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In the High Court of South Africa
KwaZulu-Natal Division, Pietermaritzburg

Case No : AR287/15

In the matter between :

Malindela Sarefilchus Phuthini

Appellant

and

The State

Respondent

Judgment

Lopes J

[1] The appellant in this matter was charged with the abduction and rape of the complainant. He pleaded not guilty to both counts. On the 7th January 2015 he was acquitted on the count of abduction, but convicted on the count of rape. He was sentenced to undergo eight years imprisonment. The appellant's application for leave to appeal against conviction was refused by the learned magistrate on the 22nd

May 2015. On the 23rd June 2015 leave to appeal against his conviction was granted on petition to this court.

[2] The complainant testified that on the day in question she was at home with her sister with whom she lived. The complainant was doing her homework together with a friend, [L.....]. When he left, she walked with him out of the gate of their home. This was at approximately 7.30pm and it was getting dark. Whilst doing so the complainant saw a white Venture motor vehicle near her home and when she asked whose vehicle it was, [L.....] told her that she should not worry about the motor vehicle, but just walk with him and she would turn back at some point. As they were passing the vehicle [L.....] got into the motor vehicle and the appellant alighted from it and grabbed the complainant, lifted her, and placed her inside the motor vehicle, telling her that he wanted to marry her. She replied that he was too old and that she still wanted to complete her schooling. Also in the motor vehicle with them was the brother of [L.....], one [N.....].

[3] The complainant testified that the appellant then drove off with her in the motor vehicle. When the complainant took out her cellphone to send a message to her sister, it was taken from her by [L.....] who gave the phone to the appellant. When the appellant stopped at Mjuqu in order to attend to some matter, the complainant tried to jump out of the vehicle but was pushed back into it by [L.....]. The doors of the motor vehicle were then locked by the appellant using central locking.

[4] They then drove on to the home of the appellant who lifted her out of the motor vehicle and put her inside a room. A television was playing loudly and he offered her a cooldrink. Whilst continuing to tell her that he wanted to marry her, the appellant then grabbed her and took her to his bedroom where he threw her on the bed, undressed her, undressed himself and then had intercourse with her. When the appellant had finished with the complainant, he told her that if she were to tell anybody about what had happened he would shoot her. He thereafter returned her to her home between 3 and 4am in the morning.

[5] The complainant testified that when she returned home that morning, she only told her sister [A....] that she had been taken against her will by the appellant to his home, but she did not tell her that she had been raped. The complainant told the court that she felt unwell for the next week. At some later stage, one of her sisters suggested that there was a problem with her. Her sister suggested that the complainant should go and see a woman nearby who is related to them, and who usually carried out inspections of girls, to confirm their virginity. The complainant said that she could not go and do that, telling her aunt that something had happened to her.

[6] At that stage the complainant's aunt approached the complainant's uncles and told them what had been reported to her. They then severely assaulted the complainant because she had not told them earlier about what had happened to her.

They insisted that the matter be reported to the police, which they did. After the matter was reported to the police, they took the complainant to a doctor where she was examined. The complainant was also, apparently, sent to the hospital because of the injuries she had sustained when she was assaulted by the uncles. Her arm was placed in a plaster cast.

[7] Under cross-examination the complainant confirmed that she had been assaulted by [L.....] [M.....] and [W.....] [M.....], her uncles. During the assault they asked her who had taken her virginity, and at first she would not tell them. They assaulted her so severely that the sticks they were using to assault her broke. A sjambok was eventually produced to continue the assault, and at that stage the complainant told them that the appellant had had intercourse with her. She said she did not tell them previously because of the threat made by the appellant to shoot her. Her uncles then took her to the home of the appellant intending to leave her there in her injured state.

[8] It was also put to the complainant in cross-examination that the morning after she had allegedly been raped, she had gone to the river with her sister [A.....] in order to do some washing. Whilst they were there, [N.....] had passed by and spoken to her. The complainant denied that she had asked [N.....] to borrow a DVD player from the appellant because hers had broken down.

[9] In cross-examination the complainant also stated that the appellant's home consisted of three structures, a rondavel, a six-cornered hut and a main house, and that she had been raped in the main house. It was suggested to her that at the time the main house was not completely built, but she alleged that it did have doors and windows at the time.

[10] It was also suggested to the complainant in cross-examination that the appellant could not have used central locking because the motor vehicle which was a 1997 Toyota Venture, did not have such a feature. It was also put to her that after she had been dropped off, the appellant returned to his home, fetching [N.....] on the way, and the two of them had slept in the six-cornered hut because the house was not yet complete. They had done so because they intended to perform some repairs the next morning on a BMW motor vehicle owned by the appellant.

[11] The complainant told the court that when the white Venture had stopped at the area called Mjuqu, she had wanted to urinate and had left the vehicle in order to do so. However, [L....] had guarded her to ensure that she did not run away. This was not mentioned in her evidence-in-chief. She denied that she had left the motor vehicle on her own and returned voluntarily. She also denied that [L.....] had come to her home specifically to call her on behalf of the appellant. The complainant also denied having telephoned the appellant who then became interested in seeing her.

[12] The complainant also told the court that when her cellphone was taken away from her by [L.....], it was given to [N.....]. It was suggested to her that she had given [N.....] the cellphone. He had used it to download music from her phone onto his, and the complainant simply said that she did not know because she was sending a 'Please call me' to her sister when [L.....] took her cellphone. It was then put to the complainant that [N...] had borrowed the cellphone and it had not been taken by [L.....] from her.

[13] The complainant was asked in cross-examination whether she had ever gone to the appellant's homestead after her family members had assaulted her and left her at the appellant's homestead. She denied that she had done so. She disputed when it was put to her that she had gone there on New Year's Day looking for something to drink. The complainant also denied having borrowed CDs from the appellant after the incident.

[14] [A.....] [M....] testified that she was the half-sister and de facto guardian of the complainant who resided with her. She confirmed that prior to the incident, the appellant had had a relationship with one of her aunts, and the complainant knew about this. She told the court that on the day in question [L.....] had arrived at their home and asked the complainant to accompany him. It was already starting to get dark at that stage. It was not normal that the complainant would go off with [L.....] when he visited them, but she was not concerned. When the complainant did not return, [A.....] had her supper and went to bed. At about 4am she saw car lights and the complainant knocked on the door. [A.....] opened the door for her and they

went to sleep. When they awoke the next morning the complainant did not say anything to her until later, when she told [A.....] that the appellant had lifted her into the motor vehicle and driven away. [A.....] told the court that the complainant said that [L.....] and [N.....] had taken her phone away when she tried to call [A.....]. They in turn gave the phone to the appellant. The complainant had said that [L.....] and [N.....] alighted from the vehicle at a later stage, but when the complainant tried to do so they stopped her and locked the door. The appellant had then taken her to his home. She did not explain what the appellant did to her and [A.....] did not ask her.

[15] [A.....] then testified that a few days later the appellant had disappeared again and told [A.....] that she had been called by the appellant. [A.....] confirmed that the complainant had been severely assaulted by her brothers or uncles although she had not been present when that happened. The complainant had eventually told her aunt what had happened to her. The uncles, together with [A...] and the complainant and one other aunt from the family, had then proceeded to the appellant's home. At the appellant's home, the appellant told the others not to enter his homestead asking what they wanted. When they explained, he said he did not damage any child. They said to the appellant that they wanted to find out whether he had slept with the complainant, because she was a child. The appellant said that he had slept with her, and that the complainant was not a child when he did so. The appellant accused them of wanting to become rich through him. They then proceeded to Umzimkhulu to the social workers, and thereafter to the police station.

[16] In cross-examination [A.....] stated that the complainant had returned back home in the morning on the second occasion when she had gone to see the appellant. She confirmed that the complainant was present when the appellant had admitted at his home that he had had sexual intercourse with her, but that the complainant was not a virgin. [A.....] said that the complainant had said that she was a virgin when she had slept with him the first time.

[17] [A.....] expressed surprise that the complainant had not testified about the appellant's confession that he had slept with her, and also that the complainant had failed to tell the court about the second occasion when she went to see the appellant.

[18] When [A.....] was asked why she had simply sat back and done nothing when the complainant told her she had been abducted by the appellant, [A.....] curiously stated that the complainant had started this and she was supposed to finish it. [A....] also confirmed that after the first incident, she had been at the river with the complainant when [N.....] arrived. He and the complainant had spoken about a DVD. [A.....] also admitted in cross-examination that the complainant had disappeared overnight on two occasions and had not given any explanation for the second occasion. [A....] had not questioned her about it. The complainant had, however, stated that the appellant had taken her away on two occasions. She said this when she was explaining to her uncles what had happened. [A.....] also stated that she did not know how the complainant had gone to the home of the appellant on the second occasion.

[19] The appellant testified that on what has been described as the first occasion, he had been telephoned by the complainant who asked him where he was going because she had heard the sound of his motor vehicle. He had then sent [L.....] to go and call her because he wanted to see her. He confirmed that [N.....] was with him in the car when she arrived. [L.....] climbed into his motor vehicle. The appellant had got out of his motor vehicle and had spoken to the complainant, asking her if she knew him. He told her he was in a hurry because he was going to Mjuqu and when he returned to his motor vehicle and started it he could hear that she was saying something from outside the motor vehicle. The appellant then asked [N.....] to roll down the window and the complainant said she wanted to accompany them. She opened the vehicle, climbed into the back and they left. They then went to [L.....] where the appellant wanted to obtain some motor vehicle parts. The complainant remained in the vehicle with [L.....]. He denied that [L.....] took her cellphone and gave it to him. He then dropped [L.....] and [N.....] off at a bus stop called [K.....]. He denied that he had ever tried to lock the vehicle and stated that there was no central locking in his vehicle. At the bus stop where he had dropped off [L.....] and [N.....] he chatted to the complainant. She eventually alighted. The appellant had then driven off and fetched [N.....] and gone to his home where they had slept. He testified that the complainant did not go to his homestead. He and [N.....] had slept in the six-cornered structure at his homestead because the main house was still being built and it had no doors and windows. The next morning they awoke and worked on his BMW motor vehicle.

[20] The appellant testified that approximately three months after the complainant had been in his vehicle, he returned home to find the appellant at his home, having been assaulted. She had been driven to his home by her sister [A.....] and three other family members. He found the complainant lying on his verandah. She said she had been assaulted because she had slept with him, and also told him that she had said that she had slept with him because she was forced to do so. The appellant went to his gate and spoke to [A.....] and the three family members. They told him that they had assaulted the complainant because she had slept with him. The appellant said that he denied having slept with the complainant. According to the appellant, [A.....] and the others had then questioned the complainant as to who she had slept with, but she remained quiet. One of the uncles then wanted to come and assault her and he was stopped by the appellant. The appellant testified that he was arrested shortly thereafter.

[21] In cross-examination the appellant also stated that he had realised, at the point when he was talking to the complainant alone with her in the car, that she was the niece of woman with whom he had had a relationship. For that reason he had not pursued the matter of wooing her.

[22] [N.....] [M.....] testified on behalf of the appellant. [N.....] told the court that on the night in question he had been with the appellant and [L.....], and they had gone to a place near the home of the complainant. [L.....] had gone to call the complainant and returned with her. When she was standing near the vehicle the appellant alighted from the vehicle and spoke to her. The appellant then returned to the

vehicle and the complainant was standing outside of it. [N.....] then opened his window and the complainant said that she wanted to accompany them. She opened the door and boarded the vehicle. They drove to near [N....'s] uncle's homestead and the appellant alighted from the vehicle. [N.....] asked if he could use the complainant's phone to download or play some music. The complainant then left the vehicle to go and urinate and returned thereafter. The appellant returned and they drove off until they reached the [K.....] bus stop. [L.....] and [N.....] alighted from the vehicle and left the appellant and the complainant in the vehicle. [N.....] was later phoned by the appellant who fetched him and they went to the appellant's homestead where they slept the night. He testified that they had slept in the six-cornered hut until morning, and then repaired the motor vehicle. He had gone home and thereafter went to look for cattle. When returning from looking for the cattle he had passed a river where he saw the complainant and [A.....]. He had spoken to them and the complainant asked him to borrow a DVD player from the appellant because theirs was broken.

[23] [N.....] told the court that he was present with the appellant when the complainant had phoned the appellant, and the appellant had later told him that the complainant had got his number from her aunt's phone. The complainant's aunt had been in a love relationship with the appellant. [N.....] testified in cross-examination that whilst in the motor vehicle, he had asked the complainant for her phone and she had given it to him to transfer some music from it to his phone. [N.....] denied that the appellant had told him to open the window which he had done in order to listen to what the complainant was saying prior to her boarding the motor vehicle. [N.....] also told the court that he was present when the complainant's relatives accused the

appellant of deflowering her. At that stage the complainant was standing there crying and she was bleeding from her head.

[24] In considering whether it is safe to rely upon the conviction of the appellant in the court *a quo*, the complainant's evidence falls to be considered in some detail :

- (a) The complainant gave the impression that she had been 'seeing [L.....] off' when she was abducted. This was after they had been working together. [A.....] contradicted this and gave the impression that [L....] had come to fetch her.
- (b) The complaint testified that she had told [A....] on the morning after the incident that she had been taken by force to the home of the appellant. It is curious that in those circumstances she did not relate to [A.....] that she had been raped. Her reason for doing so was apparently that the appellant had said that he would shoot her if she did so. However, she had already disclosed to [A.....] a serious offence on the part of the appellant – i.e. abducting her. There was then no reason for her not to disclose to her sister the other serious offence – the attack on her
- (c) The complainant only revealed to her aunt about the fact that she was no longer a virgin when it was suggested that the complainant should be tested by the lady who did the virginity testing. The complainant obviously knew at that stage that she could no longer conceal the fact that she was no longer a virgin. Inevitably then the question of who had had intercourse with her would have been raised. It was only after the complainant was severely assaulted that she accused the appellant of having raped her.

She had at first refused to disclose the identity of the person with whom she had had sex.

- (d) The complainant did not disclose in her evidence that she had gone to the home of the appellant on a second occasion. This emerged in the evidence of her sister, [A.....], who did not query the fact that the complainant had spent the night out. [A.....] also said that the complainant had confirmed this when she spoke to her uncles at the home of the appellant, when they had all gone there to confront the appellant.
- (e) The complainant did not testify that the appellant had admitted having sex with her on the occasion when the appellant had been confronted at his home by the complainant's relatives.
- (f) As was submitted by Mr *Matthews* who appeared for the appellant, the medical evidence, although disclosing a ruptured hymen, does not give any indication as to when that occurred. As the complainant was only taken to see the doctor some weeks after the incident, the gynaecological evidence is of assistance only in indicating that the complainant was no longer a virgin.
- (g) As was submitted by Ms *Moosa* who appeared for the State, the circumstances in which the offence was disclosed were unusual and unfortunate. In cross-examination [A.....] confirmed that the complainant had in fact told an aunt or another sister the identity of the appellant as the person who had sexual intercourse with her. The evidence of [A.....] was therefore not that of a person to whom a first report of rape had been made. Her evidence is useful only insofar as it relates to the alleged confession made by the appellant at his home when confronted by the

complainant's family. It is significant, however, that this was not confirmed by the complainant and none of the other witnesses present were called to confirm this fact. I agree with the submission of Ms *Moosa* that it was unfortunate that neither the doctor nor [L.....] were called by the learned magistrate. They both could have contributed meaningfully to the evidence, and the failure to call them in my view damages the State case.

- (h) Ms *Moosa* also submitted, correctly in my view, that when the second visit to the appellant was testified to by Avela (who in fact said that the complainant explained to her that she had been called by the appellant), the learned magistrate should have re-called the complainant in order to deal with this evidence.
- (i) There is also confirmation of part of the defence version inasmuch as [A.....] testified that after the incident she and the complainant had been at the river when they were approached by [N.....]. Although the complainant denies the actual content of the discussion between her and [N.....], to which [A.....] paid no real attention, the circumstances of that meeting are surprising, coming as it did, so shortly after the alleged rape. One would have expected Avela to have confronted [N.....] about his part in her abduction if the complainant had told [A.....] what was testified to in evidence by them. Clearly she did not. In addition the complainant did not confront [N.....] with the fact that he had assisted in helping her to be abducted by the appellant. It is also significant that although [N.....] testified that that meeting occurred the next day, this was not disputed by the prosecutor.

[25] In all the circumstances it would in my view be unsafe to rely upon the evidence of the complainant and [A.....] to convict the appellant of rape. Whilst there are clearly concerns about what a 37 year old man was doing taking a 13 year old girl around in his motor vehicle, the evidence of the rape cannot safely be relied upon. This is particularly because of the dreadful conduct of the complainant's relatives in assaulting her in order to ascertain the identity of the person with whom she had had sexual intercourse. There is nothing in the record to indicate whether or not her relatives were charged with assault, but it is clear from the evidence of the complainant and [A....] that they should have been. On a conspectus of the evidence led by the defence, the version given by the appellant is reasonably possibly true. That is not to suggest for one moment that the complainant did not have sexual intercourse with some person at some stage. It is simply not safe in my view to rely on the evidence in this case in order to found a conviction of the accused.

[26] I would accordingly make the following order :

1. The appeal against conviction succeeds
2. The conviction and sentence in the Court *a quo* are set aside.

Balton J: I agree.

It is so ordered.

Date of hearing: 26th April 2016

Date of judgment: 12th May 2016

Counsel for the Appellant: S Matthews

Counsel for the Respondent: Ms N Moosa

(instructed by the Director of Public Prosecutions