NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: A1015/2009

DATE OF APPEAL: 14 MARCH 2012

DATE:13/06/2012

IN THE MATTER BETWEEN:

ROBERT SHAKA MTHETHWA APPELLANT

AND

THE STATE RESPONDENT

JUDGMENT

A A LOUW. J

[1] The appellant was the second accused in the court a quo namely Piet Retief Regional Court. According to the charge sheet he is 19 years of age. The charges were that the accused on 20 September 2008 at Kwangema/Dirkiesdorp kidnapped (charge 1) and raped (charge 2) N N, a fifteen (15) year old female. I may immediately mention that although the

complainant is indicated in the charge sheet as fifteen (15) years, that according to her birth certificate which was an exhibit, she was in fact only fourteen (14) years old.

[2] Accused 1 was discharged in terms of section 174 at the close of the State case. The appellant was found guilty on both charges. The magistrate took both convictions together for purposes of sentence and sentenced the appellant to ten (10) years' imprisonment.

[3] With leave of the trial court this appeal is against the convictions and the sentence.

[4] The complainant's evidence was that on the night in question approximately 21:30 she was at home watching TV with other family members. The first accused entered and asked her to go outside with him. She thought that he was going to take her to his house so that they could listen to CD's. Outside she found the appellant who grabbed her and started pulling her saying that they should go to his home. According to her he pulled her the whole way to his home which is about 700-800 meters away, whilst at the same time beating her with open hands, fists and a white stick he had with him. This was along the gravel road running through the area.

[5] Arriving at his house, the appellant took her into his bedroom where he assaulted her further. He forced her onto the bed. At that stage they were both still dressed. He lifted her skirt and pulled off her panty. He then had sex with her against her will. She first testified that he penetrated her anus. From further evidence it is not clear whether the penetration was anal or vaginal but for purposes of charge 2 that is irrelevant. In any event the appellant admits sexual intercourse but pleads consent.

[6] The complainant spent the night there. Early the next morning the appellant took the complainant home. It is common cause that at some distance her father saw them coming and wanted to assault them. They both ran away. The father, Mr Ngema, who was described by the court as an impressive witness said that he was outside very early that morning feeding the chickens when he saw them coming along. He was clearly angry because the complainant had no permission to spend the night away from home. He forthrightly states that he wanted to give the complainant a hiding. She saw that and therefore she ran away. When he eventually found her he saw that she had already been assaulted and therefore he did not give her a hiding. Her face was swollen and she had been assaulted all over her body ("orals aan haar lyf was sy geslaan"). Most importantly, she had a tooth missing.

[7] I share the court's view that Mr Ngema is an impressive witness. He candidly admits that he would have assaulted the complainant, had she not been assaulted already and that he also gave chase when the appellant ran away. The appellant jumped over a fence into a neighbour's property and got away. According to the accused Mr Ngema also had a 'knopkierrie'.

[8] The niece of the complainant gave evidence on one aspect only. The relevance of her evidence is that she was watching TV with the complainant but the time was about 17:30, not 21:30, when the first accused together with Bongani Ngema came in and asked the complainant to accompany them. After she had gone out with them, Bongani came back and informed them that complainant left with the first accused and the appellant. In her evidence she says that the complainant left with "Shaka-hulle".

[9] The last state witness was a policeman, constable Nkosi. He gave evidence only on a

witness statement which the appellant allegedly made. During his evidence Mr Robbertse, who defended both accused, stood up and informed the court that the voluntariness of the statement is not disputed. According to the evidence presented, the only relevance of the statement would have been that the appellant in that statement allegedly denied that he had had sex with the complainant. This is of course directly contrary to the defence presented by the appellant at the trial.

[10] However, this statement was never admitted in evidence. Mr Robbertse put it to constable Nkosi that the statement was not taken down correctly because the appellant had in fact admitted intercourse to constable Nkosi.

[11] Once the correctness of the statement was in dispute a trial within a trial had to be held. The voluntariness of a statement is only one aspect that has to be satisfied for the admission of an extra-curial statement. The State also has to satisfy the court that the statement was correctly taken down with evidence relating to the language in which the statement was made, whether there was any translation in writing the statement down, whether it was read back to the appellant, and if so if that was again a translation and whether an interpreter was used etc. The position was put as follows in S v Tshabalala 1999 (1) SACR 163 (T) where the court remarked as follows:

"Mef ander woorde jy kan nie die verklaring in kruisondervraging gebruik tensy dit vas staan dat die getuie wel daardie verklaring gemaak het nie. Soos ek netnou verwys het na die getuienis waar die getuie Mhlangu ondervra is in hierdie saak oor sy vorige verklaring, kan daar nie sommer met die deur in die huis geval word aan die hand van In verklaring in die dossier en aan die getuie gestel word, maar jy het so gese nie, daar moet eers gevra word: 'het jy dit gese, is dit jou verklaring, is dit jou handtekening?' En as hy dit erken en dit is

teenstrydig met wat hy nou se in die hot le dit 'n basis vir kruisondervraging." (at 167f-h.)

[12] The State conceded the above, namely that the police statement is inadmissible evidence. No reliance can therefore be placed on this statement as the Magistrate did in his judgment.

[13] The appellant's version was that he and the complainant had a love relationship since 2006. She informed him that she was sixteen (16) years old. That they at some stage had a relationship is common cause also from the complainant's evidence. There is no evidence that at any stage this was a sexual relationship. The accused's version was that the complainant willingly accompanied him to his home. On arrival at his home his mother and brothers Robert and Andries were also there.

[14] During the course of the evening he received a telephone call from a Mr. Nyembe, who is the complainant's neighbour, and who informed the appellant that he had to "Voetsek" as the complainant is his girlfriend and that she was with him the previous evening. He continued to testify that that made him very angry and therefore he assaulted the complainant by hitting and kicking her. At that stage his older brother Sapagha Mnishwa came into the room and reprimanded the appellant. He therefore stopped assaulting her. He gave her a sponge mattress to sleep on. He got onto the bed to sleep. The complainant kept on crying and protested that the incident with Nyembe on the previous evening was against her will.

[15] He said that he felt sorry for her and took her into the bed to comfort her. She in fact requested intercourse and he said that at that stage he would have done everything to please her as he regretted that he had assaulted her.

[16] The next morning when he wanted to take her home she was reluctant. She said that he had to accompany her to within view of her parent's house so that her parents could see them and realise that they had a relationship. When he saw the complainant's father with a "knopkierrie" he ran away.

[17] Appellant further testified that after the incident the complainant's friend M brought him a letter. Although the letter was not formally granted an exhibit number in the record, it is common cause that the handwritten letter in the court file is the letter in question. There is also an official translation by a sworn interpreter of this court. The letter reads as follows:

TRANSLATION
How are you? I'm fine but I'm always heart-broken about what has happened. Shak, I think we should take it easy for a while because our parents are embroiled on our affairs.

Please be patient with me, because if I can break up with you, it is obvious that I will never find true love like I found in you. You know that what happened is not your fault and I don't know what to say.

Good bye - give your reply to M

I wish you sweet dreams."

[18] When this letter was put to the complainant in cross-examination, she denied that she had any knowledge of the letter.

[19] On behalf of the appellant the complainant's friend M was then called. Her evidence was that during 2008 she knew that the complainant and the appellant had a relationship. She remembers very well when the letter was written. They were at school together and in class when the complainant asked to borrow M's pen. She then proceeded to write the letter to the appellant whilst M was present.
She said to M that she wanted to write the letter to apologize to the appellant about what had happened. The complainant also asked her to deliver the letter to the appellant, which she in fact did.

[20] In evaluating the evidence it is firstly of importance to note that the Magistrate put great reliance on the appellant's alleged warning statement to the police. In the judgment the policeman is described as a key witness. In the same vein the court continues to say that this evidence was fatal to the version of the appellant. Once this evidence is eliminated, as it has to be done, this court must come to its own finding on the admissible evidence.

[21] The judgment a quo did not refer to the complainant's letter at all. The evidence on behalf of the defence about this letter has to be accepted. There is no basis to reject the appellant's evidence in this regard and especially no reason at all to not accept M's evidence.

[22] The acceptance of this evidence leads to the inevitable conclusion that the complainant was lying when she denied any knowledge of this letter. There is no question that she could have been mistaken about whether she had written that letter or not - she quite clearly lied under oath. This fact alone means that she is not a reliable single witness as required by the long list of authorities pronouncing on the effect of section 208 of the Criminal Procedure Act.

This is, however, not the only aspect. During argument the State quite properly conceded that the complainant must also have falsely implicated accused no 1 in the alleged kidnapping. The complaint that she was kidnapped also by accused 1 could only have come from the complainant. Accused no 1 was totally innocently drawn into this case. Under cross-examination (record page 25) she said that Themba, that is accused no 1, did nothing. The following passage then follows:
"Nou waarom het jy vir die Polisie gese Themba het gehelp om jou te trek ... om jou te gryp en jou te trek? - Miskien het ek dit gese, maar ek is nie seker daarvan nie."

[23] A third criticism of the complainant's evidence is the time she testified that they left her home namely 21:30. Her niece testified that it was approximately 17:30 whilst the accused said the time was 18:00. The time difference between these versions is so remarkable that it cannot be said that the complainant was merely mistaken. Thus, on the complainant's version the kidnapping occurred at night, whilst on the version of her niece and the accused it was still daylight.

[24] As no reliance can be placed on the evidence of the complainant, it means that any finding of guilty can only be based on the following: the evidence of her father, her niece, M and the objective evidence. The objective evidence includes the nature and extent of her injuries (see the J88, exhibit "C") and the letter she wrote to the appellant.
Against this evidence the evidence of the appellant has to be evaluated.

Charge 1: Kidnapping
[25] As it has now been established that this occurred during the day and not at night, it makes the version of the complainant that she was pulled along a public street for a distance

of up to 800 metres whilst continuously being assaulted not only with open hands, fists, but also with a stick, highly improbable. Certainly members of the public would have intervened in seeing this young man assaulting the girl continuously in this manner. Her evidence was that she was beaten all the way to the appellant's home. If that is the case she must have arrived at appellant's home in an injured state. If that had been the case then surely the accused's mother and brother who saw her on arrival would have noticed that. On the other hand the probabilities favour the version of the appellant as it is not in dispute that they were involved in a relationship. The contents of the letter also lend strong support for a finding that she went with him willingly. In any event, there is no reason to find that the appellant's version is not reasonably possibly true. The conviction on kidnapping has to be set aside.

Count 2: Rape

[26] It is common cause the appellant assaulted the complainant at his home. According to the medical report she had a blackened left eye and one tooth missing. The appellant admits that he slapped her once and also kicked her on her body whilst wearing shoes. It is not in dispute that her face was swollen and nose bloodied.

[27] Undoubtedly, one aspect on which the appellant's version cannot be accepted, is that he denies knowledge of the lost tooth, implying it was not he who inflicted that injury. He attempted to shift the blame to the complainant's family who would have assaulted her when she came back home. I reject this suggestion as the evidence of her father is totally reliable in this respect.

[28] Of course, the fact that a witness lies in one respect, does not mean that everything that witness says must be rejected. As I attempted to make clear above, that evidence has to be

weighed against the other acceptable and objective evidence. The crucial question remains: did the complainant after the assault consent to intercourse? Once again certain probabilities come into play. It flies in the face of probability that the rapist on the next morning accompanies the complainant to her home and furthermore that she also ran away when she saw that her father was aggressive. On probabilities the appellant would, if he had raped her, not have wanted to be seen with her in public at all and furthermore the complainant would not have run away from her father but would rather have run towards him for protection. Once again the content of the letter is crucial evidence. That is not a letter one writes to a person who had raped you.

[29] On the other hand one must also ask the question how probable it is that sex would have occurred after an assault of this nature. Although this might at first seem strange, it is not unusual that after a lover's quarrel, even if violence was involved, the parties regret what had happened, attempt to make up and seek to comfort each other, which eventually leads to sex. This is the version of the appellant. I cannot, on the question of consent, reject the appellant's version beyond reasonable doubt. The conviction on rape has to be set aside.

[30] What is left then is that the appellant assaulted the complainant. In State v Zwezwe 2006(2) SACR 599 (NPD) the following was said at 603 (b - d):

"Regarding the second leg of the enquiry, what distinguishes the crime of assault with intent to do grievous bodily harm (assault GBH) from common assault is that, in the case of assault GBH, the offender must have intended to cause the complainant grievous bodily harm. The enquiry into the existence of such an intent requires consideration of the following factors :-

(a) The nature of the weapon used and in what manner it was used;

(b) The degree of force used and how such force was used;

(c) The part of the body aimed at; and

(d) The nature of injury, if any, which was sustained. [1]

[31] None of these facts can be viewed in isolation. The appellant did not use any weapon but still slapped her in the face with sufficient force to dislodge a tooth. However the extent of the injuries was not serious. According to the evidence of the doctor contained in the J88 the only injuries he noticed was the blackened eye as well as the missing tooth. There was no evidence of any injuries to her body caused by the kick. There were also no lacerations. Of course, if he had kidnapped her and hit her continuously with a white stick, there could have been some injuries to the body, but I have already rejected the complainant's version in this regard. On weighing of all these factors I cannot find that assault GBH was committed, because the intent to do grievous bodily harm was not proved beyond reasonable doubt.

[32] I conclude that the appeal must succeed. Assault is a competent verdict on charge 2.

Sentence:

[33] It thus follows that we must impose a new sentence. The accused was 19 years of age and in grade 10 when he committed the offence.

[34] However, he assaulted a complainant who was only 14 years old.

[35] The court a quo correctly emphasised the following:

"Wat myns insiens verswarend is, is dat u die klaagster redelik ernstig beseer het deur haar aan te rand, en onder andere 'n tand uit te slaan. Die gemeenskap, en spesifiek vrouens en

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1S v Dipholo 1983(4) SA 757 (T);

kinders, word swaar deur hierdie voorvalle getref en hulle verlang ook sterk optrede in die geval."

[36] On the other hand the following factors weigh heavily in not sending the appellant to jail:

36.1 He is a first defender;

36.2 He is 19 years old;

36.3 He was still at school in grade 10;

36.4 The assault occurred because he was jealous;

36.5 He showed remorse in the sense that he admitted that he assaulted her;

36.6 There was reconciliation between the appellant and the complainant after the incident. This is evidenced by her letter to him quoted above. It seems that she still loves him.

[37] These six factors weigh heavily and militate against sending this young man to jail. I therefore conclude that a suspended sentence would be appropriate.

I therefore propose the following order:

1. The convictions and sentence are set aside;

2. The order that the particulars of the accused be entered into the register of sexual offenders in terms of s 50(2)(a) of the Criminal Law (Sexual Offenders and Related Matters) Amendment Act, 32 of 2007 is set aside.

3. The following is substituted:

"3.1 The accused is found guilty of assault;

3.2 The accused is sentenced to three years' imprisonment.

3.3 The sentence is wholly suspended for 5 years on condition that during the period of suspension the appellant does not commit any crime of which violence is an element and for

which he is sentenced to imprisonment without the option of a fine. "

A A LOUW

JUDGE OF THE HIGH COURT

I agree

N P MNGQIBISA-THUSI

JUDGE OF THE HIGH COURT

I agree

KEM MATOJANE

JUDGE OF THE HIGH COURT