THE REPUBLIC OF SOUTH AFRICA

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3/11/2016.

Case no: A705/2015

In the matter between:

VINCENT KWATISO **APPELLANT**

and

THE STATE **RESPPONDENT**

Heard: 20 October 2016

Delivered: 1 November 2016

JUDGMENT

Molahlehi AJ

Introduction:

[1] The appellant in this matter was charged and convicted with the offences of rape and housebreaking on 17 November 2014, in the Regional Court of Klerksdorp. The woman he was alleged to have raped was at the time 18 years old. He was sentenced to an effective 18 years imprisonment and declared unfit to possess a firearm.

[2] The appellant has now launched these appeal proceedings after obtaining leave to appeal on petition to do so on 6 August 2015. The appeal is against both the conviction and the sentence.

[3] The appellant was throughout the trial proceedings legally represented by the Legal Aid South Africa. He had pleaded not guilty to both the charges of housebreaking and the rape of the complainant, Ms M. R..

[4] In support of its case the state relied on the evidence of two witnesses. The only evidence that is direct in relation to both offences is that of the complainant. I therefore do not find it necessary to burden this judgment with the analysis of the evidence of the second state witness.

[5] The complainant testified that the incidences that led to her laying charges against the appellant occurred both during 17 November 2012. On that day she went to bed round about 21H00 with both her boyfriend and their child who at that stage was four months old. The three of them slept on the same bed.

[6] The complainant testified that before sleeping she had checked to make sure that all the windows were closed including the door. She locked the door with the shooter, which can only be opened from the inside. The three roomed house has only one door.

[7] At the time of going to bed the complainant was wearing a t-shirt and her panties. She testified that she was drunk when she went to bed. She was woken up in the middle of the night by her crying baby. She discovered when she woke up that the appellant was in the house standing next to the curtain and next to the door. He enquired from her as to whether she was fine. He then unlocked the shooter of the door and left.

[8] At that stage the appellant discovered that she was not wearing her panties and that she was wet, presumably from the semen of the appellant whom she claimed had raped her.

[9] After the appellant left, she unsuccessfully tried to wake up her drunk boyfriend. At about 2 am soon after the appellant had left she went to her sister who stays nearby. She informed her that she had been raped. Her sister then called the police who took her to the hospital. At the hospital she was examined and specimen taken from her.

[10] In evidence in chief the appellant stated that she did not feel or see the appellant having sex with her. She also firmly stated that she did not have sex with her boyfriend, which means that her boyfriend could not have penetrated her that night, resulting in her being wet.

[11] When asked during cross examination how come she did not feel when the appellant was on top of her, raping her, she said that he penetrated her from behind and that is why she could not feel it. She however conceded that this was an assumption. When asked further, why she could not feel when she was penetrated from behind she said it was because she consumed alcohol. She disputed the possibility that her boyfriend may have had sex with her on that day.

[12] When questioned further, how come she could not feel when she was penetrated, she conceded that for the person to be able to penetrate her, she would have had to spread her legs wide open for him to be able to penetrate her. She finally conceded that if she was indeed raped whilst asleep, she either would have heard, felt or noticed the penetration.

[13] In relation to the house breaking, the complainant, during cross examination testified that she did not know how the appellant entered her house. She however, conceded that the shooter

of her door can only be opened from inside but could then not say how the appellant entered the house if the shooter was engaged.

Evaluation:

[14] In my view there was insufficient evidence to convict the appellant on both charges of housebreaking and rape.

[15] In the case of housebreaking, the onus was on the state to prove beyond reasonable doubt that the appellant had the intention to break into the house, and did so when he entered.

[16] There is no evidence even on the version of the complainant that her house was broken into by the appellant. Her version is that when she woke up in the middle of the night, to attend to her crying baby, she suddenly saw the appellant standing next to the curtains near the door which at that stage was still locked from inside. The door could, according to her, as stated earlier, only be unlocked from inside. She in this respect provided no evidence as to how the appellant could be said to have broken into the house when the door was still locked and also there was no sign of any interference with the windows.

[17] The same applies to the charge of rape in that there is insufficient evidence to have convicted the appellant on that charge. The complainant testified that she assumed that she was raped by the appellant. She assumed that she was raped because when she was woken up by the
crying baby she found that she was undressed of her panties and she was wet.

[18] There is no evidence that there was any semen found on her belonging to the appellant. The DNA found on the blanket was not sufficient evidence to prove beyond reasonable that the appellant had raped her. All what that evidence points to, is that the appellant had slept on that blanket.

[19] The counsel for the state, correctly in my view, conceded during his submission that there was no basis, on both charges, to convict the appellant.

[20] In light of the above I found that the appeal stands to succeed.

[21] In the premises the following order is made:

1. The decision of the magistrate convicting the appellant for both housebreaking and rape is set aside.

2. The decision of the magistrate is substituted with the order to the effect that:

   i. The appellant is found not guilty on both charges of housebreaking and rape.

   ii. The appellant is acquitted on both the charges of rape and housebreaking.

3. The sentence of imprisonment of 18 years imposed on the appellant is set aside.

4. The order declaring the appellant to be unfit to possess a firearm is set aside.

MOLAHLEHI AJ
Acting Judge of the Gauteng High Court

I agree and it is so ordered

PIENAAR AJ
Acting Judge of the Gauteng High Court.

APPEARANCES:

APPLICANT:	Legal Aid South Africa: Pretoria Justice Centre
RESPONDENT:	Director of Public Prosecution: Pretoria.