IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R115/2018
DATE HEARD: 10/10/2018
DATE DELIVERED: 12/10/2018

In the matter between

ANELE LENNOX MALI **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] The appellant was convicted in the Regional Court of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and sentenced to five years' imprisonment in terms of s 276 (1) (i) of the Criminal Procedure Act 51 of 1977. This appeal lies against the conviction only, with the leave of the trial court. More will be said about the sentence later in this judgment.

[2] The appellant pleaded not guilty to the charge and in his plea explanation said that he had been called by the complainant's boyfriend, one K, to assist with the repair of a vehicle. He obliged, and he, K and the complainant consumed alcohol together. While K was outside working on the vehicle, the appellant was seated on a

couch and the complainant was seated on another couch. The appellant went to the complainant and shook her by the shoulder and asked her to call someone known as Chocolate so that Chocolate could buy more beers for them. At this, the complainant started screaming, accusing the appellant of raping her. The appellant denied having intercourse with the complainant.

[3] The complainant, Ms TM, was 37 years old at the time of testifying. She had a boyfriend with whom she had a sexual relationship and was the mother of one child. She testified that on 18 January 2017 she, the appellant, K S, S M and B M, were together at K's home (I shall refer to K, S and B by their first names, as they were referred to during the trial). The appellant was a neighbour whom she had known for many years, and there had never been problems between them. K is a relative and a neighbour of the complainant. They all consumed alcohol there and eventually the complainant, as she expressed it, "passed out" on the couch. She acknowledged that she was drunk. At this time K was outside.

[4] The complainant could not say how long she had been asleep when she sensed that something was happening to her and opened her eyes. The appellant was on top of her, having sexual intercourse with her, without a condom. Her tights and panties were pulled down to her knees. She felt pain, and the doctor who examined her later told her that there were tears caused by the intercourse. There was no one else in the house at the time. She pushed the appellant away and asked him why he was so dirty. The appellant pulled up his trousers and inserted his penis in his trousers. He placed a chair in front of her, sat down, and said he was sorry. He offered her R20.00 and told her to buy chocolate. The complainant swore at him and asked him if he had ever seen her eating chocolate, at which he put the R20.00 back in his pocket. The complainant then telephoned K. She told K that she could

not tell him what had happened over the phone. K arrived and she told him what had happened. The appellant denied the accusation.

[5] Khaya then requested S to examine the complainant physically. After she had done so, Khaya and S pleaded with the complainant to forgive the appellant and not to lay a charge. They did not want to believe that she had been raped but one of them said that she would not lie about something like this. The complainant was very angry with the appellant and said that he should leave because she did not want to see him there. He refused to leave and said he had done nothing wrong. The complainant then called the police.

[6] The complainant denied that the appellant had shaken her by the shoulder and asked her to call Chocolate to buy beers. She said that there were still some beers in the house. It was put to her in cross-examination that the appellant wanted her to call Chocolate because he is not on speaking terms with Chocolate. She said she was not aware of this.

[7] K testified and corroborated the complainant's evidence of the persons who were present at his home drinking that day. K was working outside on the car and went in and out of the house. At a certain stage he left to borrow a spanner and was called by the complainant who asked him to hurry home and said that she could not tell him something over the phone. He went home and found the complainant crying. She was sober. She told him she had found the appellant on top of her and showed him her dress and tights and how her panties were rolled over. The appellant entered and said that the complainant was lying. K could tell from his speech that the appellant was "tipsy". K called S to come and when she arrived the complainant said that the appellant had raped her. She said that she could feel that something was happening and when she opened her eyes she saw it was the appellant on top

of her. She pushed him and he pulled up his trousers. She said that the appellant placed a chair next to the couch and sat down and handed her R20.00, telling her to buy chocolate. She told K that even if she disliked a person she would not lie and accuse someone of rape because rape was a serious matter.

[8] K asked S to go into the bedroom with the complainant and K and the appellant went into the bathroom where the appellant undressed. K leaned forward and sniffed but said that he does not have a good sense of smell. He told the complainant that there was a smell but that he could not identify it. The appellant said that he had not washed for three days.

[9] The police were called. Before they arrived K told the complainant to talk the matter over. B arrived and pleaded with the complainant, saying that he was not used to the court. The complainant said what infuriated her was that the appellant had apologised to her while K was outside. She then said that all she asked was that the appellant should remove himself from her presence because while he remained in her presence she was reminded of what he had done. K asked the appellant to leave but he refused, saying he had not done anything. The police arrived and the appellant told them that he had not done anything to the complainant. The police asked the appellant if he understood what it was alleged he had done and he said he had not done anything.

[10] The police left with the appellant, K and B in the back of the police van, and the complainant in front with the police. The appellant asked Bongani to speak to the complainant and said that she would listen to Bongani and drop the case.

[11] A J88 form, completed by the doctor who examined the complainant on 18 January 2017, was admitted as an exhibit. The doctor's conclusion was that there were no visual signs of penetration. Swabs were taken for DNA testing.

[12] A DNA biology report relating to the swabs was also admitted as an exhibit. It reflected that samples were subjected to DNA analysis and that no DNA was obtained from swabs taken from the labia minora and majora.

[13] The appellant testified and confirmed the evidence that he and the others were drinking together at K's house. He and the complainant were under the influence of alcohol. He was on one couch and the complainant was on the other one. He noticed that the beers were finished. It was some distance to go to the place where beers are sold, Chocolate was closer, and Chocolate had previously been sent to buy cigarettes. The appellant therefore woke the complainant so that she could call Chocolate to buy beers. He patted her on the shoulder, telling her to go and call Chocolate. The complainant, who was dressed, was surprised and asked what he was doing on top of her, did he want to rape her? He told her that she was mad and to call Chocolate. She ignored him and said that he wanted to rape her.

[14] Prior to this incident there were no problems between him and the complainant. When asked by his attorney why she would falsely accuse him of rape he said it was puzzling because at times when he was at K's house the complainant would chase him away. He did not know why she would do so but when she was under the influence of alcohol she would only want to be with Khaya at his house. She would not chase away people who were not drinking there. On the day of the incident S and B were not drinking. In spite of her behaviour however, the appellant did not have a grudge against the complainant for her behaviour. As far as he was concerned he was on good terms with the complainant but he did not know what her attitude was.

[15] When asked in cross-examination about the relationship between the complainant and K, he said that K had told him that the complainant was his girlfriend and that they were sleeping together.

[16] The magistrate found the complainant to be an impressive witness. The magistrate expressed the need for caution where the State relies on the evidence of a single witness. She found that the complainant's evidence was clear and satisfactory in all material respects. She said that the complainant's evidence was clear and straightforward and that she was not shaken when cross-examined. She found that the complainant was consistent, given the account she had given to K of the incident. On the other hand, the magistrate found the appellant to be a poor witness and that his evidence contained a number of improbabilities. The magistrate accepted the evidence of the complainant and rejected that of the appellant as not reasonably possibly true.

[17] It is trite that an appellate court will not readily interfere with the trial court's factual and credibility findings. In *Maphaha v The State* [2018] ZASCA 08 at paragraph [17] Plasket AJA said the following (footnote omitted):

> "The test for permissible interference by a court of appeal with a trial court's factual findings imposes a high threshold. In *S v Francis* Smalberger JA explained it as follows:
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> > 'This court's powers to interfere on appeal with the findings of fact of a trial Court are limited. Accused No 5's complaint is that the trial Court failed to evaluate D's evidence properly. It is not suggested that the Court misdirected itself in any respect. In the absence of any misdirection the trial Court's conclusion, including its acceptance of D's evidence, is presumed to be correct. In order to succeed on appeal accused No 5 must therefore convince us on adequate grounds that the trial Court was wrong in accepting D's evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial Court's evaluation of oral testimony.'"

[18] In the present matter there is nothing apparent from the record warranting interference with the magistrate's factual and credibility findings. Her assessment of the complainant's credibility was fully borne out by the record. A reading of the evidence of the complainant reveals a frank and fair witness who was not vindictive and who admitted she was drunk when she fell asleep. The magistrate was correct in finding that the complainant was consistent, given her report to K. K's evidence that the complainant was sober when she made her report was not challenged. The magistrate did misdirect herself in one aspect. She regarded K's evidence that there was a smell of sorts emanating from the appellant as a factor proving that sexual intercourse had taken place. This aspect of K's evidence had no value whatsoever. This misdirection however had no impact on the correctness of the magistrate's findings in all other respects.

[19] It was submitted that the complainant's evidence that intercourse took place was not supported by the doctor's conclusion in the J88 form and the DNA results. In my view these factors do not detract from the credibility of the complainant. She was a sexually active 37 year old woman and the fact that there were no visual signs of penetration is unsurprising. The fact that no DNA was detected on the swabs is of no significance.

[20] The appellant's version was indeed improbable. It was improbable that he would choose to wake a sleeping person to call someone to buy beers, when he was awake and could have done so. It is highly improbable that if he had merely shaken the complainant by the shoulder, or patted her on the shoulder, she would have accused him of being on top of her wanting to rape her. Her evidence that there were no problems in her relationship with the appellant was not challenged. The appellant made a weak attempt to suggest that the complainant was antagonistic

towards him when she was drunk and they were consuming alcohol at Khaya's home. This accusation was never put to the complainant and was at odds with the appellant's own evidence that there were no problems in their relationship. It was clearly an afterthought. Further, seemingly an extension of this afterthought, his evidence that K had told him that the complainant was his girlfriend was never put to the complainant or to K. The magistrate was correct in rejecting the appellant's evidence as not reasonably possibly true.

[21] The appeal therefore cannot succeed.

Sentence

[22] The minimum prescribed sentence for rape in the circumstances of this case is 10 years' imprisonment (s 51(2)(b) of the Criminal Law Amendment Act 105 of 1997 read with Part III of Schedule 2). Section 276 (3) of the Criminal Procedure Act 51 of 1977 provides:

> "(3) Notwithstanding anything to the contrary in any law contained, other than the Criminal Law Amendment Act, 1997 (Act 105 of 1997), the provisions of subsection (1) shall not be construed as prohibiting the court-
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> (a) from imposing imprisonment together with correctional supervision;
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> or
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> (b) from imposing the punishment referred to in subsection (1) (h) or (i) in respect of any offence, whether under the common law or a statutory provision, irrespective of whether the law in question provides for such or any other punishment: Provided that any punishment contemplated in this paragraph may not be imposed in any case where the court is obliged to impose a sentence contemplated in section 51 (1) or (2), read with section 52, of the Criminal Law Amendment Act, 1997."

[23] The sentence imposed was therefore incompetent. In the exercise of this court's inherent review jurisdiction I am of the view that the sentence should be set

aside and the matter remitted to the trial court to impose sentence afresh. Counsel were in agreement with this proposal.

[24] The following order will issue:

[24.1] The appeal against conviction is dismissed.

[24.2] The sentence of 5 years' imprisonment imposed in terms of s 276 (1) (i) of the Criminal Procedure Act 51 of 1977 is set aside.

[24.3] The matter is remitted to the court *a quo* to impose sentence afresh.

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J M ROBERSON
JUDGE OF THE HIGH COURT

BROOKS J:-

I agree

_____
RWN BROOKS
JUDGE OF THE HIGH COURT

Appearances:

For the Appellant: Ms N M Mazibukwana, Legal Aid South Africa, Grahamstown

For the Respondent: Adv L Sinclair, Director of Public Prosecutions, Grahamstown