REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: A164/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

MNGQIBISA MLUNGISI Appellant

and

THE STATE Respondent

J U D G M E N T

MASHILE, J:

[1] This is an appeal from the Regional Court of Gauteng held at Soweto. The Appellant was a twenty-eight year old man charged with kidnapping, rape of a fourteen year old girl whom he had abducted and the contravention of Section 120(6)(b) of the Firearms Control Act 60 of 2000 - Pointing of anything which is likely to lead a person to believe that it is a firearm.

[2] The Appellant who was legally represented throughout the proceedings pleaded not guilty to all the three counts. On 28 August 2009 the Appellant was found guilty, convicted and sentenced to an effective seventeen years imprisonment on kidnapping and rape. He was however acquitted on pointing of anything which is likely to lead a person to believe that it is a firearm.

[3] Leave to appeal was sought and granted against his conviction alone. It is against the conviction that he is appealing now.

[4] The three charges emanate from the facts that I will proceed to describe hereinafter. The Appellant and the Complainant know each other very well consequently there is no issue about the identity of the Appellant.

[5] On 8 April 2006 at approximately noon the Complainant was in the company of one T, a friend of hers, when she was approached by the Appellant. The latter lifted his shirt to display to her what appeared to her to be a firearm and demanded that she accompany him. T ran away and the two walked along side each other.

[6] Upon arrival at the Appellant's friend, Mlungisi, they passed some members of the public including Mlungisi at the gate. She was then forced to go into a certain shack apparently belonging to Mlungisi. Once they were inside the shack the Appellant took out what the Complainant believed was his firearm and placed it on the bed. From that moment began her ordeal when the Appellant forcefully had sexual intercourse with her without her permission

[7] Later in the day the Appellant went out to buy liquor for himself. The Complainant took this opportunity to escape. Through a window she jumped to the immediate neighbour where she encountered a male person. She told him that Mlungisi next door had kept her against her will and that she did not want to sleep there.

[8] The male person advised her to jump to the next property occupied by a couple that lived in a garage, which she did. The couple hid her there for quite a while checking from time to time whether the Appellant was in the street or not. When she was told that he was not, she left for her home where she immediately related the horrendous occurrence to her mother.

[9] Dr Bomvana medically examined her the following day, 9 April 2006, at 9h50. According to the J88 that he completed subsequent to his examination, he discovered that there was indeed some proof of forced penetration into her vagina. She informed the doctor that the Appellant has had sexual

intercourse with her against her will. The doctor recorded the time of the occurrence as midnight.

[10] The mother of the Complainant took the stand and largely corroborated the evidence of her daughter except in one or two respects. The mother said that the Complainant told her that the Appellant grabbed and dragged her into the shack yet her evidence to court is that she walked alongside the Appellant albeit of course against her will. The Complainant also testified that she was forced to go into the shack.

[11] At the time when the trial took place unfortunately Dr Bomvana had passed on consequently Dr Ilunga took the stand. He testified in accordance with what the deceased doctor Bomvana recorded on the J88. The evidence of the doctor therefore confirmed that there was forced entry to the Complainant's vagina.

[12] The Appellant testified on his own behalf. He said that he saw the Complainant being in the company of T on the day and time alleged. He called her and enquired about his friend, V, whom is also known to the Complainant.

[13] The Complainant did not know where Vusi was but then went on to request if the Appellant could give her some money. The Appellant did not have such money but invited her to escort him to another friend of his, A, where he would obtain money to give to her.

[14] The two got to Andile's place but only to discover that he was not home. According to the Appellant the two went their separate ways thereafter. In short therefore his evidence is that he did not have any sexual intercourse with her whether with or without her consent.

[15] The court is to determine whether or not the Appellant had sexual intercourse with the Complainant against her will.

[16] It is common cause that the Appellant and the Complainant know each other very well, they saw each other on 8 April 2006, they spoke and walked together.

[17] The evidence of the Complainant in so far as the act of rape is concerned is indubitably that of a single witness. It is trite that the evidence of a single witness especially of a child should be approached with great circumspection. Section 208 of the Criminal Procedure Act 51 of 1977 provides that a court may convict a person on the proviso that it is satisfied that the evidence of the single witness is reliable and satisfactory in material respects.

[18] When convicting the Appellant the court *a quo* was swayed that the evidence of the Complainant was reliable and satisfactory in material respects notwithstanding that she was a single witness.

[19] In the case of *R v Mokoena* 1932 OPD 79 at 80, which has been followed many times and affirmed in the Appellate Division (see *S v French-Beytagh* 1972 (3) SA 430 (A) at 446A) it was said that:

> "*The uncorroborated evidence of a single competent and credible witness...should only be relied upon where the evidence of the single witness is clear and satisfactory in every respect*."

See also *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G.

[20] The magistrate was alive to the fact that the evidence of the Complainant was to be approached with some degree of vigilance. The following factors are very pertinent:

20.1 The Complainant knows the Appellant very well;

20.2 No one compelled or persuaded her to implicate the Appellant;

20.3 She used the first reasonable opportunity to report the incident.

[21] The question of identity cannot feature since both parties know each other very well. The Complainant had a choice whether to report this to her mother or not. She voluntarily told her mother that the Appellant kidnapped her, took her to Mlungisi's shack where he had a penetrable sexual intercourse with her against her will.

[22] The Appellant holds the view that the Complainant's failure to report the incident to Mlungisi's immediate neighbour and the couple that lived in the garage whom she claims to have known should have been regarded adversely against her by the magistrate. The point is that the Complainant was 14 years old and therefore should be judged in accordance with a thinking standard of a person of that age.

[23] She states that she did not want to tell the male person about the rape in case he would tell Mlungisi. Her failure to report to the couple in the garage is also understandable and can be expected of a 14 year old child because rape is disconcerting and embarrassing, one that a person does not readily share with any member of the public. This does not only happen with children but also with women who are of age.

[24] Thus it is perfectly logical why her mother under the circumstances became the first person to whom she confided. Moreover, she did this on the very same day. The criticism would conceivably be justified if she only did so a day or two after the incident.

[25] It is also apparent from the J88 that she also informed Dr Bomvana that she was raped by the Appellant and the doctor recorded it as such. There is therefore consistency in what she has reported. The criticism in my opinion is rather gratuitous.

[26] The respondent also points out that according to the evidence of the mother of the Complainant, the latter reported to her that she was '*grabbed and dragged into a shack*' whereas she testified that the Appellant took her against her will and they walked side by side until they reached Mlungisi's shack where she was forced into the shack.

[27] The Complainant conceded that her choice of words could have been wrong. In my opinion her concession should take care of that criticism. The point is that the Complainant herself testified that she was forced to do what she did. Besides the Appellant himself agrees that he was in the company of the complainant on that day.

[28] I do not think it is fair to attribute the discrepancies in the time of the occurrence of the rape to the Complainant. It is Dr Bomvana who wrote that the Complainant was raped at midnight but she has throughout been unswerving that she was kidnapped at midday and that the rape occurred between that time and 18h00.

[29] It is relevant to add here that it is trite that it is not necessary for the State to prove its case beyond all doubt. The case of *S v Van As* 1991 (2) SACR 74 (W) finds application here.

[30] I regard the reference to midnight as a mistake by Dr Bomvana or even the Complainant herself. What is more is that one can easily confuse midnight and midday. The Appellant corroborates the Complainant's evidence that he

met her during the day and her mother too says that she arrived home at approximately 18h00. The rape could not therefore have occurred at midnight.

[31] In evaluating the evidence presented, the Court must not decide the matter in a piece meal fashion but all the evidence presented must be taken into account. See in this regard, *S v Radebe* 1991 (2) SACR 166 (T) and *S v Van Der Meyden* 1999 (1) SACR 447 (W) at 449j-450b.

[32] The evidence of the Complainant viewed in its entirety is reasonably possibly true whereas one cannot say the same with that of the Appellant. The Appellant's evidence is simply that he knows nothing about the rape. This is not satisfactory at all. The question is why would a 14 year old falsely accuse a person that she knows, one whose uncle has an intimate relationship with her mother and one who is far older than her for rape.

[33] While the evidence of the Complainant is satisfactory for purposes of the conviction of the Appellant one cannot but point out that the Respondent has in many respects failed to discharge its duties. It failed completely to secure the evidence of T albeit that the evidence is that T would have been an unwilling and probably also unco-operative witness because she is a drinking friend of someone who knows the Appellant.

[34] The evidence of the first person who came into contact with the Complainant and the couple in the garage would have been extremely valuable. The Respondent has furnished no reasons why the attendance of these witnesses was not secured by way of a subpoena.

[35] That said, however, the evidence of the Complainant and the other witnesses viewed in its totality remains more probable than that of the Appellant. In the result the respondent has successfully managed to discharge its onus beyond reasonable doubts and the appeal cannot succeed. Accordingly, the following order is made:

1. The appeal is dismissed.
2. The judgment on conviction of the court a quo is confirmed

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B MASHILE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree

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SA THOBANE
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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