

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: A575/2015

15/6/2016

Not reportable

Not of interest to other judges

Revised.

In the matter between:

EUSEBIO SITHOLE

Appellant

And

THE STATE

Respondent

***Coram:* HUGHES J**

JUDGMENT

HUGHES J

1. The appellant was convicted in the Regional Court Benoni on one count of rape and sentenced to 18 years' imprisonment.
2. The appellant was legally represented at the trial and leave was granted by the trial court against the conviction.
3. The appellant who pleaded not guilty to the charge preferred was accused of

sexually penetrating an 11 year old girl, N. M., without her consent. The sister of the complainant, A., who was the appellant's girlfriend lived together in a shack. On 22 December 2013 whilst at her sister's shack, the complainant and the appellant left and proceeded by way of a taxi to Daveyton mall in order to purchase clothes for the complainant. At the mall the appellant was unable to obtain the size of clothing to fit the complainant and instead he bought her a hair cloth and balls.

4. The complainant's testimony is that they returned to the shack on foot and on their way home they had to pass through a veld. Whilst in the veld the appellant wanted to rape her and attempted to undress her. She states that she managed to run away, but the appellant called upon two boys to apprehend her, which they did and brought her back to him. Thereafter they too ran away.
5. The appellant undressed himself by removing his trousers and jockey. He thereafter took out his penis. He also undressed the complainant by removing her panty, made her lie down on the ground and inserted his penis into her vagina.
6. During the course of their walk home after the rape the appellant tried to give the complainant intoxicating liquor which she first refused but after a while she succumbed.
7. On arrival at the shack the appellant used an iron to open the door. The complainant testified that he tried to rape her yet again. She was saved by the arrival of two priests who arrived at the shack. They circumvented the rape from occurring and their arrival allowed the complainant passage to escape. She ran to the neighbours whilst the appellant attended to the two priests. According to the priest he did so with his zip of his trousers not pulled up.
8. The appellant's version was that A. drank too much alcohol and she did not appreciate that he restricted her. Further, the two priests who arrived at the shack were boyfriends of A. that is why they assaulted him. He reasons that A. was using the complainant to formulate the charge against him as she was

having a relationship with the two priests.

9. The medical evidence of the doctor who examined the complainant after the incident was conclusive that the injuries sustained by her were consistent with penetration or sexual assault.
10. It was argued on behalf of the appellant that the complainant advanced different versions in her testimony. The State place reliance on *S v Mkohle 1990 (1) SACR 95 (A)* where the court said that "contradictions per se do not lead to rejection of a witness' evidence: they may simply be Indicative of an error".
11. The State argued further that the contradictions were not fatal and even in the face of these contradictions the magistrate accepted that the evidence proved beyond a reasonable doubt that the appellant had committed the crime. Likewise with the argument raised by the appellant in respect of the contradictions between the evidence of the two priests. The State argued that these witnesses narrated the events as they saw them unfold from their individual perspectives.
12. It is trite that an appeal court will only interfere with the findings of fact of the trial court if the trial court has misdirected itself in reaching a conclusion and the evidence shows clearly that it was wrong in its finding. Only in exceptional circumstances, such as the appellant convincing the appeal court that the acceptance of a witnesses evidence was wrongly accepted by the trial court, could a justification of interference arise. However, in convincing the appeal court mere reasonable doubt will not suffice as the trial court was at an advantage of seeing, hearing, and appraising the witness to reach a conclusion on the evaluation of the oral testimony. See *Kekana v The State (581111) {2012} ZASCA 75 (25 May 2012) at para [BJ, S v Monyane & others 2008 (1) SACR 543 (SCA) .at para [15]; S v Francis 1991(1) SACR 198 (A) at 2046.*
13. In my view the medical evidence is in keeping with the complainant's evidence that she had been raped. Further the two priests' version of what they observed of the complainant and the appellant in the veld and walking towards the shack. Their observation of the appellant forcing the complainant to drink alcohol, the

manner in which he held and touched the complainant, urged them to follow the appellant to the shack. The priests' testimony of the use of an iron by the appellant to force open the door of the shack and the complainant fleeing from the shack to the neighbours corroborates the evidence of the complainant in material respects.

14. I must at this stage highlight that the complainant though a single witness was consistent and stood her ground when her version was tested. To my mind the contradictions in her evidence were not material at all. In fact the main aspect of her testimony was corroborated by the evidence of the two priests as I have stated above.

15. Turning to the appellant's evidence. Even though he started out by denying the evidence against him he ended up making valuable concessions that indeed he was drinking wine on the day in question. This is in line with the complainant's evidence that he was drinking wine, that he gave her alcohol to drink and that the priests witnessed him drinking. It is therefore not far-fetched to conclude that the priests saw him give the complainant wine to drink which would corroborate the testimony of the complainant.

16. His explanation of the two priests appearing at his shack because they were in a relationship with A. is just unsubstantiated, far-fetched and improbable. Likewise is the appellant's version that the complainant was influenced by A. to say that she was raped because A. was not happy with the restrictions he had placed on her drinking habits.

17. Cumulatively on the facts and evidence I cannot find any misdirection by the learned magistrate in accepting the evidences of the witnesses in the face of the non-material contradictions in reaching the conclusion that it did regarding the conviction. I further conclude that the appellant did not demonstrate that this is an instance where exceptional circumstances warrant this court to interfere with the evaluation of the testimony of the witnesses.

18. In the result I make the order below:

The appeal against the conviction is dismissed.

It is so ordered.

W HUGHES
Judge of the High Court Gauteng, Pretoria

I concur

AC BASSON
Judge of the High Court Gauteng, Pretoria

Date of hearing: 06 June 2016

Date delivered: 15 June 2016

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