IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION PRETORIA)

CASE NO: A82/2014

DATE: 23 JULY 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

IN THE MATTER BETWEEN:

ANDILE NOMBIBA **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

KOLLAPEN J;

l. The appellant was convicted on the 25th January 2012 in the Regional Court sitting at Pretoria on two counts of contravening Section 3 of Act 32 of 2007 (Sexual Offences Act) and on the 15th of May 2012 he was sentenced to fifteen years' imprisonment, both counts having been taken together for the purpose of sentence.

2. Leave to appeal against both conviction and sentence was granted by this Court on the 21st of October 2013 following the submission of a petition by the appellant in terms of Section 309C of the Criminal Procedure Act No 51 of 1977.

3. The two charges on which the appellant was convicted relate to one count of vaginal penetration and one count of anal penetration. The appellant did not dispute the act of vaginal penetration with the complainant, but his stance was that it was consensual, while he denied the charge of anal penetration in its totality.

4. The State called five witnesses in support of its case while the appellant testified in his own defence.

5. The issues for determination accordingly are:

a) Whether the act of vaginal penetration was consensual or not;

b) Whether the State proved the count of anal penetration; and

c) Whether there is any basis for this Court to interfere with the sentence imposed, in the event of it confirming the conviction(s).

THE BACKGROUND FACTS

6. The complainant, who was sixteen years old at the time of the alleged incident, was visiting at her aunt's home at a place called Kalambazo. On the evening of the 11 of June 2010, she and her cousin D[...] B[...] went out with the appellant and one K[...] who was the boyfriend of D[...]. This was the first time that the complainant had met the appellant and prior to going out she had attempted to inform her aunt of her plans for the evening. As her aunt was asleep she instead informed her cousin B[...], of her plans.

7. The group of four then went to buy some alcohol, Castle Lite, and a few Red Squares for the complainant. The appellant paid for the alcohol. They then made their way to a tavern called Kortions where they spent a bit of time drinking some of the alcohol they had bought. After a while they left Kortions in order to buy food after the complainant had intimated that she was hungry - it was the appellant who also paid for the food.

8. There is some dispute as to what transpired when they bought the food. The evidence of the appellant, supported by D[...]'s evidence, was that he and the complainant went to buy the food and were together for a period of some thirty minutes while they ordered and waited for the food. His evidence was that during this time, he proposed love to the complainant and she accepted his overtures and they came to an arrangement that they would discuss what would happen later in the evening. According to him, telephone numbers were also exchanged at this point in the evening. The complainant denied accompanying the complainant to buy food and denied the existence of any love agreement. I will return to this aspect later.

9. After they had eaten the meal that the appellant had purchased, they returned to Kortions and spent a short while outside the tavern. At that stage it appears that K[...] was drunk and a decision was taken to go home

and bring an end to the evening's proceedings. D[...] suggested that the complainant be dropped off first as it was the nearest point from Kortions. The appellant responded by saying that he would drop her off on his return from dropping off K[...] and D[...]. It appears that D[...] had planned to stay the night at K[...]'s home. The complainant accepted the suggestion that she be dropped off later.

10. K[...] and D[...] were then dropped off and D[...] reminded the appellant to take the complainant safely home and to call when he had done so. As they left K[...]'s home, the complainant, who was seated at the back of the vehicle, asked to use his phone which she used to make a call to her cousin B[...] advising her that she was on her way home and requesting her to unlock the house door. All of the above, except for what may have occurred between the appellant and the complainant when the food was purchased, was common cause. It is the events that followed when they left K[...]'s home that are in dispute.

11. According to the complainant, the appellant's attitude changed and he said words to the effect that there was no home and that she was going to pay for the people who drank his alcohol. He also said that he will stop the car only when the petrol was finished. He then drove to a bushy area, told her to undress and then came to the back seat where he also undressed and penetrated her without her consent. Her further testimony was that she needed to relieve herself and after she had defecated outside of the vehicle he penetrated her anally, again without her consent. She then dressed and he said to her, that should he hear his name on the airwaves, she was going to die. He left her at the very spot where he raped her and she then walked back to her parental home where she made a report to her mother of what transpired. Charges were laid and she was taken to hospital for an examination.

12. The appellant's version on the other hand was that after dropping off K[...] and D[...] and after the complainant had called B[...] to inform her she that was on her way home, they continued their conversation and he then drove to the dumping site where they then agreed to have sex. They had consensual sex once in the back seat and he denied that any anal sex took place. He then, at her request, dropped her off near Nellmapius, which he was led to believe, was close to the complainant's home.

13. The evidence of J[...] B[...], the mother of the complainant, was that she lived at Nellmapius and that during the period of the 11th of June 2010 she had allowed her daughter to visit her aunt at Kalambazo. She was a very strict mother and her children were not allowed to go out until late hours, or to go partying or to consume alcohol. She described the complainant coming home at around 4 or 5 AM on the morning of the 12th of June 2010 with 'her hair messed up, her jean full of blood and her bag full of soil' and then reported to her that she was raped by a friend of K[...]. She admitted that she was furious that the complainant had not followed her instructions by going out late at night and decried herself as a harsh mother in this respect. She also testified that the dumping site to which reference has already been made, is not far from her home.

14. The evidence of B[...] was in large measure to confirm the telephone call she had received from the complainant advising that she was on her way home and requesting her to open the door. She opened the door but the complainant never arrived home and instead came there the next morning accompanied by her mother. She described the complainant as crying and also informing her that she was raped the previous night by the appellant.

15. The evidence of D[...] B[...] was largely not in dispute and she confirmed the events of the evening up to the time that she and her boyfriend, K[...] were dropped off at K[...]'s home by the appellant. Her further evidence was that when they had gone to buy food, the complainant accompanied the appellant into the shop and that they were there alone for about thirty minutes.

16. In addition, evidence in terms of Section 212 of the Criminal Procedure Act was received which was not in dispute and which confirmed that the DNA sample from a vulva swab of the complainant matched the DNA of the complainant taken from a blood sample. There was no mention in the Section 212 affidavit of any other sample taken from the complainant even though the complainant in her evidence said that she saw the examining doctor put something like an ear-bud into her anus when she had complained of pain in her anus during the examination.

17. The J88 which was handed in by agreement contains the following observations and conclusions:

a) There was no evidence of any bodily injuries, wounds or abrasions;

b) There were fresh tears at 3 o'clock and 6 o'clock on the vagina;

c) There was bleeding on the vagina and the cervix;

d) The anal examination was normal in all respects and no tears, swelling, or bruising was observed.

ANALYSIS

18. It is trite that the evidentiary burden that rests on the State is to prove the guilt of the appellant beyond reasonable doubt and that conversely if there is a reasonable possibility that the version of the accused may be true, the appellant is entitled to be acquitted. Also, the Court must have regard to the evidence in its totality in making the determination as to whether the State has proven the guilt of the appellant beyond a reasonable doubt.

(See ***S v VAN DER MEYDEN*** **1999 (1) SACR 447** (W) and also ***S*** v ***TRAINOR*** **2003 (1) SACR 35 (SCA)).**

19. In ***S v CHABALALA*** **2003(1) SACR 134 (SCA),** HEHER AJA said that 'The correct approach is to

weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account for 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.' (at para 15 on page 139).

20. When one accordingly has regard to the evidence, the following emerges:

a) It is clear that the complainant had voluntarily agreed to go out with her cousin and others to have a good evening of food and drink. I accept, despite her denials, that she was alone for a while with the appellant when they went to buy food and that in all likelihood there was some discussion between them that perhaps held the promise of something that could develop later;

b) Also, the complainant agreed to be dropped off last even though she could have elected to be dropped off first and must accordingly have contemplated, at least, that she would be alone with the appellant on the way to drop her off, after D[...] and K[...] had been dropped off;

c) To suggest however that her behaviour constituted consent in advance to have sex would not be acceptable. She may have felt comfortable in the company of the appellant and even felt safe and may at the same time have harboured the prospect of a relationship in the future, but that by itself cannot be seen as a signal of her willingness or availability to have sex. To do so would have the dangerous consequence that every woman who is attracted to a man, runs the risk that such attraction may be construed as an invitation to have sex;

d) Thus even though her evidence that she was not alone with the appellant when they purchased food cannot stand up to scrutiny, it does not follow necessarily that all her evidence stands to be rejected. The principle that 'once a liar, always a liar' is correctly not part of our law;

e) Accordingly it must be accepted for what it is worth, that up to the time that D[...] and K[...] were dropped off, the complainant did not feel that she was in any danger and on the contrary may have indicated that she had no problem being alone in the company of the appellant;

f) Once D[...] was dropped off, it is clear that the complainant expected to return home to her aunt's house. The phone call to B[...] indicated this, and if indeed she had planned to spend more time with the appellant before returning home, she would not have made the call at that time, or at the very least she would have made the call later;

g) On the appellant's evidence, they had come to some arrangement to be lovers quite early in the evening and this resulted in them being alone at the end of the evening. Even if this was the case,

there was no agreement to have sex. In his evidence there are conflicting accounts of when agreement was reached to have sex. Initially he stated that they agreed on this after dropping off D[...] and K[...], while in response to questions by the Court, he stated that they agreed to have sex after they talked at the dumping site. This is important - if there was no agreement to have sex prior to the talks at the dumping site, then it is clear that his intention of going to the dumping site must have been to have sex, even before any agreement was reached and even under circumstances when the complainant had intimated to her cousin that she was on her way home. This, in my view, fits into the evidence of the complainant that the appellant wanted payback for the food and the alcohol he had bought and that he was not going to take her home until someone had paid;

h) It is unfortunate that the doctor who conducted the medical examination on the complainant, Dr Seopelo, was not called as a witness. The complainant testified about pain in her anus and states that she informed the doctor about it and that the doctor inserted what looked like an ear-bud into her anus and gave her pills to take. The absence of injuries cannot be decisive either way as to whether anal penetration took place. The evidence of the complainant's mother that the complainant was kicking the door and not knocking on it and called 'Mama open the door', that her hair was messed up, her jean bloodied and her bag full of soil and that she was crying, all point in the direction of someone who was genuinely traumatised . None of this evidence, in particular her physical condition, was challenged in cross-examination.

i) It was not in dispute that the complainant's mother was strict - she described herself as being harsh in matters relating to the comings and goings of her children. No doubt, and this emerges from the evidence, she was angry that the complainant had gone out that evening and the complainant knew that if she went home she would have to face the wrath of her mother. This then raises the question - if the complainant had engaged in consensual sex and had had a good time as was suggested, why would she opt to go home and face her angry mother with all the consequences that would go with it instead of going to her aunt's home where she was staying at the time and where she had already made an arrangement for the door to be opened for her? It is highly improbable in my view that the complainant would have opted to go to her parental home after a fun, carefree night and face consequences when the option of going to her aunt's home would surely have meant that her secrets and her indiscretions (in staying out late and drinking) would not have reached the attention of her mother. It simply does not make sense and the only way for it make sense is if she was raped and abandoned at the dumping site as her parental home would then be the closest destination to reach;

j) The appellant's evidence was that he dropped the complainant off at Nellmapius and not at her home as it was difficult to travel over sand hills there. In addition he states that he did so at the

request of the complainant who told him her home was not far from where he dropped her off. Even on his version it is hardly consistent with someone who has found a new lover, and had had an enjoyable evening with her, to drop her off sometime after 4AM on a cold winter morning at a place other than her home. The complainant in her evidence stated that the dumping site was a distance from her home and that she would have had to first pass extension 8 and then would reach extension 7 where her parental home was. If indeed the evening had ended on a warm note, one would have expected the appellant to have taken the appellant home;

k) Finally, there is the matter of whether the complainant offered resistance or simply followed the instructions of the appellant to undress and have sex with him. Prior to getting to the dumping site, the appellant said she would not go home and someone had to pay - this is the language of force and payback and under such circumstances, I do not believe that much hangs on the failure (if it could be called that) by this sixteen year old complainant to offer more resistance or indeed to give phone number to the appellant. He was, for all intents and purposes, in control of the situation.

20. In all the circumstances and when one regard to all the evidence in its totality, then I am satisfied that the State had proved the guilt of the appellant on Count 1 beyond a reasonable doubt.

SENTENCE

21. No submissions were made with regard to sentence and it is my view that the sentence imposed was not excessive and nor does it evoke a sense of shock.

The appeal against sentence must accordingly fail.

ORDER

22. I accordingly propose the following order:

a) The appeal against the conviction is dismissed;

b) The appeal against sentence is dismissed.

N KOLLAPEN

JUDGE OF THE HIGH COURT

I AGREE,

S POTTERILL

JUDGE OF THE HIGH COURT

IT IS SO ORDERED

A82/2014

HEARD ON: 21 JULY 2014

FOR THE APPELLANT: ADV A. B. BOOYSEN

INSTRUCTED BY: SCHURMAN JOUBERT PROKUREURS

FOR THE RESPONDENT: ADV S. J. NTULI

INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS