IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION. PRETORIA)

CASE NO: A647/2012

DATE: 3 June 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

IN THE MATTER BETWEEN:

KENNY KENNETH KHUMALO **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

KOLLAPEN J:

1. This is an appeal against both conviction and sentence, following the conviction of the accused on the 10th of February 2009 in the Regional Court at Secunda on a charge of rape, and his subsequent sentencing to a term of fifteen years' imprisonment.

2. Leave to appeal against conviction and sentence was granted on petition by this Court on the 17lh of November 2011.

3. In the court *a quo* no fewer than twelve witnesses testified and the learned Magistrate probably correctly divided the evidence into two broad areas. Firstly there was evidence relevant to DNA and samples taken, and secondly there was evidence with regard to the alleged incident itself and the events that followed it.

4. With regard to the DNA evidence, it is common cause that there was no evidence implicating the appellant

from this perspective and, in particular, a sample of the discharge of semen from the complainant, taken during the morning after the alleged rape, did not match the DNA of the accused.

What was not clear however, and was not canvassed in evidence, was the question of whose semen was found on the complainant. I will return to this aspect later.

5. The evidence for the State was that of the complainant, Ms N[...] Z[...], her friend Ms V[...] M[...], her aunt Ms J[...] S[...], her uncle Mr E[...] S[...] and neighbour Ms N[...] M[...].

6. The testimony of the complainant, in brief was that on the 21st of March 2008 she was at home with her friend Ms M[...] when the appellant invited them to watch movies at his home nearby. They went with him to his house. From there the complainant went to her boyfriend's home after the appellant had asked her to leave her friend (Ms M[...]) with him. Whilst at her boyfriend's home, she claims that appellant came to call her, saying that her uncle wanted food. She left with the appellant to go back to her home and when they arrived there, she claims that the appellant assaulted her. removed her panty and raped her. He used a condom. Her uncle was not home at the time and she was alone with the appellant.

7. She reported the alleged rape to her friend. Ms M[...], on the same evening and to her aunt Ms S[...] the next morning when the latter arrived home.

8. Her further evidence was that following an intervention by her aunt, the appellant and his girlfriend came to their home the next morning and he admitted what he had done and asked to be forgiven.

9. Her evidence in broad terms was supported by Ms M[...] and Ms S[...], with regard to the report she made to them, but there are what may be described as inconsistencies and criticisms that emerge therefrom:

a) In her evidence, the complainant's aunt Ms S[...], said that the complainant reported to her that the appellant came to fetch her from his home where she was watching TV. The complainant on the other hand, testified that the appellant came to call and fetch her from her boyfriend's home.

b) In her evidence the complainant testified that the appellant came to her boyfriend's home to tell her to return home as her uncle wanted food. She testified that her boyfriend then ordered her to go home to show her uncle where the food was. The evidence of Ms S[...] is that the complainant refused to go with the appellant, after which the appellant grabbed her and took her back home.

10. When one has regard to the incident during the morning after the alleged rape, then it is clear from the evidence of Ms M[...] and the neighbour, Ms M[...], that the appellant was angry at being accused of rape, so much so that he wanted to assault the complainant. It is strange that if the appellant had adopted such a strong

stance of denial, that he would for no apparent reason, suddenly confess to the alleged rape and seek forgiveness. Such a dramatic change in stance is hardly explicable.

11. In addition to the above, the matter of the semen found on the complainant's underwear remains unanswered. While on the one hand it is clear that it does not belong to the appellant, there is, on the other hand, no explanation for it, in her evidence, the complainant says that on the night in question she also visited her boyfriend where she watched a movie, at which point the appellant arrived. Her further evidence was that the appellant used a condom when he allegedly raped her. Thus, on her version, the semen could not have been from either the appellant or from her boyfriend. This aspect was never clarified, and in my view, the Court *a quo* should have recalled the complainant to deal with this part of the evidence.

12. Of course there may be some explanation for it and while it is certainly arguable that it may not necessarily detract from her evidence that she was raped, it does leave unanswered an important segment of the complainant's activities on the day / evening in question.

13 In a criminal trial the onus is on the State to prove its case beyond a reasonable doubt and the court in this regard must make that assessment on the totality of the evidence before it.

In **S v VAN DER MEYDEN 1998 (1) SACK 447 WLD**, the Court described the onus as follows;

> *The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollaiy is that he is entitled to be acquitted if it is reasonably possible that he might be innocent. These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives, In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.'*

14. In my view and for the reasons already offered, it must be arguable that reasonable doubt exists with regard to the evidence presented in the court *a quo* and they may be summarised as follows:

a) The contradictions in the evidence as to where the complainant was fetched by the appellant and indeed whether she went voluntarily or was forced to go;

b) The anger and denials of the appellant when he was confronted with the allegation of rape and sudden change by confessing to the crime;

c) The gap in the evidence with regard to the origins of the semen found on the complainant's

underwear;

d) Concern that the complainant was afraid of the appellant as he always threatened her as testified to by Ms S[...], in the face of her seeming willingness to go and watch videos at his home and to accompany him from her boyfriend's home back to her own home.

ORDER

15. In the circumstances 1 would propose the following order:

i. That the appeal against conviction and sentence be upheld;

ii. That the conviction by, and sentence of, the learned Magistrate be set aside.

N KOLLAPEN

JUDGE OF THE HIGH COURT

1 AGREE,

PD MOSEAMO

ACTING JUDGE OF THE HIGH

COURT

IT IS SO ORDERED.

A624/2013

HEARD ON: 06 MARCH 2014

FOR THE APPELLANT: ADV *I.* W. RANKAPOLE

INSTRUCTED BY: LEGAL AID SOUTH AFRICA (PRETORIA JUSTICE CENTRE) (ref: 052/13)

FOR THE RESPONDENT: ADV M. J. VAN VUUREN

INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS (ref: MA 76/2012 6/3/MJvV)