

CA NO : 123/2002

IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)

In the matter between:

THUSO TLOTLENG

APPELLANT

and

THE STATE

RESPONDENT

CRIMINAL APPEAL

MMABATHO

LEEUEW J & PAKO AJ

FOR THE APPELLANT:
FOR THE RESPONDENT

:

R D HENDRICKS
A MOGOENG

DATE OF HEARING

:

21 FEBRUARY 2003

DATE OF JUDGMENT

:

27 MARCH 2003

J U D G M E N T

LEEUEW J:

1.The Appellant was convicted of Rape by the Regional Court Magistrate of

Mmabatho and sentenced to ten (10) years imprisonment. He appeals against conviction and sentence.

2.The appellant and the complainant are students of the University of North West. They both occupy separate rooms at a building provided by the University as a residence accommodating both male and female students “(Molopo Sun)”.

3.The appellant and the complainant are well-known to each other in that they are permanent residents of the Republic of Botswana and are neighbours at their home town. They were all the time in good terms prior to this incident.

4.The evidence led by the State was to the effect that on the date of this incident, the complainant was in her room, awaiting the arrival of her roommate who was not present. At about midnight, the appellant knocked at the door and the complainant allowed him to enter, being under the assumption that it was her roommate.

5.When the appellant entered the room, the complainant was preparing herself to sleep. On enquiring from the appellant about the purpose of his visit, he forcefully grabbed and threw her on to the bed; he overpowered her, and had sexual intercourse with her without her consent. She tried to scream but to no avail. After the sexual intercourse, she managed to push the appellant, grabbed a towel and covered herself therewith as she was half-naked and ran outside the room. Whilst crying she ran to other occupants of the same residence and made a report to them and to the security guard on duty. It is alleged by the complainant, that the appellant admitted having had sexual intercourse with her and even asked for forgiveness from her. This was denied by the appellant in the Court *a quo*.

6.The appellant’s defence was to the effect that the complainant falsely implicated him because he had previously declined to lend her money and also that she had

plotted with her friends to falsely implicate him.

7. Mr Hendricks, on behalf of the appellant, submitted in his written and oral arguments that there is no sufficient evidence to prove that sexual intercourse did take place because this aspect was not corroborated by the medical evidence tendered by the State. He further submitted that an adverse inference should be drawn against the State's case in favour of the appellant because of lack of such evidence.

8. This submission overlooks the fact that:

- (a) The appellant used a condom at the time he had carnal intercourse with the complainant;
- (b) that it was not the complainant's first sexual experience. The fact that she did not sustain visible genital injuries does not on its own exclude the fact that sexual intercourse has taken place. Compare S v N 1988 (3) SA 450 (AD) at 463 E - F.

9. The complainant's evidence was corroborated by witnesses, K Nkai and S Mabeo (the security officer) to the effect that immediately after she was attacked, she made a report to them about the rape; she was crying and had wrapped herself with a towel. That they immediately thereafter confronted the appellant who denied the rape but alleged that the complainant consented to sexual intercourse with him. I am not persuaded by the submission that the medical evidence would materially affect the outcome of the trial.

10. The Learned Magistrate in assessing the total evidence in the Court a quo took into account the following:

- (a) that as far as the sexual intercourse is concerned, the complainant is a single witness and did therefore consider her evidence with caution;
- (b) that immediately after the rape, the complainant reported to K Nkai and S Mabeo;
- (c) That the appellant admitted having had sexual intercourse with complainant although there is a contradiction between the State witnesses with regard to whether he admitted sexual intercourse with complainant's consent and also as to whether he asked for forgiveness;
- (d) he made a credibility finding with regard to the State witness and the appellant and found the appellant to be an unsatisfactory and dishonest witness who contradicted himself on material aspects. He rejected the appellant's version. On the other hand, he found the State witnesses to be credible and reliable.

11. This Court is reluctant to interfere with the Learned Magistrate's credibility findings. The appellant has failed to persuade this Court that the Learned Magistrate has misdirected himself in considering evidence.

12. With regard to sentence, the appellant has proved himself to be unreliable by admitting in mitigation of sentence, that he did in fact have sexual intercourse with the complainant albeit by consent. This sudden change of attitude is indicative of the incredibility of appellant's defence of a bare denial, which was an attempt on his part to mislead the Court. Such attitude is not indicative of one who is remorseful.

13. The fact that the appellant attacked the complainant in the privacy of her room is

in itself an aggravating circumstance.

14. The Learned Magistrate carefully considered the sentence and took into consideration all the factors affecting the appellant's personal circumstances, interests of society and retribution. I am satisfied that he exercised his discretion judicially, and that no irregularity was committed by him.

The appeal against conviction and sentence is dismissed.

M M LEEUW
JUDGE OF THE HIGH COURT

I agree.

O A PAKO
JUDGE OF THE HIGH COURT

APPELLANT'S ATTORNEYS : S M MOOKELETSI
RESPONDENT'S ATTORNEYS : STATE ATTORNEYS