

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: A358/2013

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

18/06/2014
DATE


SIGNATURE

19/6/2014

In the matter between:

STEPHEN MDLULI

Appellant

and

THE STATE

Respondent

JUDGMENT

THOBANE, AJ

[1] The Appellant appeared in the Mkobola Regional Court, on a charge of rape of an adult female person. He pleaded not guilty to the charge and elected to exercise his right to remain silent.

[2] The provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 were applicable to the charge. He was nonetheless found guilty of rape and sentenced to 10 years imprisonment and declared unfit to possess a firearm.

[3] The Appellant enjoyed legal representation throughout the trial.

[4] The Appellant is appealing against the conviction with leave of the court *a quo*.

[5] The evidence of the complainant is briefly that on the 21st April 2011 she was on duty at Kwaggafontein where she was employed as a security guard. The Appellant, the complainant and one Dudu Masomola had lunch together. They had finished eating lunch at the kitchen when the Appellant dragged her to his office, in the presence of Dudu Masemola. He then locked the office door. He attempted to undress her but Dudu Masemola knocked on the door. She did not have much strength to fight the Appellant as she was three months pregnant. She tried to scream but there were no people at the offices. She managed to open the door and exit after Dudu Masemola had shouted that the supervisors were there. She went back to the kitchen but did not tell Dudu about what had happened. After about 20 to 25 minutes the Appellant again grabbed her by her arm and dragged her to his office. While being dragged she was screaming. Dudu Masemola was at this stage sitting in the kitchen. She reprimanded the accused but was given the sum of R10 by the Appellant to go and buy cold drink. She took the money and went to buy cold drink. She was again pulled into the Appellant's office and the door was locked.

The Appellant took off her left shoe and thereafter the left leg of her panty and trouser. While pressing her down, with one hand, he took out a condom with the other hand from his pocket and he put it on his penis. He had lowered his trouser and he then penetrated her vagina with his penis. When he finished, she then managed to escape and went to the kitchen where Dudu Masemola was. The Appellant came and attempted to kiss her on her neck but she pushed him away. She then went to sleep on a chair while the Appellant drank the cold drink with Dudu Masemola.

[6] Later that day when she knocked off, Appellant offered to accompany them to their home. As it was raining she did not have a choice so she went along. Dudu Masemola was dropped off first and thereafter the Appellant drove her home. On the 3rd May 2011, the complainant reported the matter to Dudu Masemola, to a Mr Mtsweni at the circuit office and thereafter to Mr Mnguni the circuit manager. She waited that long to report the matter because she was scared that the Appellant, as he had threatened to do, would inform the complainant's partner. She denied having an affair with the Appellant.

[7] Dudu Masemola, whom the legal representative of the Appellant called Dudu Madonsela, and such a wrong name was followed by the respondent's legal representative, was the second witness to testify. She testified that she was a colleague of the complainant. It was lunch time and the Appellant offered to buy food which he did. The three of them, the Appellant, herself and the complainant ate together. The Appellant left and went to his office. Later she, together with the complainant went to the office of the Appellant briefly. On their way out the Appellant grabbed the complainant on the waist. The complainant did not say anything and she left the two of them in the Appellant's office and went to the kitchen. She heard what sounded like a scream and she went to the office and knocked. She tried to open it but it was locked. She said to them "here are the

supervisors", whereupon the Appellant opened the door. The complainant was at that stage standing behind the Appellant. The three of them left the Appellants office and went to the kitchen. She indicated that she wanted money to buy cold drink. The Appellant gave her R10-00 and she left to buy cold drink. On her way to buying cold rink she looked back and noticed that the Appellant and the complainant were going back to the Appellant's office. The Appellant led the way and was followed by the complainant. She was gone for about 10 minutes and on her return went to the kitchen. She had been back for 5 minutes when the complainant and the Appellant emerged and went into separate toilets. The Appellant then kissed the complainant twice, on the right and the left of the neck. The Appellant left. The complainant slept on a chair for a while. Later she together with the complainant met the Appellant while on their way to the store and she asked if he could give them a lift, to which request he agreed. She was dropped off at her gate and the Appellant as well as the complainant proceeded further. She never saw the complainant until the 28th April, when the complainant informed her that she was raped by the Appellant on the 21st April. She was surprised at this as the complainant never said anything on that day. She suggested that they should inform Mr Mtsweni which they did.

[8] After the close of the state's case, an application was launched on behalf of the Appellant by his legal representative, for a discharge in terms of the provisions of section 174 of the Criminal Procedures Act 51 of 1977. The Application was refused.

[9] The Appellant testified that on the day in question he was on duty. After having lunch he retreated to his office where he locked himself in. The complainant together with Dudu Masemola knocked on the door and he opened for them. They wanted to watch a DVD on the computer. He informed them that he was not watching a DVD but playing a CD. They left to the kitchen and he again locked the door. Dudu shouted that they needed

to drink something after eating. He went to the kitchen to give her R10-00 so that she could buy cold drink. The Appellant and the complainant went into the office of the Appellant. He locked the door as he usually does when working after hours. The complainant sat to his right and he continued with his work on his desk. After about 5 minutes, Dudu Masemola shouted that the drink was in the kitchen. They left for the kitchen to have a drink. After having a drink he again retreated to his office. He knocked off and as arranged met the complainant as well as Dudu Masemola at the shop. He then transported them to their respective homes starting with Dudu and thereafter the complainant. He denied ever grabbing the complainant, dragging her, undressing her and having sexual intercourse with her.

[10] The Appellant did not call any witnesses.

[11] The magistrate, according to the record, identified the issue for determination as being "*whether there was nonconsensual or no sexual intercourse between the parties*". The question therefore is whether the State proved its case beyond a reasonable doubt. In this matter the State case is in direct conflict with the version of the Appellant. It is trite that in such circumstances, the Court must, over and above considering the conflicting facts before it, apply its mind to the probabilities of the case. In this regard, the comments by Leon J, in **S v Singh 1975(1) 227 (NPD)**, are relevant and worth noting:

".....where there is a conflict of fact between the evidence of the State witnesses and that of the accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and credibility of the State witnesses that, therefore, the defense 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 defense 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 grounds."

[12] It is common cause that on the rape itself, the evidence before court was that of a single witness. In terms of section 208 of the Criminal Procedures Act 51 of 1997, an accused may be convicted of any offence on the single evidence of any competent witness, provided the evidence is clear and satisfactory in every material respects. **S v Sauls and Others 1981(1) SA 172 (AD).**

[13] The magistrate in his judgment concedes that there are inconsistencies and contradictions between the evidence of Dudu Masemola and that of the complainant. This concession is also made in the heads of argument on behalf of the respondent. Both the magistrate and the legal representative of the respondent are however of the view that they were immaterial.

[14] In the my view what follows are some of the contradictions between the evidence of the complainant and Dudu Masemola:

14.1. The complainant testified that after they ate, the Appellant grabbed her in the kitchen in the presence of Dudu Masemola, who did nothing, and dragged her to his office where he then locked the door. He attempted to undress her but stopped when Dudu Masemola knocked on the door. Dudu Masemola testified that after eating the Appellant retreated to his office. She together with the complainant went to his office to check out the music that was playing on the computer. On their way

out of the office to the kitchen, the Appellant grabbed the complainant on the waist. The complainant said nothing and did nothing. She, Dudu, proceeded to the kitchen and left the two of them in the office of the Appellant. She heard what sounded like a scream and she went to the Appellant's office and knocked on the door.

14.2. According to the complainant after Dudu Masemola had knocked on the door, she managed to open the door as the key was in the door. Dudu Masemola testified that it is the Appellant who opened the door while the complainant stood behind the Appellant. Dudu Masemola stated during cross examination that she is *"definitely sure"* that it is the Appellant that opened the door.

14.3. The complainant testified that while she sat in the kitchen with Dudu Masemola, the Appellant came and grabbed her arm and dragged her to his office. During this time she was screaming. Dudu Masemola tried to reprimand the Appellant at the time when he was dragging her, who thereupon gave her R10-00 to go and buy cold drink. Dudu Masemola testified that after the Appellant had opened the door as described in 14.2. above, both the Appellant and the complainant followed her to the kitchen. At the kitchen she informed them that she actually wanted the money given to them by Mr Mtsweni. She said this to both the Appellant and the complainant. The Appellant gave her the sum of R10-00 and she left to buy cold drink. While she was leaving she noticed that they were again walking in the direction of the Appellant's office. The Appellant was leading the way and was being followed by the complainant. She testified that there was no contact or touching between them.

14.4. Dudu Masemola testified that on her return from the shop she went to the kitchen and sat there to drink the cold drink she had bought. As she sat there first the complainant then the Appellant emerged and went into separate toilets. While standing at the door of the kitchen the Appellant went to the complainant *after* she had finished brushing her teeth and was packing her toothbrush and kissed her on both sides of the neck. The complainant said "*leave me*". She was not cross. The Appellant went to pour himself the cold drink and left for his office. The complainant's testimony was to the effect that after she escaped from the Appellant's office, she went to the kitchen where she found Dudu Masemola. She went to her bag to get a toothbrush. *Before* she could brush her teeth the Appellant came and kissed her on her neck and told her that he loves her. She simply pushed him.

14.5. According to the complainant, the Appellant offered, when they knocked off, to accompany her and Dudu Mesemola home. Dudu Masemola testified that is it her who asked the Appellant to accompany them home.

14.6. Complaininant testified that on the 3rd of May 2011, she reported the matter first to Mr. Mtsweni, who works as a clerk at the circuit office. She indicated however that before she told Mr Mtsweni, she first told Dudu Masemola.

14.7. Complainant testified that the reason why she did not tell anyone about the rape was that she was scared. Dudu Masemola testified that when she asked the complainant why she had not informed her about the rape earlier, she said she didn't know why. The complainant herself also testified that the reason why she did not tell her colleague, Dudu Masemola about the rape, was that she thought that Dudu was an accomplice to the rape.

[15] The improbabilities inherent particularly in the complainants version are numerous. There are other issues that leave one with more questions. The following however stand out:

15.1. The evidence by the complainant that the Appellant held her with one hand and pressed her down on his table in his office. With the other hand he managed to undress her, taking off her belt, her shoe, one leg of the trousers she was wearing, one leg of her panties, to thereafter undress himself, take out a condom from his pocket, put it on his penis and continue to have nonconsensual sex with her,

15.2. The fact that it never crossed the mind of the complainant to tell her colleague Dudu Masemola of the rape on her return from being raped five minutes earlier.

15.3. That neither the Appellant nor the complainant kept the SMS messages where there was be it extortion, threats and so forth.

15.4. That immediately after the rape had taken place, the Appellant gave the complainant and her colleague a lift home.

15.5. That after the rape the complainant reported the matter to the police but not to open a case, but to get advise.

[16] The Appellant gave a version in the trial proceedings which was rejected by the presiding officer as not being reasonably possibly true. This is surprising because the

presiding officer also found that the evidence of the Appellant corroborated the testimony of the two state witnesses, except the denial of the rape. The version by the Appellant was that after Dudu Masemola had left to buy some cold drink, he together with the complainant walked to his office. His version was that the complainant led the way whereas the version of Dudu Masemola was that the Appellant led the way and was followed by the complainant. The corroboration between Dudu Masemola and the Appellant is inescapable. The complainant was not dragged to the office of the Appellant. The finding by court *a quo*, that the evidence of Dudu to the effect that the Appellant grabbed the complainant was in support of the contention that the complainant did not enter the office of the Appellant voluntarily was a clear misdirection in that Dudu's testimony related to the earlier incident where, according to her, they went voluntarily to the office of the Appellant to listen to music and that it is then that the Appellant grabbed the complainant, while already inside the office, and that the complainant did not say anything or express her displeasure at being grabbed. Further, according to the evidence of Dudu Masemola, she left the Appellant and the complainant in that office and went out.

[17] The finding by the court *a quo* that the R1000-00 mentioned in the SMS exchanges related to the pregnancy was another misdirection. The evidence by the Appellant was to the effect that the complainant said he should pay the money or face the music. The Appellant did not refer to the pregnancy as being the reason for demanding payment.

[18] The magistrate made a finding that the screaming of the complainant while in the office of the Appellant was corroborated by Dudu Masemola. The magistrate however failed to explain that the corroboration related to the first incident where the complainant testified and alleged that there was an attempt to rape her. This in my view is another misdirection.

[19] The finding by the trial court that the State case, despite inconsistencies, is so convincing as to exclude the possibility that the Appellant is innocent is a misdirection. So is the finding that, even though viewed in isolation the evidence of the Appellant might suggest otherwise, if the evidence is taken in its totality, the Appellant's story is not convincing.

[20] In my view, this being a matter where evidence of a single witness was tendered as to the rape, had the trial court adopted the approach in **S v Chabalala 2003(1) SACR 134 (SCA)**, where it was held that:

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those that are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt",
a different outcome would have been the result.

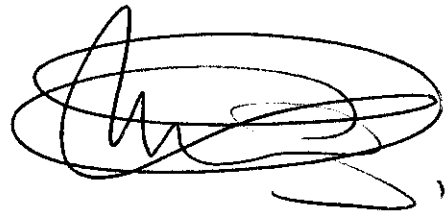
[21] The evidence of the Complainant must be approached with great circumspection because it is of a single witness and is not satisfactory in all material respects. The numerous intrinsic improbabilities, omissions and contradictions in such evidence and the lack of corroboration, in material respects, fortifies this court's resolve to reject the Complainant's evidence as most improbable. See **S v Teixeira 1980 (3) SA 755 (A) at 761** where the following was stated:

"I think I am stating the obvious in saying that, in evaluating the evidence of a single witness, a final evaluation can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities."

[22] I am of the view that the trial court should have found that the version of the Appellant is reasonably possibly true.

[23] In the circumstances the appeal is upheld and I make the following order:

1. The order of the trial court is set aside;
2. The Appellant is found not guilty,
3. The Appellant is declared fit to possess a firearm.



**S.A. THOBANE
ACTING JUDGE OF THE HIGH
COURT, PRETORIA**

I agree, and it is so ordered



**N. KOLLAPEN
JUDGE OF THE HIGH COURT,
PRETORIA**