IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE **SIGNATURE**

Case Number: A801/2013

DATE: 22 MAY 2014

In the matter between:

THULANI VUSI NKOSI Appellant

and

THE STATE Respondent

JUDGMENT

PIETERSE AJ

[1] The Appellant, Mr Vusi Thulani Nkosi, a 29 year old male, appeared in the Regional Court for the Division of Mpumalanga Held at Ermelo (Piet Retief) under Case Number PSH91/12, in front of the learned magistrate, Mr Hallet. He was charged with sexual assault, contravening the provision of section 3 read with Section 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act 32 of 2007, read with section 252 of Act 105 of 1997. In the charge sheet it was alleged that upon or about the 4th December 2011 and at or near RDP Itswepe in the regional division of Mpumalanga, the accused unlawfully and intentionally sexually violated the complainant, K[...] A[...] H[...], a 37 year old female by patting her breast (the words "touching her breast" were used in the Annexure I to the record) and trying to pull her skirt down with an attempt to have sexual intercourse with her without her consent.

[2] Mr Sibanyoni appeared on behalf of the state. The state called two witnesses, Ms K[...] H[...], the complainant in the matter and a second state witness, Ms Nkabinde.

[3] The accused was represented throughout the trial by Ms Ngwenya from the Legal Aid Board. The accused applied for discharge in terms of section 174 of Act 55 of 1977, which was denied by the Court. The accused pleaded not guilty on the charge and testified in his own defense. On the 9th July 2012 he was convicted of attempted rape and sentenced to 10 (ten) years imprisonment.

[4] On 9th July 2012 the accused applied for leave to appeal against the conviction as well as the sentence, which was refused by the trial court.

[5] The accused then petitioned to the North Gauteng High Court for Leave to Appeal, which was granted on the 12th September 2013 in respect of the conviction as well as the sentence.

Summary of facts of the case

[6] The complainant, Ms **K[…] A[…] H[…],** testified that on the night of 4th December 2011, she was at home at Itswepe with her six year old child. The door was open as she was cooking and it was hot. It was dark already but the light in her house was on. An unknown male person came into her house, asking for water. The man introduced himself as Vusi, the son of Lenie and said that he was from Boesman. She told him that she was afraid of him as she heard bad things about a man by the name of Vusi. The man comforted her and asked her to look at him and showed her

his hands, stating that he will not hurt her. She washed a cup and went outside to fetch him the water. While she was outside he turned on the volume of the radio and the television and broke the light bulb. At her return into the house with the water, he grabbed her and throttled her and hit her on the mouth. Some of her teeth broke as a result of the blow. He pushed her outside and she resisted the attack. They fell on the stones outside. The man had her by her throat and was on top of her with his knee on her stomach. He grabbed her breasts and her left breast was hurt. It had a big mark on it and it was swollen after the attack. She could not scream as his hands were around her throat. He tried to pull down her skirt and it was torn in the process. She explained that he tried to pull down her skirt to get her naked. Another unknown man stepped up to them and kicked her. She got hold of stones and hit the accused on his hands and both men then ran away. She then went to an elderly neighbour with her child and asked if they did not hear her. The neighbour said she heard the noise and asked whether it was the complainant who made the noise. The complainant made enquiries about a man by the name of Vusi from the farm Boesman.

[7] The next morning she ran into the second state witness, Ms Nkabinde, who testified that she saw the complainant who was holding her hand over her jaw. The complainant told her it was Vusi who did that to her. This witness told the complainant that Vusi also came to her house early evening on the night before, which was the night of the attack and told her he was the son of Lenie, also called

Majeni from Boesman. She testified that she know the man but did not recognize him as it was some time since she last saw him.

[8] The accused alleged that the complainant made a mistake with his identity. He said he is Vusi the son of Meni. He denied that he was at Itswepe the night of the attack. He alleged that he was visiting his sister after a football game the Saturday. The court pointed out that 4 December 2011 was a Sunday not a Saturday. He was asked by his legal representative whether he wants to call his sister as a witness, but he refused and the defense case was closed.

[9] The testimony of the witnesses were carefully analyzed by the court in respect of the identity of the accused and the court came to the conclusion that the complainant had enough time to get a good look at the person as she was invited by the accused to look at him. The second state witness also saw the same man earlier on the night of the attack as he came to her house and introduced himself as Vusi the child of Lenie or Majeni. The two women incidentally ran into each other and spoke to each other on the Monday morning about the presence of the man, Vusi, the son of Lenie from Boesman, on the night before and the attack on the complainant. The court accepted the testimony of the two state witnesses as being proof of the identity of the accused.

[10] The court further found that the state has proved the intention of the accused to rape the complainant, as the only inference that the court can make on the facts, being that of the accused attacking a woman, who did nothing to him, in the way as testified by the complainant, was that the accused had the intention to rape the complainant and found him guilty of the offence of attempted rape.

[11] The state did not prove any previous convictions of the accused.

[12] The charge

[12.1] According to the charge sheet attached to the J15 which forms part of the record, the accused was charged with contravening the provision of section 3 read with section 1, 56(1), 57, 58, 59, 60, 61 and 68(2) of Act 32 of 2007 and read with section 51 and 52 of Act 105 of 1997.

"Deurdat die beskuldigde op of omtrent 4 Desember 2011 en te of naby 1436 RDP Iswepe/Piet Retief in die streekafdeling van Mpumalanga wederegtelik en opsetlik gepoog het om 'n daad van seksuele penetrasie te pleeg met die klaagster, te wete K[...] A[...] H[...], 'n 37 jarige vrou, deurdat die beskuldigde gepoog het om vleeslike gemeenskap te hou met die klaagster sonder haar toestemming."

[12.2] The charge read to the accused in court states that the accused is guilty of contravening the provision of section 3 read with Section 1, 56(1), 57, 58, 59, 60

and 61 of the Criminal Law Amendment Act 32 of 2007 and read with section 252 of Act 105 of 1997. "In that upon or about the 4th day of December 2011 and at or near RDP Itswepe in the regional division of Mpumalanga, the accused did unlawfully and intentionally sexually violated the complainant, K[...] A[...] H[...], a 37 year old female by patting her breast and trying to pull her skirt down with an attempt to have sexual intercourse with her without her consent. (The words "touching her breast" were used in the Annexure I to the record.)

[12.3] Both charges referred to above, refer to the contravention of **section 3 of Act 32 of 2007.** The difference between the two lies in the use of the words *"sexual penetration*" and *"sexual violation"*

In section 1 of Act 32 of 2007, the definition of *sexual penetration* is as follows -

'Sexual penetration' *includes any act which causes penetration to any extent whatsoever by-*

(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;

(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

(c) the genital organs of an animal, into or beyond the mouth of another person.

In **section 1 of Act 32 of 2007**, the definition of *sexual violation* is as follows –

'Sexual violation" *includes any act which causes*

(a) Direct or indirect contact between the –

(i) Genital organs or anus of one person or, in the case of a female, her breast, and any part of the body of another person or an animal, or any object, including any

(ii) object resembling or representing the gintalorgans or anus of a person or an animal;

(iii) mouth of one person and –

(aa) the genital organs or anus of another pseon or , in the case of a female, her breast;

(bb) the mouth of another person;

(cc) any other part of the body of another person, other than the genital organ or anus of that person or, in the case of a female, her breasts, which could –

(aaa) be used in an act of sexual penetration;

(bbb) cause sexual arousal or stimulation, or

(dd) any object resembling the genital organ or anus of a per son and in the case of a female, her breast, or an animal; or

(iii) mouth of the complainant and the genital organ or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organ of a per son or animal into or beyond the mouth of another person.

Conviction

[13] The court *a quo* considered whether the State has proved that the accused had the intention to rape the complainant and came to the conclusion that the only inference that the Court can make on the evidence, is that the accused had the intention to rape the complainant. The evidence was that of a woman, bringing water for a man, he grabs her, hit her on the mouth and breaks some of her teeth, throws her on the ground, throttles her, while she has done nothing to him. He pins her to the ground with his knee on her stomach and tries to pull of her skirt. The Court is satisfied that

the state has proven that the accused had the intention to rape the complainant and found the accused guilty of **attempted rape.**

[14] On behalf of the Appellant it is submitted that-

The trial court misdirected itself in convicting the Appellant of the attempt of contravening **section 3 of Act 32 of 2007;** the charge that was read to the Appellant in the trial court was a combination of **section 3 and section 5 of Act 32 of 2007;** the accused was not charged with contravening the provisions of **section 5**; and the Appellant did not contravene the provisions of **section 5,** as the complainant testified that she did not know what the Appellant's intention was. It was argued that the State merely proved assault, which is a competent verdict for contravening **section 3 or 5 of Act 32 of 2007.**

[15] To establish whether the learned magistrate's erred or misdirected himself in convicting the accused of attempted rape, the evidence lead by the State has to be scrutinized to establish whether all the elements of the offence with which the accused was charged were proven.

Rape

According to **Section 3 of Act 32 of 2007** –

"Any person ('A') who unlawfully and intentionally *commits an act of sexual penetration with complainant ('B'), without the consent of B, is guilty of the offence of rape."*

From the evidence of the complainant it is clear that penetration did not take place in any manner as provided for in **section 3** read with **section 1 of Act 32 of 2007**.

However, **section 261(1) of Act 51 of 1977**, provides that –
(**the relevant parts are underlined**)

1) if the evidence on a charge of rape or compelled rape, as contemplated in section 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or any attempt to commit any of those offences, does not prove any such offence or an attempt to commit any such offence, but the offence of

(a) assault with intent to do grievous bodily harm;

(b) common assault;

(c) sexual assault as contemplated in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; ....

the accused may be found guilty of the offence so proved.

Sexual Assault

Section 5 of Act 32 of 2007 reads as follows –

"(1) A person ('A') who unlawfully and intentionally sexually violates a complainant ('B') without the consent of B , is guilty of the offence of sexual assault.

(2) A person ('A') who unlawfully and intentionally inspires the belief in a complainant ('B') that B will be sexually violated , is guilty of the offence of sexual assault."

Sexual violation

In terms of **section 1 of Act 32 of 2007,** with specific relation to the underlined parts thereof,

'Sexual violation" *includes any act which causes*

(a) Direct or indirect contact between the –

(i) Genital organs or anus of one person or, in the case of a female, her breast, and any part of the body of another person or an animal, or any object, ...

The contention of the Appellant's legal representative that the skirt of the complainant was torn during the wrestling between the accused and the complainant and that the State has merely proven assault is incorrect, as the different elements of the assault should not be analyzed in isolation. It all forms part of one single event and the accused had one single intention with the violent attack on the complainant.

It is contended that the accused not only physically assaulted the complainant, but that he ***sexually violated*** her. The evidence by the complainant was that while she was fetching the water for the accused from outside, the accused turned on the radio and the television and broke the light bulb. These actions by the accused clearly indicated that he wanted to muffle the sounds of the attack which he was planning on the complainant and that he wanted to darken the area by breaking the light. At her return with the water, the accused threw her to the ground, throttled her,

hit her so hard on the mouth that some of her teeth were broken, he grabbed her breasts, leaving a big mark on her left breast and that her breast was swollen afterwards. He pinned her to the ground with his knee on her stomach and tried to pull her skirt down in an attempt to get her naked. No doubt can be cast on the Appellant's intentions with the complainant, which were experienced and understood by the complainant that he wanted to get her naked. Looking at the trail of events as described above, the only inference that could possibly be made, is that the accused wanted to rape the complainant and for that reason he wanted to over-power her and tried to pull down her skirt, tearing it in the process. Every element of the offence of ***sexual assault*** as contemplated in **section 5 of Act 32 of 2007** read with **section 1 of Act 32 of 2007**, quoted here above, is proved by the complainant's evidence.

[16] After hearing arguments for both the Appellant and the State, it was conceded that the identity of the Appellant is no longer in dispute.

[17] I am satisfied that the court *a quo* misdirected itself by finding the Appellant guilty on the offence of attempted rape and that a contravention of section 5 of Act 32 of 2007 is a competent verdict on the attempt to contravene section 3 of Act 32 of 2007.

Sentence

[18] Ms Ngwenya on behalf of the accused stated in mitigation that the accused was 29 years old, unmarried, with two children, 17 and 6 years old and is also financially responsible for his mother. He was employed at Shosalosa Timber Company for the past 10 years, earning an amount of R600.00 per month. He is relatively young and a first offender. According to the testimony it appears as if he was under the influence of alcohol. She left the matter in the hands of the court with regards to the fitness of the accused to possess a firearm.

[19] The prosecutor requested the court to find the accused unfit to possess a firearm as he was convicted of a serious crime which involved an element of violence. Violence against women is a common occurrence and should be stopped. Direct imprisonment of 8 (eight) years was recommended by the prosecution as being an appropriate sentence to send a clear message that this kind of offence cannot be tolerated.

[20] The court took everything into consideration as stated. The court found that the accused must have planned the offence. He went to a house not far from the complainant's house and found the circumstances unfavourable. He then moved to the complainant's house. He found a woman alone with a young child and misleads her to believe that he has no intentions to harm her and then attacked her. Another person who was with him also kicked the complainant. They both ran away after she

fiercely resisted and hit the accused with stones. The accused was clearly guilty when he was questioned about the Saturday and Sunday in question. Violence against women cannot be tolerated. The complainant testified that he smelled of liquor and fortunately did not succeed to rape her. The court found that the accused cannot hide behind the fact that he consumed alcohol and that he knew exactly what he was doing. The accused had no remorse whatsoever and alleged that the complainant was confused about his identity. The court informed the accused that the only suitable sentence is direct imprisonment and if he had succeeded to complete the offence of rape by penetrating the complainant, the court would have been compelled to sentence him to a minimum of 10 (ten) years imprisonment. The court informed him that what the accused had done is just as serious and that he was clearly on the outlook for a woman to rape. The court sentenced the accused to direct imprisonment of 10 (ten) years in terms of section 276(1)(B) of the Criminal Procedure Act.

[21] The court further found that the accused unnecessarily hurt the complainant and declared him unfit in terms of section 103 of Act 60 of 2000 to possess a firearm.

[22] It was decided in ***S v Mokela*** **2012 (1) SACR 431 (SCA)** at page **439** that a court of appeal will only be justified to interfere in the sentencing court's discretion where it is satisfied that the sentencing court misdirected itself, or did not exercise its

discretion properly or judicially. In the present case the court found the Appellant guilty of the offence of rape and sentenced him to the minimum sentence applicable.

[23] On a conviction of sexual assault the minimum sentence for rape does not apply. A suitable and just sentence must be concluded taking into account the seriousness of the crime, the interest of the community and the personal circumstances of the offender which must be weighed against the personal circumstances of the appellant in mitigation and also the aggravating circumstances.

The Appellant's personal circumstances as stated by Ms Nwenya are that he was 29 years old at the time of the conviction; unmarried, with two children and a mother who are financially depending on him; he was working and earning R600.00 per month and he is a first offender.

Aggravating circumstances are that the Appellant showed no remorse for the sexual assault on the complainant and alleged that she was mistaken about his identity. He misled a vulnerable woman to trust him and then assaulted her. The assault was her in front of her six year old child. He planned the assault on the victim and found himself a woman alone after experiencing unfavourable circumstances at another house. He tried to overpower a woman by throttling her, preventing her to scream, muffling the sounds of the attack by turning on the sound

of the radio and television. He did not come alone and his friend also hurt the victim by kicking her.

The amount of violence used on the victim was so severe that he broke some of her teeth and left a big mark on her breast and tore her skirt in an attempt to pull it down;

This kind of offence against vulnerable victims such as women is a common occurrence and has to be stopped by imposing a sentence that sends a clear message to society that such offences will not be tolerated.

[24] The following order is made:

1. That the appeal against sentence is upheld and the sentence is set aside and replaced with the following order –

   "The accused is sentenced to 5 (five) years imprisonment ante-dated to 9 July 2012";

2. That the Appellant is declared to be unfit in terms of section 103 of Act 60 of 2000 to possess a firearm.

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A.C.M. PIETERSE

ACTING JUDGE OF THE HIGH COURT

I agree

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S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: A801/2013

HEARD ON: 19 May 2014

FOR THE APPELLANT: ADV. L.A. VAN WYK

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. A. ROOS

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 22 May 2014