IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: CA&R 77/15

In the matter between:

MKHULULI NGQAWANA Appellant

and

THE STATE Respondent

JUDGMENT

MBENENGE J:

[1] The appellant stood charged before the Regional Magistrate's Court, Motherwell, facing a charge of rape. The charge had been founded on the allegation that on or about 16 February 2013 and at or near Motherwell, Eastern Cape Regional Division, the appellant had unlawfully and intentionally committed an act of sexual penetration with L. D. (the complainant). Whilst admitting that he had had sexual intercourse with the complainant at the place and on the date mentioned in the charge sheet, the accused claimed that such intercourse had been consensual. At the conclusion of the trial, the appellant was found guilty as charged and thereupon sentenced to undergo 10 years imprisonment.

[2] The appeal, which is against the conviction only, is with the leave of this court, granted on petition.

[3] It is necessary to examine the testimony given during the trial in some detail.

[4] The complainant testified that on the night of 15 February 2013 (which turns out to have been a Friday) she had been at "*Toeks*" tavern, NU6, Motherwell in the company of one Z. On their arrival there they met K. and his friends. At that point the complainant and K. had been lovers.

[5] In the early hours of the 16 February 2013 (Saturday) the complainant and K. left the tavern and proceeded to Andile's house. They found no one in the house and entered the bedroom, where they had sex. Thereafter, K. exited the bedroom. In no time, subsequent to that, K.'s friends, Mjero (the appellant) and Andile entered the bedroom and found the complainant still lying on the bed. As the complainant was getting up, the appellant pushed her back. A struggle ensued between the appellant and the complainant. The appellant stretched the complainant's arms wide open whilst with one of his legs he pressed down the complainant's right thigh. The complainant was over- powered. The appellant had sex with her. All the while Andile was standing behind the door leading to the bedroom, laughing and blockading exit from and entry into the bedroom. The complainant said she screamed for help, also asking where her boyfriend was. All those endeavours were unavailing.

[6] After the appellant had finished having sex with the complainant he got off her. The complainant also got up and looked for her shoes and panty. She couldn't find her panty. After exiting the bedroom she saw some people, one of whom was K., in the lounge, even though it was dark. Upon exiting the house, she saw Andile and the appellant standing outside. Andile persuaded her not to leave at that time, but heedless of that she proceeded homeward.

[7] On arrival at her home the complainant went straight into her bedroom, and did not tell her mother what had befallen her. She remained home for the rest of that day, and told no one what had happened. She also did not share the experience with any other person, even on the following day – Sunday.

[8] Then came Monday. As the complainant was preparing to go to school, she received a call from Andile inviting her to come and fetch her panty. She proceeded there and on arrival Andile attended to her. The appellant was also there, asleep in the bedroom. When Andile brought to the appellant's attention the complainant's presence, the appellant said nothing but covered himself with blankets. She found her panty in the bathroom. Leaving Andile's place, the complainant decided to report the incident to her mother. On her way to her mother's place of work she sent a text message to Zikhona informing her about what had befallen her during the weekend. Zikhona advised her to report the incident. Upon arrival at her mother's place of work the complainant reported the matter to her mother. She said her mother became emotional and cried upon receiving the report. The matter was ultimately reported to the police. A statement of the incident was obtained from the complainant. Thereafter, she was referred to Dora Nginza Hospital for examination. She said she bore a blue mark on her upper arms which she claimed resulted from being grabbed by the appellant, and a blue mark on her thigh resulting from being pressed by the appellant with a knee against her thigh.

[9] The complainant further claimed that her nails were damaged during the struggle she had with the appellant during the incident. She terminated her love affair with Khaya because he had not shown care towards her and had been friend with the appellant in whose hands she had suffered.

[10] Asked by the court *a quo* why she did not report the incident on Saturday and Sunday, the complainant responded that she was in a state of shock.

[11] During cross examination it was put to the complainant that when the appellant entered the room wherein the complainant was, the appellant had requested to sleep on the bed and the complainant had responded by saying he must jump over her; she threw a blanket towards him; he asked to have sex with her, and she agreed. The complainant denied all this as being false.

[12] Asked why he did not inform his boyfriend that she had been raped, she said she was angry towards him because he had left her alone in the bedroom where the incident took place. She also did not tell K.'s friend of the incident because she no longer wanted to be anywhere near that house.

[13] It further emerged during cross examination that when the complainant had been to Andile's house to fetch her panty, there were other two ladies in the house. The complainant denied that during that visitation one of the ladies, said to be the appellant's girlfriend, slept with the appellant and that she became angry when she saw this and left. According to the complainant, the two ladies had been with Andile in the lounge.

[14] The complainant admitted having partaken of liquor, but denied having been drunk, adding that she was "*moderate"*. She explained an inconsistency contained in a sworn statement she deposed to wherein it is stated that when she got to Andile's house there were people sleeping in the living room, stating that she had made a mistake because she only saw persons in the house whilst exiting, after the rape.

[15] Zikhona also testified. She confirmed having been at the tavern with the complainant. She parted ways with her when the tavern closed, in the early hours of the following morning (Saturday). She met the complainant on the day following the incident (Sunday). She described the complainant as having been not her usual self, and laid back. She received a call from the complainant on the following day (Monday), reporting that "*Mkhululi overpowered her and laid on top of her*." According to Zikhona the complainant made no further report. She said the complainant had been drunk when they parted at the tavern.

[16] When being cross examined, Zikhona stated that she observed something strange with the complainant when she met her on the day following their attendance upon the tavern. She observed that the complainant's acrylic nails had been broken. The complainant reported that she had a squabble with K. and that her body was painful. The complainant did not show her any injuries besides pointing to the damaged acrylic nails.

[17] The appellant testified in pursuit of his defence. He was at the tavern on the night in question and so were the complainant, Zikhona, Andile and K.. In the early hours of the following day the tavern closed. He thereafter proceeded to Andile's home being in the company of Andile. He knew the complainant and Zikhona as they used to socialise and drink together. He also knew the complainant's boyfriend, "*Wanga*". They had been friends.

[18] Upon K.'s arrival at Andile's home, they knocked on the door, but nobody opened for them. They knocked on the window and K. opened the door for them. They entered the house carrying beer. They sat in the lounge and watched TV. K. returned to the bedroom.

[19] At some point, K. emerged from the bedroom. The appellant thereafter went into the bathroom to urinate. Whilst walking towards the bathroom, the appellant saw the complainant sitting on the bed in the bedroom. The bedroom door was ajar and the bedroom light on. The appellant thereupon joined the complainant in the bedroom. He undressed himself. The complainant had been sleeping on the one side of the bed. He asked her to shift. She refused saying he must jump over her, and he did. They had a chat, concerning events at the tavern. In the course of that the appellant asked why the complainant had left with K.. She blamed him for that saying he was the one who did not want to go with her, yet his problem had been that Masixole had refused to give him car keys.

[20] After the chat, the appellant and the complainant had sex. According to the appellant the complainant was lying on the bed, her legs open and arms wrapped around his neck. The sexual intercourse was consensual.

[21] When they had finished having sex, they (the appellant and the complainant) went out to have a smoke. Andile supplied them with matches, and joined the appellant and the complainant who were smoking. The appellant thereafter left Andile and the complainant chatting and got back inside the house. After half an hour Andile also got back into the house, upon accompanying the complainant homeward, albeit half way through.

[22] The appellant never met the complainant on Saturday and Sunday. Whilst the appellant, Andile and their friends were at the tavern, the appellant's cellphone which was then in the possession of Andile rang. Andile answered it. The complainant expressed desire to be supplied with a "*carry pack*" (6 bottles or cans of alcohol packed together).

[23] On Monday morning between 08h00 and 9h00), the complainant arrived at Andile's place and, according to the appellant, found him (the appellant) sleeping with his girlfriend, whilst Andile sat with his (Andile's) girlfriend in the lounge. On that

occasion the complainant conversed with Andile. She merely stood on the passage way infront of the bedroom where the appellant slept with his girl friend.

[24] The appellant denied that Andile had stood by, looking on during the occasion he (the appellant) had sex with the complainant. According to the appellant Andile had been in the lounge. He said the complainant never screamed when they had sex; there was no quarrel or push or struggle between them. K. was also in the lounge. The appellant told K. that he had had sex with the complainant. That did not attract any unfavourable reaction. The appellant maintained that he had consensual intercourse with the complainant. Under cross examination the appellant stated that he never had a love relationship with the complainant. They were merely used to socialising and flirting with each other. Asked why it was never put to the complainant when she was being cross examined that he flirted with the complainant, the appellant said his legal representative "*never came to that question*". When the question was repeated he said "*I see no reason why my attorney has to tell the complainant that.*" The appellant was taken to task regarding how probable it was for him to sleep with the complainant whilst her boyfriend was in the same house. He said whilst he and the complainant were in bed they had a conversation during which the complainant asked the whereabouts of K.. His response was that K. had been asleep. She then consented to having sex with him. Asked why, if they had a secret relationship, the complainant would falsely implicate him of raping her, the appellant surmised that being found sleeping with his girlfriend might have triggered the laying of the charge.

[25] Andile was called as a defence witness. He knew the complainant. Since primary school days they had been lovers. The relationship ended way back then. Whilst they were still in the tavern he had seen the complainant chat with the appellant as she did with the rest of the persons who had been at the tavern. Besides visiting another tavern, he eventually went home, being in the company of the appellant. On arrival there he knocked on the door, and K. opened for him. K. and the appellant sat in the lounge and drank liquor. At some stage the appellant got up and walked towards the bathroom. The appellant did not resurface. Meanwhile, K. had fallen asleep. He also slept on the couch. The appellant woke him up asking for a cigarette. The appellant, the complainant and himself went out and had a smoke.

He accompanied the complainant halfway homeward. On his return he found K. asleep and the appellant sitting on the couch. Andile next interacted with the complainant when she called the appellant and at a stage when the appellant's cellphone was in his (Andile's) possession. On that occasion the complainant asked them to buy her a carry pack. They did not have money to buy that stuff. On Monday she attended upon Andile's home and found Andile sitting in the lounge with his girlfriend, whilst the appellant slept with his (the appellant's) girlfriend in the bedroom. She had been there to fetch her panty at the invitation of Andile.

[26] Andile further testified that after he (Andile) had been to accompany the complainant the appellant told him that he had had sex with the complainant. Even though he was initially taken aback at this revelation, it sprung to mind that whilst they were still at the tavern the complainant had been in the habit of chatting about sex or relationships.

[27] Andile had discussed with the appellant concerning how the case had unfolded, particularly the testimony given by Zikhona and the fact that the complainant had lied in court. He also admitted that the appellant had told him what the complainant had said in court.

[28] The court *a quo* found that the State had proved beyond reasonable doubt that the appellant had had sex with the complainant without her consent and was furthermore of the view, whilst alive to the fact the complainant's evidence (as a single witness) fell to be treated with caution, that the complainant's testimony was truthful and reliable, and lacked material contradictions and inherent improbabilities.

[29] In its rejection of the criticism levelled against the complainant for not immediately reporting the rape to her friend with whom they shared secrets and to her mother, the court *a quo* reasoned as follows:

> "…rape is quite a sensitive and humiliating occurrence and it is not unthinkable that the complainant was not ready to disclose the incident. Also due to the fear of what kind of reaction she could have expected from, her friend and her mother. It is quite common that rape victims seem to try to hide it and only disclose it later even years after the incident. She testified that she was afraid that her friend would have been judgmental."

[30] The court *a quo* also became satisfied that corroboration of the injuries the complainant had sustained could be found in the J88 medical report. The report

compiled by Dr Mhlaba on (18 February 2013) embodies the following clinical findings:

> "Right upper arm: Positive bruise on the medical aspect of the arm.
>
> Left thigh: Positive bruises on the medical lower aspect of the thigh.
>
> Left hand: She claims to have lost all her acrylic artificial nails from fighting off the perpetrator"

and concluded:

> "Positive signs of physical injury as evidence by bruises on the arm and thigh."

[31] The version of the appellant, on the other hand, was rejected as being false and highly improbable, in the following terms:

> "That brings the court to the evidence of the defence. The accused did not impress the court at all. At first he testified that he knew about the relationship between the complainant and K.. He denied that there was a relationship between him and the complainant, or that they had any previous discussions about a possible relationship, but a few breaths later he testified that they secretly chatted and flirted with each other. When he was confronted why it was not posed to the complainant, and whether the flirting gave him permission to have sexual intercourse with her, he testified that they kissed each other and also went to the beach together. Strangely enough, he also testified that K. was a problem and he waited for him to fall asleep because he would not have agreed that he could have sexual intercourse with the complainant. Then later he testified that he told K. that he had sexual intercourse with the complainant because he knew K. would not have been bothered. It is also highly improbable that this relationship, according to him, was a secret, but he goes around and told everybody about the intercourse. The accused was also not able to give an explanation why the complainant will now turn around and accuse him of rape. He indicated that she saw him on Monday with another girlfriend in bed. Then again, why will it bother the complainant if they did not have a relationship and she was in a relationship with K.."

[32] Much as the Magistrate seems to have had an appreciation of the applicable test if the conviction is to follow upon the evidence of a single witness, it remains to be seen whether she conducted a proper assessment of such evidence.

[33] The rape was reported two days after it had occurred in circumstances where the complainant had interacted with other persons prior thereto. The rule has always been that a rape complaint becomes admissible if it is made to a person to whom the

complainant would be expected to make a complaint "*without delay and at the earliest opportunity which under all circumstances could reasonably have been expected*." [1]

[34] Section 59 of the Criminal law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides that in criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.

[35] The report of a rape or any length of a delay in reporting the rape, however, remains part of the factors which must go into the scales when a determination whether an accused is guilty beyond reasonable doubt is being made.[2]

[36] I make no moment of the complainant's failure to report the rape to any one of the persons, including K., who were at Andile's place during the occurrence of the alleged rape and immediately after the rape had occurred. There had been drinking (of liquor) taking place there. It seems strange, however, that the complainant who claimed to have desperately called out for K. to come to her aid would, after the alleged rape, simply pass by K. and not utter a word about the mishap, unless of course K. had been in a drunken stupor.

[37] I now turn to deal with the complainant's interaction with Zikhona during the two days immediately succeeding the alleged rape incident.

[38] To begin with, only Zikhona testified in relation to the report of a rape incident made by the complainant to her. She interacted with the complainant on Saturday. They did not chat a lot on that occasion. The rape was not reported. The only report given was that of a "*squabble*" the complainant had had with K. resulting in her acrylic nails being damaged. When asked what the quarrel had been about she responded:

> "…it was just a squabble between the two of us, I only held K. with my hands and during that holding my nails broke"

[39] Even though the complainant and Zikhona discussed "*things [they] did the previous night*," not a word was said about the rape. Surely, in that context, it must

---

1 R *v Gannon* 1906 TS 114, per Innes CJ.

2 *Booysen v S* [2015] JOL 34385 (ECG) at para [55] per Hartle *et* Stretch JJ.

have been opportune stage for the complainant to recount the experience she had with the appellant, especially if, as she claimed, she had been raped.

[40] Not even on Sunday when the complainant and Zikhona, who are neighbours, was any rape report made. During a conversation Zikhona and the complainant had with one another, the complainant is on record as having complained about a painful body and, quite strangely, once again, not a word about the alleged rape. Yet, on her own showing, the injuries she bore had been sustained whilst she was being raped by the appellant.

[41] The only occasion the complainant is on record as having made a report implicating the appellant was during a telephonic conversation the complainant and Zikhona had on Monday (18 February 2013), after the complainant had been to Andile's place and was on her way to town to report the matter to her mother. She reported (to Zikhona) that "*Mkhululi overpowered her and laid on top of her*." Beyond this point the record is not clear as to precisely what the content of the discussion was between the complainant and Z. The recorded questions and answers seem to suggest that the complainant eventually reported that she was raped but furnished no details as to what happened in the house.[3]

[42] What must already become clear from the above is a contradiction or, mildly put, an inconsistency between the testimony of the complainant and that of Zikhona in relation to how the damage to the complainant's acrylic nails came about. According to the complainant the damage was caused by the appellant when he was raping her, which flies in the face of Zikhona's version namely, that the complainant reported to her that the damage had been caused during a squabble the complainant had with K., the complainant's boyfriend. The judgment is silent on this incongruity. That points to a failure on the part of the magistrate to properly evaluate the evidence of the complainant, and constitutes a misdirection.

[43] Zikhona's testimony of a report of the squabble between the complainant and K. on the night in question renders it probable that the complainant might have gotten

---

[3] The relevant portion of the record reads:

> "And she told you that she was raped by the accused, she did not tell you in detail what happen in the house. Is that correct because she was (indistinct) the phone?
> No, she could not tell me everything in details. Your worship."

the bruises recorded on the medical report, allegedly caused by the appellant, during the squabble. Indeed, the acrylic nails broke during the squabble, as testified to by Z.

[44] The record also reveals that there were other people in the house during the alleged rape. The complainant testified that when the appellant was raping her she screamed for help. There is no evidence supportive of the scream from possible independent witnesses, who, from a reading of the record, appear to have been warned to attend the trial. Andile said nothing about the scream. It is not impossible that the complainant never screamed during her encounter with the appellant.

[45] The fact that there was a report of rape made after the complainant had been to Andile's place to fetch her panty is not without significance. Firstly, there is merit to the appellant's suggestion that the report of a consensual sexual intercourse graduated to a rape complaint as soon as the complainant saw the appellant sleeping with another girl when she had gone to pick up her panty from Andile's place. Contrary to the magistrate's conclusion, the version of the appellant in this regard is reasonably and possibly true. It is reasonably and possibly true that the report was triggered by jealousy on the part of the complainant.

[46] In any event, courts have been cautioned to be careful to decide against an accused merely as punishment for untruthful evidence.[4]

[47] I am not satisfied that in this matter the evidence as a whole, including the evidence of the prosecution, with the defects it had, weighed against the exculpatory explanation of the appellant, established the appellant's guilt beyond reasonable doubt.[5]

[48] It is not enough for a court to pay lip service to the cautionary rule; it has to determine whether the evidence of the single witness was clear and satisfactory in every material respect[6] and whether such evidence amounts to proof beyond a reasonable doubt.[7] There are inconsistencies and gaps in the evidence before this

---

4 *Burger and Others v S* 2010 (2) SACR 1 (SACA); [2010] 3 All SA 394 (SCA).

5 *Dweba v S* [2004] 4 All SA 1 (SCA); see also *S v Steynberg* 1983 (3) SA 140 (A) and *S v Mtsweni* 1985 (1) SA 590 (A).

6 *S v Mokoena* 1932 OPD 79 at 80. Olawale v S [2010] 1 All SA 451 (SCA) at para [15].

7 *Olawale supra* at para [15].

court which point to different probabilities. It is probable that the appellant might have raped the complainant on the said day, but it has not been proven beyond a reasonable doubt that the appellant had sex with the complainant without her consent.

[49] In all these circumstances, had the court *a quo* evaluated the evidence properly, it would not have been satisfied that the State had proved its case beyond reasonable doubt.

[50] I would in the circumstances uphold the appeal, and set aside the conviction and sentence, which is the order that I hereby grant.

_____

S M MBENENGE

JUDGE OF THE HIGH COURT

I agree

_____

CTS COSSIE
ACTING JUDGE OF THE HIGH COURT

Counsel for the appellant	:	Mr P Daubermann
Instructed by	:	Peter Daubermann Attorneys 64 Third Avenue Newton Park PORT ELIZABETH
Counsel for the respondent	:	Mr D G Robinson
Instructed by	:	DPP'S Office

GRAHAMSTOWN

Date heard	:	09 March 2016
Date Delivered	:	11 March 2016