22/11/12

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO: A108/12

In the matter between:

THOMAS MAFA KGOLE Appellant

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

21/11/12
DATE

SIGNATURE

THE STATE Respondent

JUDGMENT

Tuchten J:

1 The appellant was charged in a regional court with the crime of rape. It was alleged that on or about 14 July 2007, and at or near Soweto, he had sexual intercourse with the 17 year old complainant without her consent. Despite his plea of not guilty, he was convicted as charged and sentenced to imprisonment for 15 years. Leave to appeal against both conviction and sentence was granted by the court *a quo*.

2 The complainant gave evidence through a closed circuit television link. She described how she knew the appellant as her uncle's friend. She clearly regarded him as an authority figure. During the evening on the day in question, she went to buy some oranges. The appellant encountered her and told her to walk to her destination by a route other than that which she was using. She complied. The route chosen by the appellant, she said, led past a house which turned out to be the house in which the appellant and his mother lived.

3 She says that he "made me enter forcefully into that house" and that she went in unwillingly. There, she said, he took her into a bedroom, closed the door and asked her if she wanted some food, to which she replied that she did not, she wanted to go home. The appellant then left her in the room and, she said, when he came back told her that if she tried to escape and unless she pretended to be his girlfriend, he would kill her. He then allegedly forced her to undress, removed his own clothes and raped her, through the night until the morning. The next morning the appellant allegedly forced the complainant to wash herself and then let her go.

4 The appellant went home, declined to take her grandmother whom she found there into her confidence and then went to her sister, at a church at Baragwanath, and told her everything. She went to a clinic and then to a police station. Then she was taken to be examined by a medical practitioner. She said that she had been a virgin before her ordeal.

5 It was put to the complainant in cross-examination that the appellant would deny forcing her to enter into the house or committing any violence toward her. Strangely, in the light of the defence of the appellant which emerged when he ultimately testified, it was not put to the appellant that she did not take her clothes off in the appellant's bedroom or that no intercourse took place.

6 The complainant's sister testified, confirming the report made to her by the complainant. She said that the complainant "could not talk, I did not understand most of what she said but she was not herself." According to the complainant's sister, the complainant told her that she had been raped by the appellant.

7 The complainant was examined by Dr Bomvana, an experienced medical practitioner. He found a deep laceration in the posterior fourchette, with passive bleeding. He also found bruising of the focca

navicularis and swelling of the hymen with a fresh tear. Dr Bomvana concluded that there had been recent traumatic medical penetration, consistent with sexual intercourse. He also found the complainant appeared to be depressed.

8 Faced with this overwhelming clinical evidence that the appellant had either been raped or had had sexual intercourse without lubrication, the appellant proceeded to testify that he had come upon the complainant in the street and proposed love to her. The age of the appellant was given in the charge sheet as 39 years. He proposed that she come home with him, to which she there and then agreed. At the appellant's home, he says, the complainant was greeted by his mother and her friend. The appellant's niece was allegedly also there. A social interaction allegedly took place, during which the appellant's mother asked the appellant whether she was there to spend the night, in which event they did not wish the complainant later to say she had been raped, to which the complainant said that she would not do that and that the appellant was her boyfriend.

9 Later that evening, the appellant claimed, the complainant got into bed with him with all her clothes on and declared her desire not to engage in sexual intercourse, whereupon they both went to sleep. The appellant admitted that the complainant washed herself the next

morning but claimed that she did so of her own volition. Then they parted on amicable terms.

10 The appellant's mother gave evidence. The appellant had said in his evidence that his mother and her friend were drunk that evening. She supported the appellant's version. She maintained initially that although she had consumed liquor, she had not been drunk. Later she admitted that she had been drunk.

11 Counsel for the appellant criticised the evidence of the complainant in heads of argument and in oral submissions. He submitted that it was improbable that she would merely have followed the appellant. I disagree. The complainant was a naive young person who regarded the appellant as an authority figure. Counsel argued that it was unlikely that the appellant would have offered her food if his intention was to rape the complainant. It is common cause that the complainant was offered and refused food. It is not in my view improbable that a would be rapist would employ both coercion and what had falsely the appearance of kindness to overpower the will of his intended victim.

12 It was argued that because the appellant was a friend of the complainant's uncle, he would be unlikely to commit the offence or to have allowed the complainant to leave the house when he had

allegedly earlier prevented her from doing so. I disagree. Having got what he wanted from her, he had at some stage to let the complainant go. The appellant no doubt would have considered that it was his and his mother's word against that of the complainant, particularly as the complainant could be, and was, prevailed upon to wash away some of the signs of intercourse.

13 It was submitted that it was unlikely that the complainant would not have tried to escape or enlist the aid of the appellant's mother. The appellant's mother was on her own version drinking liquor when the complainant arrived and became drunk. Her attitude toward the complainant was not such as to inspire confidence in the complainant that she would come to the complainant's aid or be sympathetic to an accusation of rape or attempted rape against her son.

14 Then counsel pointed to the complainant's evidence that when she got home she was asked by her grandmother where she had been but did not tell her grandmother what had happened, preferring to tell her sister. I see nothing worthy of criticism in this. I do not find it strange that a young person who had suffered such an ordeal would prefer to confide in her sister rather than her grandmother.

15 Counsel criticised the complainant because only one charge of rape was brought although the complainant said that she had been raped several times during the night. There was no cross-examination on the point and, in my view, the complainant cannot be held accountable for the way the prosecutor drew the charge sheet.

16 Counsel pointed to certain contradictions and discrepancies in the complainant's evidence. In chief, she said that she spoke to the appellant's mother for the first time the morning after her ordeal while in cross-examination she said that the night she arrived the complainant's mother asked her whether she was the type of girl who would falsely claim she had been raped and that she responded that she was the appellant's girlfriend; the complainant said that she had been scratched on her arms and that her arms were twisted while Dr Bomvana saw no sign of any such injury; in chief she did not mention that the appellant had in his possession an object that looked like a knife while in response to questions from the bench, she explained her submission to the appellant partially on the basis that she feared for her life because the appellant had in his possession what she thought was a weapon.

17 Counsel submitted that while the complainant had undoubtedly had at the very least unlubricated sexual intercourse shortly before she was examined by Dr Bomvana, there was no evidence to corroborate the complainant's evidence that it had happened the day before the examination and thus that the appellant was involved.

18 The evidence must be seen holistically. The matters I have mentioned in the previous paragraph give cause for reflection. But the evidence of the complainant must be weighed with the proven facts that the complainant had undoubtedly had a sexual experience about which she wanted to confide in and seek the advice of her sister, that at this early opportunity she identified the appellant as her assailant and that she was prepared to go through the indignity of having the law take its course. The state case as a whole must be weighed against the version of the appellant to see whether it can reasonably possibly be true.

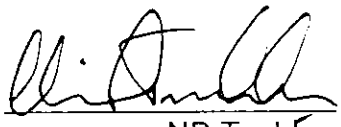
19 The regional magistrate believed the complainant, describing her as very naive about the question of love affairs, and rejected the version of the appellant and his mother as not reasonably possibly true. In my view that conclusion was correct. The appellant's version is preposterous. To suggest that this young woman, having very recently lost her virginity, would have chosen a man more than twice her age

whom she encountered in the street for an intimate relationship and then repaid his kindness by making a false accusation of rape against him flies in the face of all human experience. The appellant's version cannot account for the clinical evidence of at the least unlubricated penetration, her identification of the appellant as the man who raped her and her depressed mood when she spoke to her sister and Dr Bomvana. The fact that the essence of this version, ie that the complainant allegedly slept fully clothed in the same bed as the appellant and that no intercourse took place, was not even put to the complainant reinforces this conclusion. The appeal against conviction must fail.

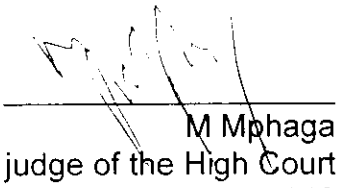
20 The appellant had a previous conviction for rape, committed in 2003. The sentence of fifteen years was a lenient one. I would have imposed a much harsher sentence. The appeal against sentence must also fail.

21 I therefore make the following order:

> The appeals against both conviction and sentence are dismissed and the conviction and sentence imposed upon the appellant are confirmed.



NB Tuchten
Judge of the High Court
21 November 2012



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Acting judge of the High Court
21 November 2012

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