedly with her that day, particularly in the morning, either while she was doing her washing, or at the party, or when she arrived home in the evening and was allegedly insulted by the accused, to corroborated that part of her version.

[34] In my view it is clear that there is reasonable doubt in the case made out by the state, and had the magistrate properly applied the legal principles he quoted in his judgment, he would have been bound to acquit the accused.

[35] The state has not proved its case beyond a reasonable doubt and the appeal must succeed. We make the following order:

1. The appeal succeeds.
2. The conviction and sentence are set aside, and the order of the Regional Court, Johannesburg, is substituted with the following:

"The accused is acquitted of all charges"

3. The head of the Correctional Centre in which the appellant is incarcerated is directed to release the appellant to the extent that he is not being held for any reason other than his conviction in this matter.

**S YACOOB**

**JUDGE OF THE HIGH COURT  
JOHANNESBURG**

I agree.

**T BOKAKO  
ACTING JUDGE OF THE HIGH COURT  
JOHANNESBURG**

Appearances:

Counsel for the appellant: A C Roestorf

Instructed by: Steve Nkosi & Partners Attorneys

Counsel for the State: A De Klerk, Office of the Director of Public Prosecutions

Date of Hearing: 14 October 2024

Date of Judgment: 23 December 2024