REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION: PRETORIA

APPEAL CASE NO: A300/2014

DATE: 8 OCTOBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

PETRUS BOY MOKHETHI

And

THE STATE

JUDGMENT

SEMENYA AJ:

1. Appellant was, on the 25th September 2012, convicted by the Middleburg (Mpumalanga) regional magistrate on the offence of rape in contravention of the provisions of section 3 read with sections 1,56(1), 57,58,59 60 and 61 of Criminal Law (Sexual offences and Related Matters) Amendment Act 32 of 2007 ("the Act") He was sentenced to seven (7) years imprisonment on the 23rd October 2012. This appeal is concerned solely on the aforementioned conviction. The appeal is with leave of the regional magistrate.

2. The conviction of the appellant followed upon the following facts: On the 24th of May 2010 T[...] M[...] (the complainant), who was 17 years old as at the date of the incident, had visited her ailing grandfather in Middelburg. Due to the time of day (sunset),when she was supposed to return to Witbank, her father realized that there were no more taxis and thus approached the appellant and requested him to take his daughter to

Witbank, a request to which the appellant agreed. As they were so travelling, the appellant repeatedly commented on her beauty.

3. He dropped her at a taxi rank in Witbank where she found a taxi with only one female passenger. This other lady later disembarked from the taxi and the driver advised her to look for alternative transport as he could not transport only two people. The appellant called and she told him that she did not have transport to her home. The appellant told her to wait for him and that he will take her home. The appellant arrived but instead of taking her home, he drove back to Middleburg and told her that he would like to find out what the results of the soccer match were before he could take her home The two stayed at his place until the early hours.

4. At about 2am she told him that she wants to go home as she has examination to write the next day. Upon this, the appellant pulled her hair and slapped her. He continued to hit her with a sjambok and the palm of his hands until she eventually succumbed to the pressure he was exerting onto her. He then forcefully undressed her and raped her. The victim managed to escape from the house when the appellant retreated for a smoke. She ran until she met a security officer and reported to him that he was raped. The security officer told her to make a call to her father to arrange a place where they could meet.

5. Shortly thereafter the complainant's father arrived in the company of the police and they proceeded to the appellant's place of residence but did not find him. He was arrested when he was seen speeding off in an attempt to flee. The complainant's father stated that she was crying when she called him to tell him that she was still in Middleburg.

6 . This is in short, the sequence of events as testified by witnesses for the state.

7. The appellant conceded that he was requested by the complainant's father to transport her to Witbank. He however stated that the complainant later called him and told him that she is stranded as there are no taxis to take her home. He told her to wait for him and offered to take her there. The two were in agreement that he would take her home after watching the soccer match at his home back in Middleburg. He further stated that they kissed and fondled each other as they were watching television. They also agreed to engage in sexual intercourse on condition that he would not ejaculate into her vagina, the reason being that he did not have a condom with him. Following on, he unfortunately ejaculated in her vagina and this infuriated her. The complainant then told him that she is going to lay a charge of rape against him. He denied that he hit her with the palm of his hands and a sjambok. He further denied that he attempted to flee from the police.

8. The appellant further testified that the complainant's cell phone rang numerous times when she was in his company and that she ignored it.

9. The appellant did not call witnesses to testify on his behalf.

10. In order to clarify himself regarding the dispute as to who called the other between the complainant and the appellant, the regional magistrate made a request to Mobile Telephone Network (MTN), in terms of section 205(1) of The Criminal Procedure Act 51 of 1977, for a statement of calls made from the appellant's cell phone on the date of the incident. The statement revealed that it was in deed the appellant who made the call.

11. The grounds of appeal as they appear from the heads of argument and the oral submissions by advocate PSAJ Jacobs, counsel for the appellant, can be summarised as follows:

> 11.1 Firstly, that the regional magistrate erroneously accepted the version of the state as proof of the guilt of the appellant beyond reasonable doubt even though there was no medical evidence in support of it.
>
> 11.2 Secondly, that the regional magistrate was bound to draw an adverse inference due to the state's failure to call the security officer in his capacity as the first person to whom the incident was reported.
>
> 11.3 Thirdly, that the regional magistrate should have found that the complainant consented to sexual intercourse as the evidence supports this stance.
>
> 11.4 Lastly, that the regional magistrate erred by rejecting the appellant's version solely on the ground that he lied in his version when he testified that it was the complainant who called him and asked him to come and collect her.

12. Counsel for the respondent, advocate C L Burke, argued that the issue of lack of medical evidence is "neither here nor there and that it takes the matter no further" as the appellant does not deny that he had sexual intercourse with the complainant. Further, that the court ***a quo*** correctly rejected the version of the appellant. Counsel argued that the fact that the appellant lied about the call he made to the complainant was not assessed in isolation but that it was done together with the totality of the evidence presented before the regional magistrate.

13. The manner in which the complainant and the appellant met and the reasons why they ended up back in Middleburg are matters of common cause. The arrival of the complainant's father in the company of the police is also common cause. The complainant's version that she reported to a security officer that she was raped is not in dispute.

14. The attack on the respondent's case is largely based on the credibility of the complainant. Counsel for the

appellant argued that the court was compelled to reject her version on the basis that the medical report does not reflect that she was severely beaten and that there is no other version to support her in this regard. This argument is rejected on the basis that her version of injuries on her face is consistent with that of her father. The two state witnesses were not the authors of the medical report. The court therefore finds that it will be unfair to expect them to account for the omissions (if any) that may have been made on the J88.The explanation given by the complainant was that she was wearing a thick jacket as it was winter- a fact which is not disputed - and that it helped to protect against infliction of injuries on her body is found to be reasonable.

15. Counsel for the appellant argued that it is extraordinary that the respondent failed to lead evidence of the injuries or marks suffered by the appellant as a result of the complainant's attempt to protect herself. This argument cannot be accepted as it is not the complainant's version that she inflicted some injuries on the appellant when she was warding off his blows.

16. The appellant was 30 years old as at the date of the incident. The complainant was only 17 years old. It was argued on behalf of the appellant that the court should not have believed her simply because she did not protect her dignity by putting up a fight. I doubt that, that would have assisted her at all. On the contrary, it is my view that it may have worsened the situation she found herself in.

17. In the case of S ***v Mkohle 1990 (1) SACR95 (A)*** at 98 f-g the judges of appeal had this to say regarding the manner in which the courts are to approach contradictions in the evidence of witnesses. ''Contradictions *per se* do not lead to a rejection of a witness's evidence. Nicolas J, as he then was, observed in S ***v Oosthuizen 1982(3) SA 571 (T)*** at 576B-C, they may simply be indicative of error. Furthermore, (at 576G-H) it is stated that not every error made by a witness affects his credibility; in each case the trier of facts has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on the parts of the witness' evidence."

18. Section 58 of the Act provides as follows;" Evidence of previous consistent statements. Evidence relating to previous consistent statements (my emphasis) by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent statements."

19. Counsel for the appellant argued that the court *a quo* erred by not placing enough emphasis on the fact that the complainant was a single witness and that another witness, a security guard, who could testify to the complainant's immediate state after the alleged rape was not called. I find that, based on the provisions of section 58 ***supra***, the regional magistrate cannot be faulted for not placing any emphasis on this aspect at all. According to this section, evidence of any previous consistent statement other than that of a so-called first

report is also admissible. In this case, that would be the evidence of the complainant's father who arrived shortly after the incident and testified to the effect that she was distraught.

20. In the present case I find that no negative inference can be drawn out of the fact that the complainant and her father differ as to the exact stage at which she reported to him that she was raped. That the father received a call from the complainant who was hysterical in the early hours of the morning and that he called the police so that they can accompany him to the place she was calling from is evidence enough to show that the complainant was indeed in trouble. It suffices that the evidence proves that a report was made within a very short space of time. I find that whether she reported on the phone or upon her father's arrival is therefore immaterial.

21. It appears from the version of the appellant that it was important to him to state that it was the complainant who called him and not the other way round. This version was clearly tendered to show that she was happy to be with him and to engage in sexual intercourse with him.He obviously lied about this fact which is a material part of his defence and I find that the court a quo was correct in rejecting his version in this regard. The regional magistrate was aware of the fact that in line with the decision in the case of S ***v Mtsweni 1985 (1) SA 590 (A)*** he cannot find the appellant guilty merely because he lied about this one fact. The regional magistrate took the totality of the evidence presented before him in arriving at a guilty verdict. I agree with the submissions made by the respondent's counsel that the appellant took advantage of the trust that the complainant's father placed in him. It is also my view that the complainant trusted him because he transported her safely to Witbank and expected him to do the same when he told her that he will help her when she could not find a taxi.

22. The appellant's version that the complainant negotiated sexual intercourse with him on condition that he shall ejaculate outside her vagina, and thereafter decided to lay charges against him simply because he ejaculated into her, was correctly rejected on the basis that it is not reasonably possibly true. In my view she would not have left, alone in the early hours of the morning, thereby exposing herself to danger, if she indeed wanted to have sex with the appellant. I find that the regional magistrate correctly latched on the appellant's false evidence which he assessed in the context of the full picture presented in evidence-S ***v Chabalala 2003 (1) SACR 134 SC A)*** at 15.

23. I fail to find any misdirection on the part of the regional magistrate with regard to the finding of fact and credibility of the two state witnesses. There is no reason to interfere with the conviction of the appellant. (S ***v Hadebe and Others 1997 (2) SACR 641 (SCA)*** **at 645 e-f.**

In the result I suggest the following:

1. The appeal against conviction is dismissed.

2. The conviction is confirmed.

M V SEMENYA AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered.

LM MOLOPA-SETHOSA J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Date heard: 19 AUGUST 2014

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