IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO

(3) REVISED

DATE: : _____11 April 2016____

SIGNATURE:_____

CASE NO.: A190/2015

14/4/16

In the matter between

MZWABANTU ANDREW BATHAKATHI Appellant

and

THE STATE Respondent

JUDGMENT

JANSEN J

[1] The appellant appeared before the regional magistrate court in Fochville on two counts, namely rape and a count of pointing a firearm at the complainant during the rape.

[2] The appellant pleaded not guilty on both counts. In terms of his section 115 plea explanation, he admitted to having sexual intercourse with the complainant, but stated that it was with the complainant's consent. Regarding the count of pointing a firearm, the appellant stated in his section 115 explanation that he did not even have a firearm with him and never pointed a firearm at the complainant.

[3] It bears mention that this part of the record had to be reconstructed but that the charge sheet is at least included in the record. The alleged rape allegedly happened on or about 28 March 2010 within the township of Kokosi and the count relating to the pointing of a firearm (in terms of section 120(6)(a) read with sections 1, 103, 120(1)(a), 121 read with schedule 4 and section 151 of the Firearms Control Act 60 of 2000) took place during the said rape.

[4] On 6 July 2011 the appellant was convicted on both counts and sentenced to 20 years in respect of the rape and two years for pointing a firearm.

[5] The complainant was born on 22 April 1994 according to her birth certificate which was accepted as an exhibit. Hence, she was 15 years, 11 months and 6 days old when the alleged rape occurred.

[6] The appellant, according to his birth certificate, was born on […] September 1983. Hence he was twenty-six, going on twenty-seven, when the alleged rape occurred.

[7] The matter came before this court based on the appellant's petition against his conviction and sentence being granted. (Leave to appeal in respect of both conviction and sentence was refused by the court *a quo*.)

[8] Before turning to the evidence, it is emphasised that even though it was sought to reconstruct a part of the missing evidence, a part of the record relates to evidence in a completely different matter and the record ends with part of a judgment rendered in another matter. The transcribers also emphasise that the interpreter often commenced interpreting whilst another party was still speaking and that the questions and statements of the presiding

officer and attorney for the appellant were inaudible on various occasions. The record further (containing the transcription of evidence in a totally different case) commences halfway into a question posed by the appellant's attorney. What the transcribers state is the following: —

> ***"Neem asseblief kennis dat daar 'n heel aantal 'onduidelikhede' in die oorkonde voorkom as gevolg van die feit dat klank op twee geleenthede totaal vervaag het. Selfs op mp3 kon dit wat deur Hof gestel word nie waargeneem word nie."***

[9] The court *a quo* had sought to reconstruct the record as far as it was able to do and the transcribers did their best to type what could be gleaned from the recordings in instances where the sound was of a poor quality.

[10] This court is of the opinion that the relevant parts of the evidence which were transcribed are such that they can rely on the record in its current format. The contrary was, in any event, not contended on behalf of the appellant.

[11] The appellant was represented by an attorney throughout the proceedings.

AD CONVICTION

[12] A J88 medical report was admitted by the defence and was handed in as an exhibit. It was dated 29 March 2010, a day after the rape, and indicated that there was *"…tear bleeding from the vagina with tear on posterior fourchette and tear on hymen membrane at 5 o'clock/7 o'clock. It looked bruised. Buttocks full of grass."* The conclusion which was reached by the medical practitioner was that the complainant had been sexually assaulted.

[13] In addition to this evidence, the complainant, her mother and her sister were called by the state as witnesses.

[14] The appellant testified in his own defence and called no witnesses.

[15] Given the fact that the appellant admitted to having sexual intercourse with the complainant, the only issue was whether it was consensual. If she was under the age of sixteen, the question of consent is not even an issue as the provisions of section 51 and

schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended, prescribes a minimum sentence of life imprisonment.

[16] From the record, it does not appear that the possible imposition and implications of a minimum sentence were explained to the appellant.

[17] The magistrate termed the complainant's evidence cogent and credible. She testified that the appellant arrived at the house of her aunt, where she and her sister were staying, to walk with him to go and buy Coca Cola. This happened at about 20h00. She testified that the appellant asked her aunt's permission for her and her sister to accompany him and that he then took them to a tavern called T.. He bought himself, and Ace, a friend of his who had accompanied them, Black Label beer and Cokes for the sisters. He then offered to buy the sisters a Smirnoff Storm, then another and a third, all of which the girls consumed. It bears mention that these were 750ml bottles.

[18] The appellant, according to the complainant, was her cousin as her mother and the appellant's mother were sisters but they referred to him as their "uncle".

[19] Asked why she drank the Smirnoff Storms, she answered that she wanted to know what it tasted like. Much later they left the tavern but because her legs felt weak, she asked the appellant to carry her on his back. He could not proceed as the younger sister also had problems walking due to her state of inebriation.

[20] The complainant testified that the appellant sent her sister back to the tavern to go and fetch his brother who was there in order to assist in carrying her. After her sister had left, the appellant pulled her into a cemetery where he gave her the choice of having sex with him or being shot. She stated that he took out a firearm with his right hand from behind his back and with his left hand, undressed her by pulling off her jean shorts and panties. He forced her onto her back. He then penetrated her and moved up and down and she testified that it hurt tremendously. The whole time he held the firearm in his right hand. At that point in the time, two men appeared and asked what was happening whereupon the appellant told them to leave or he would shoot the complainant. She dressed quickly whilst he pointed the gun at her and the two men.

[21] Thereafter the appellant took her back to the tavern where she found her sister and told her that they should go home. The appellant accompanied them. She started running when close to the house and she went straight to her aunt's bedroom and told her that she had been raped. Her sister and the appellant arrived and her sister entered and the appellant told her to lock the door.

[22] The aunt texted the complainant's mother and they phoned the police. The complainant was taken to a doctor and the police the next day. She also testified that she could remember what happened even though she was drunk.

[23] The version which was put to her in cross-examination was different. It bears mention that the magistrate mentioned that when she left the witness box, she was crying.

[24] The complainant added that the appellant had threatened her that if she told anybody about what had occurred, he would kill her or her family members.

[25] It was put to the complainant that her younger sister (when they were still at their aunt's home) was told that a Rebecca called her to tell her somebody wanted her outside and it was the appellant and his friend Ace. The younger sister, only thirteen, told the appellant they should first ask their aunt's permission before they could go and buy Cokes with him, which he indicated he wished to do.

[26] They then went to T.. It was put to the complainant that the appellant did not offer to purchase Storm of his own accord after he had purchased Coke for the girls. It was put to her that she had insisted on the appellant purchasing the Smirnoff Storm, which she denied. The younger sister, the complainant admitted, was running around in the tavern. It was put to her that they were all relaxed, having a good time whereupon the complainant stated that she felt uncomfortable because there were so many people. She was asked why she did not demand to be taken home and she answered that she did not because the appellant had invited them and purchased Coke and drinks for them. She ultimately insisted that they go home but she could not walk.

[27] It was then put to her that the appellant's version was that she kissed him and hugged him and sat on his lap, all of which the complainant denied. It was further put to her that it

was the appellant's version that after her sister left, whilst they were returning to her aunt's home, she kissed the appellant and started unbuttoning his overall, which she denied. She admitted that her jeans were tight bootleg jeans. She also testified that he forced her upper legs open with one hand, and that she tried to resist but could not hold his hand as he produced a firearm.

[28] The complainant testified that the appellant pulled her to a cemetery. When asked why he did not carry her as she could not walk, she said she did not know.

[29] It was further put to her that she told the appellant that she wanted to have sex with him but that he was not to tell her sister. It was also put to her that she went to the cemetery voluntarily and that the appellant even made her lie on his overall. Furthermore, it was put to her that the appellant would testify that they heard the footsteps of two men and remained silent. The complainant denied all the versions put to her.

[30] They then went back to the tavern and sat for quite a while whilst the appellant consumed two more Smirnoff Storms, which the complainant denied. She stated that she found her little sister and told her that they should return home immediately.

[31] The complainant also admitted that Nkulu, the appellant's brother, had asked the appellant from where they had returned and that the appellant alleged from his girlfriend. The complainant further admitted that she never asked her sister why she had not returned to her (where she left her with the appellant close to the cemetery) – not on the day of the incident nor the following day.

[32] It was put to the complainant that the appellant would allegedly also testify that he gave her R20.00 at the tavern and that they agreed to tell nobody about having sex which the complainant denied. It was also put to her that the appellant would testify that they agreed to have sex and that he never threatened her.

[33] The next witness was the appellant's aunt whose evidence was consistent with that of the complainant. She testified that the complainant told her about the rape, the two men who approached and asked what was happening in the cemetery (as sex with a girlfriend would not take place in a cemetery). She testified that the complainant had told her that the

appellant pointed a gun at her and added that the complainant had told her that the appellant had held her mouth shut with his shirt. She further testified, as had the complainant, that the appellant threatened to murder the complainant if the two men did not leave. She testified that the complainant was crying. She added that the complainant told her that if she were to tell anybody, including the police, the appellant threatened to kill her.

[34] During cross-examination, the aunt testified that the appellant was part of the family. The complainant was recalled for further cross-examination (although the magistrate commented that she was crying) in order to establish whether she was not afraid to arrive home late and drunk. The aunt was asked whether she saw that the complainant was dirty, but she stated that she only saw that her zip was undone. She testified, upon questioning, that she did not confront the appellant because the complainant had told her that he was armed. She admitted that she was strict with the children and would scold them when they did anything wrong, and that she indeed scolded them when the younger sister told her that they had been drinking because they were not accustomed to alcohol. She stated that the children had a lot of respect for her. She also testified that she trusted the appellant as he was the girls' uncle.

[35] The complainant finally admitted that both she and her sister were drunk and knew that they would get into trouble. She also testified that she told the appellant that they were not allowed to drink alcohol but that he urged them to drink the Smirnoff Storms.

[36] It was put to her that the she had fabricated the story of a rape because she was afraid of her aunt but her aunt testified that she thought that they were telling the truth. The complainant denied that she had kissed the appellant.

[37] She testified that the complainant had told her that the appellant had carried her and then ran to the cemetery with her.

[38] The younger sister then testified and corroborated the complainant's evidence in all material respects. She said that she and the appellant's brother indeed returned to where they had left the complainant and the appellant after she had fetched him from the tavern but upon finding nobody there, returned to the tavern. She said they were uncomfortable because there were so many people, some quarrelling. The State closed its case.

[39] The appellant then testified. His evidence did not accord with the version put to the complainant and the other witnesses. According to him, he was sitting in a tavern, and went out to speak to his friend, when the younger sister came to ask him to buy them Coke. According to him, the younger sister insisted on going to the T. tavern because a jazz band was playing there and that he had actually wanted to buy the children Coke at another shop. He also stated that even though the younger sister said that she would go with the complainant, he was reluctant because it was a "rough" place. Allegedly, the younger sister stated that she was well acquainted with the tavern. None of his evidence was put to the complainant and her sister during cross-examination.

[40] According to the appellant, the younger sister insisted that he purchase them Smirnoff Storms after he had purchased them Coke. He also came with a feeble version that he thought that the children were 18 years old and would not have been allowed into the tavern if they were any younger. However, he admitted that no ID documents were requested. He also came with a new version that the police were frisking the men in the tavern and would have found a firearm had he been carrying one. He also said they were celebrating the children's good school results and hence he purchased the Smirnoff Storms.

[41] The appellant testified that the complainant kissed him in the tavern unexpectedly. When they returned home and he carried the complainant on his back and after they had sent the younger sister back to the tavern, the complainant allegedly kissed him again and asked to have sexual intercourse. He allegedly did it reluctantly, "against his will".

[42] Regarding the two men who arrived at the scene, he testified that they just laughed and walked past. He denied having a firearm.

[43] The appellant then alleged that after they had had sex, the complainant wished him to have sex with her younger sister as well.

[44] During cross-examination, he was evasive as to how he fitted into the family and testified that he was simply called "uncle". He tried to argue this away by stating that he had had a sexual relationship with the complainant's mother's sister.

[45] The appellant also changed his version and said that it was he who had asked the complainant to have sexual intercourse with him. He said that because the complainant kissed him in a way indicating a willingness to have sex, he wanted to have intercourse with her. He insisted that he never planned on having intercourse and that it simply happened and that because he was intoxicated, he was less inhibited.

[46] The appellant testified that when the complainant kissed him, he got a warm feeling which caused him to wish to have sex. He added that he was inebriated and that it was a mistake. He told the court, when questioned by the court:—

> ***"Waar is dit toe nou? – Na hierdie soenery en na ek toe heirdie warm gevoel gekry het.***
>
> ***Wat vra u toe? – Ek het haar gevra dat ons seks moet hê want hierdie gesoenery van ons dit is soenery dat 'n mens seks wou hou.***
>
> ***Goed en wat sê sy toe? – Sy het gesê ja dit is reg ek het toe vir haar gese kom ons soek 'n veilige plek."***

[47] The appellant also admitted under cross-examination that he had been drinking at another tavern and was intoxicated before they went to T..

[48] The appellant said because they were in a cemetery, they were rushed and he did not know whether he injured the complainant but there was no time for foreplay.

[49] The appellant even denied that there could have been grass on her buttocks as the doctor had remarked because he had allegedly taken off his overall and made her lie on it.

[50] The appellant reiterated that he had not known that he was going to have sexual intercourse with somebody whilst under the influence of alcohol.

[51] The appellant was asked why the complainant would immediately have told her aunt that she had been raped and he answered by stating that he had refused to have sexual intercourse with her younger sister even though the complainant insisted that he should. He

said that he had refused because he had not meant to have sexual intercourse with the complainant in the first instance. He further expressed his regret that he had taken the girls to T. and had not simply purchased them Coke. He was also asked why knowing that he was taking the girls to a dangerous tavern, he had not told the aunt that that was what he intended doing. He had no audible explanation.

[52] The appellant stated again that he bought the children the Smirnoff Storms to celebrate their good school results. It was also put to him that he sent the younger sister back to the tavern because he knew he was going to rape the complainant. He denied this stating that the younger sister was heavily under the influence of alcohol.

[53] The appellant once again blamed the rape on the complainant's conduct.

[54] The defence then closed its case.

The applicable legal principles

[55] It was argued, on behalf of the appellant, that although the court may convict an accused on the evidence of a single witness in terms of section 208 of the Criminal Procedure Act 51 of 1977, such evidence must be reliable and satisfactory in all material respects. A general cautionary rule in respect of sexual assault cases is outdated as was held in ***S v Jackson*** **1998 (1) SACR 470 (SCA)**.

[56] The examples set out in the cases cited by the appellant's counsel namely: —

- ***Stevens v S 2005*** **(1) All SA (1) SCA**;
- ***S v Sauls and others*** **1981 (3) 172 (A)** at 180 E-G; and
- ***R v Mokoena*** **1932 OPD 79** at 80.

do not find application in this case.

[57] There was no reason whatsoever for the complainant to have lied. It is true that on that particular evening she ventured into new territory by going to a tavern and drinking (apparently for the first time) but that is a far cry from believing that that would give rise to a

wish on her part to have sexual intercourse with her uncle. People behave differently whilst under the influence of alcohol and the complainant might have started flirting and kissing the appellant, but that did not mean that she wished to engage in sexual intercourse.

[58] Assuming, *arguendo,* that she did kiss him in an inebriated state – that does not indicate at all that she wished him to rape her – which is what he literally did because he said they were pressed for time. The evidence points to the contrary. Her younger sister said that the complainant was trembling when she returned to the tavern and when close to home, she ran and went to her aunt and cried and told her that she had been raped.

[59] In his evidence, the appellant admitted that his conduct had been wrong and that the sexual intercourse should never have taken place. Furthermore, he was the one who enticed the compliant and her sister to drink and who took them to a bar which he knew was unsavoury ("rough").

[60] The reasons advanced by counsel for the appellant why the complainant and her sister were lying were that they were drunk, had intentionally consumed three bottles of alcohol, arrived home late under "suspicious circumstances", coupled with the fact that the complainant did not cry at the tavern or on her way home. The latter point takes the matter no further. People react differently when in shock. She was trembling. The children probably also kept on drinking because their inhibitions were lowered by the alcohol which they had consumed and the appellant kept on buying yet further alcohol. He stood in a position of trust towards them which he abused.

[61] Regarding the firearm, the appellant's counsel argued that the complainant would not know whether it was a firearm or what the appellant pointed at her. However, one can accept that everybody has an idea of the general appearance of a firearm, whatever its make, and when one is told that one is going to be shot, one will believe the person making the statement. It should be borne in mind that the pointing of a firearm in terms of Act 60 of 2000 is of a firearm, an antique firearm or even a pellet gun.

[62] Regarding the appellant's version – it was full of fabrications. The magistrate found the complainant and especially her younger sister to be credible, disciplined children. It was submitted that the appellant kissed the complainant in the presence of her younger sister.

That, most certainly, was not the younger sister's testimony. Why on earth – even if intoxicated – the complainant would wish her sister to be raped is incomprehensible. She said that it hurt very much.

[63] One could speculate that the complainant and her sister were in the same trouble because they visited a tavern together and consumed alcohol, and that after having sex, she wished her sister to be in the same boat that she was. This would be pure speculation however. On the other hand, it is *prima facie* such a strange defence for the appellant to have fabricated, that he could reasonably possibly have been telling the truth regarding this issue.

[64] However, even if this were the case, it would merely be because the complainant wished her sister to be in as much trouble as she was. It does not detract from the fact that the appellant raped her.

[65] In the premises, the state proved beyond a reasonable doubt that the appellant raped the complainant.

[66] Regarding the pointing of a firearm, the complainant's testimony sounds far-fetched. It is improbable that he suddenly produced a firearm and somehow managed to undress her with one hand and remove her tight bootleg jeans with one hand. It is held that the appellant's version that he had no firearm could reasonably possibly be true. No firearm was ever retrieved either from the cemetery or the appellant.

AD SENTENCE:

[67] These appellant's personal circumstances were conveniently summarised by the appellant's counsel as follows: —

a) The Appellant was 27 years old when he was sentenced. He was still young and was not beyond rehabilitation.
b) He was single but staying with his girlfriend.
c) His girlfriend's financial position was not placed on record and it may be safely assumed that the was the sole bread winner at home.
d) He had one minor child to maintain.

e) He was a primary care giver and contributed R400-00 towards the maintenance of the minor child.

f) He was not fully literate, but was employed by a Contractor known as Pelle earning R1600-00 per month. He worked continuously for the same company for a period of 3 years.

g) He was partially literate having passed grade 11 only. He never received any life skills and or anger management lessons.

h) He was under the influence of alcohol when he committed this offence.

i) He was a first offender and did not have pending cases.

j) He was on bail and in custody from date of sentencing namely 6 July 2011 until date of the hearing of his appeal on 2 November 2015. He was therefore in jail for approximately four years before his appeal was heard.

[68] It was argued, in the circumstances of this case, that imprisonment for a period of 22 years induces a sense of shock, allowing the appeal court to interfere with the sentence imposed. The magistrate expressed himself in very strong terms regarding the fact that the consumption of liquor could never be a mitigating circumstance, even though he accepted that he appellant was drunk and that the courts should hold so unequivocally. I am unable to agree with the magistrate. Circumstances may lead to the consumption of alcohol and the commission of a crime which was never intended. It is the consumption of liquor which should be addressed. It cannot always be held that an inebriated person is still functioning intentionally and with *dolus* (depending on the circumstances). The magistrate clearly overemphasized the seriousness of the offence and disregarded the fact that the appellant was drunk. The fact that he was inebriated, in the first instance, was of course of his own volition, for which he must be held accountable.

[69] It must be kept in mind that the purpose of punishment of criminals should be rehabilitative and that the triad of the *opus classicus Malgas* should be applied. A sentence of 22 years would simply break the young man and deprive him of all hope.

[70] The respondent's counsel emphasised that the appellant was in a position of trust, used a firearm during the commission of the offence which was serious and showed no regret. The finding is incorrect. The appellant did show regret. He stated in his evidence that he wished that the incident had never occurred and that they had never gone to the T. tavern and

that the sexual intercourse was not intentional and should not have happened as it was wrong. That the complainant probably kissed him is borne out by his spontaneous allegation that he felt that "warm feeling" when one wishes to have sex due to the manner in which the complainant kissed him.

[71] In the premises, the following order is proposed: —

Order

1. The conviction in respect of the pointing a firearm is set aside.
2. The appeal in respect of sentence is upheld and the magistrate's sentences are substituted with the following sentences: —
    - The appellant is convicted to 10 years' imprisonment, four (4) years of which are suspended on condition that he does not commit any sexual offence during the period of four years.
    - The appellant is declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000.
    - The sentence is antedated to 6 July 2011 in terms of section 282 of the Criminal Procedure Act.

MM JANSEN J
JUDGE OF THE HIGH COURT

I agree and it is so ordered.

DE KLERK AJ
JUDGE OF THE HIGH COURT

For the Appellant **Advocate S Moeng** (012-401 9200/082 299 1644)

Instructed by **Pretoria Justice Centre**

For the Respondent: **Advocate S Scheepers** (084 520 0593) sscheempers@npa.gov.za
Instructed by **The Director of Public Prosecutions** (Ref: PA 34/2015 (2/11/SS)