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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION – GRAHAMSTOWN

Case No: CA&R 262/2016

In the matter between:

LUNATHI FANELO **Appellant**

and

THE STATE **Respondent**

JUDGMENT

MALUSI J

[1] The appellant was arraigned before the regional court sitting in East London on a single count of rape read with the provisions of section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 *(the Act)*. He was convicted as charged and sentenced to 10 years imprisonment. Despite the clear prohibition of the suspension of a sentence in section 51(5)(a) of the Act 2 years imprisonment was

suspended for a period on certain conditions. The appeal against conviction and sentence is with the leave of the court *a quo.*

[2] It is common cause that the complainant and the appellant had engaged in sexual intercourse. The central issue for determination in the court a quo and in this appeal is whether or not the complainant consented to the intercourse.

[3] The evidence discloses that the complainant moved into Phase […], S. Park during the last week of September 2015. Her boyfriend built a shack for her in the backyard of the property of her landlord. Early in October 2015 the appellant visited the complainant in her shack under the pretext of seeking accommodation for his brother from her landlord.

[4] The complainant had reluctantly provided the appellant with her cellphone number on his second visit as the appellant indicated he is from the neighbourhood and they may assist each other in the future. He visited her on three further occasions always standing outside the shack including the day of the incident. During the following weeks they regularly communicated with each other by way of short message service *(sms)* or whatsapp message mostly at the instigation of the appellant.

[5] On 23 November 2015 at about midday the appellant sent a whatsapp message asking if the complainant was at home. The complainant enquired about the identity of the person sending the message. The appellant used a pseudonym Luleka, a Xhosa name for females, as he thought the complainant's boyfriend was replying to his message. The complainant stated she did not know or recall such a person. The appellant indicated he was coming to visit her.

[6] At this point there is a divergence in the two versions. According to the complainant upon arrival the appellant entered the shack and sat on the bed next to her as there were no chairs in the shack. The complainant was eating her lunch. She thereafter prepared coffee for herself and offered same to the appellant. He declined the offer. She said he may as well leave as she was preparing to go to work at 15h00 that afternoon and the appellant was seated uncomfortably close to her on the bed. This appeared to have angered him. He stood up and closed the top part of the stable door. He turned on the complainant aggressively pushing her onto the bed. He undressed the complainant and undressed himself. He raped the complainant vaginally. Thereafter he poured water in a basin and instructed the complainant to wash. He then left the shack as she was washing.

[7] The complainant's neighbour, N. called out for her. N. came around into the complainant's shack and received the first report of the rape from the complainant. She prevailed on the complainant to go to the local police station to lay a rape charge.

[8] According to the appellant on his arrival at the shack he stood at the doorway as usual. The complainant offered him a meal which he declined. Shortly thereafter she offered him a cup of coffee. He interpreted the last offer as an invitation to get into the shack and upon entry sat on the bed. Though he declined the coffee, the atmosphere soon got so convivial and playful to such an extent she asked him to lower his voice as her grandmother resided nearby.

[9] When the complainant stood up to heat water in a kettle, the appellant got off the bed and embraced her. Though she was coy, she did not object to his kiss. He placed her on the bed and closed the door. He undressed the tight pants she was wearing and likewise undressed himself without demur from her. He engaged in sexual intercourse with her without any objection from her. In the heat of passion he was startled to notice that tears had welled up in her eyes. He stopped intercourse

immediately and despite his questions about the cause of her emotion did not get any reply.

[10] The regional magistrate gave a judgment in which she properly set out the evidence tendered and the law applicable to the facts. Thereafter, she gave terse reasons for convicting the appellant. She stated that the evidence of the complainant was corroborated by N.. She found that the complainant made a favourable impression to the court. She accepted the complainant's evidence *in toto*. She found that the state had proved its case beyond reasonable doubt and convicted the appellant.

[11] In the notice of appeal the evidence tendered by the complainant was assailed as not satisfactory and not corroborated. It was contended there were material contradictions between her evidence in the court *a quo* and her statement to the police. The regional magistrate was criticized for not accepting the appellant's version as reasonably possibly true.

[12] A court of appeal's powers to interfere with the findings of fact by the trial court are circumscribed. It is trite that *'…in the absence of*

demonstrable and material misdirection by the trial court, its findings of fact were presumed to be correct, and would only be disregarded if the recorded evidence showed them to be clearly wrong.'[1] The conclusions of the trial court will be overturned only where the court of appeal is persuaded that they are incorrect.[2]

[13] The regional magistrate stated in her reasons that the complainant's evidence was *'corroborated'* by N.. This is not entirely correct. N. only corroborated that the complainant was crying at the time of her arrival at the latter's shack. The issue was not in dispute as the appellant testified he stopped the sexual intercourse due to tears in complainant's eyes. The rest of N.'s material evidence amounted to self-corroboration as she related what the complainant had told her. N. had not observed any interaction between the appellant and the complainant. Consequently, she is not in a position to corroborate the complainant in any material respect on the facts of this matter.

[14] The regional magistrate did not consider and evaluate the evidence of the appellant in her reasons for judgment. She concentrated solely on

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[1] *S v Hadebe & Others* 1997 (2) SACR 641 (SCA) at 645e-f
[2] *S v Ntsel*e 1998 (2) SACR 178 (SCA) 182d-h

the complainant's evidence apparently without regard to the appellant's evidence. Consequently, she did not reject the appellant's evidence as false because she simply disregarded it. This approach by the regional magistrate constitutes a misdirection.

[15] The reasoning by the regional magistrate is a material misdirection which allows the appeal court to disregard the court *a quo* findings. The proper approach in a case where there is a conflict of fact between the State's version and that of the accused is trite and provides:

"It would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the state witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the state witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the state and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt."[3]

[3] *S v Sigh* 1975 (1) SA 227 (N) at 228F-H

[16] The complainant's evidence is that the appellant appeared to be *'angry'* when he closed the door. She later stated that the appellant was *'aggressive'.* She was not prepared for the sexual intercourse and was not lubricated by the appellant in any way. During the sexual intercourse she was turned around by the appellant indicating he was vigorous with her. The overall impression created by the complainant was that the appellant was not gentle with her.

[17] The appellant paints a completely different picture. The atmosphere was convivial, the complainant was *'smiling'* and he was *'playing with her'.* The complainant even requested that they must lower their voices. When he embraced her, they kissed each other. He was gentle with the complainant and at first she was enjoying the sexual intercourse.

[18] In my view, the probabilities favour the appellant's version. The complainant suffered no injuries whatsoever despite the appellant being *'aggressive'.* I am aware that there may be many reasons for the lack of injuries besides the appellant being gentle with the complainant. This aspect was not explored at all by the State. It was necessary, in my view,

for medical evidence to have been led by the State to address this aspect. There was no damage to the complainant's clothes though she was wearing *'tight pants'.* Even on her own version, the complainant was neither threatened with violence nor physical force used to initiate the sexual intercourse. She is not restrained in any manner but does not shout for help. This is despite N.'s shack being a mere 5metres away and within earshot. By all accounts, the door to the shack is simply closed but not locked. Regardless of the obvious risk the appellant proceeds *'to rape'* her at midday. The prospect of a person walking in on *'the rape'* was ever present which made it highly unlikely a rapist would not lock the door. It appears to me the couple was consumed by passion and were oblivious of the risk. This fact viewed as part of the mosaic creates reasonable doubt when left unexplored as the State did in the court *a quo*.

[19] The recollection of the complainant regarding various aspects of the incident is a cause for serious concern which induces reasonable doubt. The complainant was confronted with her police statement and J88 whose contents were materially at variance with aspects of her evidence in court. The most significant of these contradictions relates to her informing the police and the doctor who later examined her that *'she tried to push him*

away but could not'. She candidly admitted that she was unable to recall *'other things'* that happened apparently due to her *'freezing'.*

[20] The complainant explained her freezing as being *'lost',* shock, not knowing what to do and not even thinking to cry. It appears from the complainant's evidence to be some form of paralysis. No medical evidence was adduced to explain the cause and *sequelae* of this state of paralysis. In my view, it was necessary to adduce medical evidence for the court to fully understand the *'freezing'.* A court must not just accept a mere say so regarding a medical condition without medical evidence to substantiate such a contention.

[20] The issue of a complainant in a rape case allegedly freezing was considered in *S v Zuma*[4]. In that matter the State led the evidence of a clinical psychologist who considered the complainant's background and history to contend that it was normal for her to freeze during the alleged rape, not to cry out but rather to submit. The court held that psychometric tests ought to have been done to find out more about the complainant's personality. The State needed to present evidence of a full medical

[4] 2006 (2) SACR 191 (GSJ)

enquiry regarding complainant's condition before a Court can conclude that a complainant did freeze. In the present matter no such evidence was presented in the court a quo to substantiate the complainant's evidence that she suffered from a *'freezing'* condition.

[21] When the evidence is viewed holistically it cannot be said that the appellant knew that the complainant did not consent to the sexual intercourse. At no stage did the complainant say *'no'* to sexual intercourse. On complainant's own version she was simply limp and did not actively participate. On the appellant's version the complainant initially actively participated though reluctantly, only to cry later. Nowhere on the evidence can it be inferred that the complainant by words or conduct refused consent to the sexual intercourse. In these circumstances the appellant's version is reasonably possibly true and cannot be rejected. This is so despite the obvious shortcomings in the appellant's evidence as pointed out by the state counsel.

[22] After a careful reading of the record and anxious consideration of the matter, I am of the view that the appellant must succeed on overturning the conviction. As such it is not necessary to consider the sentence.

[23] In the result the following order will issue:

223.1 The appeal is upheld;

23.2 The conviction of the appellant by the court *a quo* is set aside and replaced with the following:

"The accused is found not guilty and discharged."

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T MALUSI
Judge of the High Court

Beshe J: I agree and it is so ordered.

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N BESHE
Judge of the High Court

Counsel for the appellant, Mr Maseti instructed by Mzwai Mqanto Attorneys, c/o Mgangatho Attorneys, 119 High Street, Grahamstown.

Counsel for the respondent, Mr Els instructed by Director of Public Prosecution, Grahamstown.

Date Heard: 7 March 2018

Date Delivered: 10 April 2018