IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: A13/2022

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

SIGNATURE 13/09/2022 DATE

In the matter between:

JOHANNES NHLANHLA MSHOLOLO **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGEMENT

MOSOPA, J

INTRODUCTION

[1] This is an appeal against conviction, following the appellant's conviction on 21 September 2021 in the Springs Regional Court on one count of rape, in terms of section 3 of Act 32 of 2007, read with the provisions of section 51(1) of Act 105 of 1997, and one count of assault.

[2] Following conviction, the appellant was sentenced as follows;

2.1. Count 1: Rape – Ten (10) years imprisonment, four (4) years of which are suspended for five (5) years, on condition that he is not convicted of a similar offence during the period of suspension, and;

2.2. Count 2: Assault – Cautioned and discharged.

[3] The appellant was legally represented throughout his trial. This appeal is brought with leave of the court *a quo*.

BACKGROUND

[4] The evidence used by the State to convict the appellant can be summarised as follows; in his plea explanation, the appellant admitted to having had sexual intercourse with the complainant in the matter, and that such sexual intercourse was with the consent of the complainant.

[5] The State led the evidence of three (3) witnesses and the appellant closed his case without testifying or calling witnesses. Ms Duduzile Mthetwa testified that on the day of the incident she was home, along with her mother and Zanele, when the appellant arrived there and requested that she accompany him to his place of residence, so that they could have a discussion about the complainant's broken phone.

[6] When they arrived at the appellant's place of residence, she remained seated on the couch when the appellant went outside to speak to other tenants and smoked, and he took a long time to return to the house. When he returned, he locked the burglar gates, as well as the door and he said to her that he is now going to sleep with her but she refused. The appellant told her to undress and while undressing, the appellant went into the inside toilet and smoked. After smoking, he returned and found her standing next to the bed wearing only her panties.

[7] The appellant then hit her with the canvas shoe (tekkies) on the left side of her face. He then pushed her onto the bed, tore her panty and he then raped her. After raping her, the appellant fell asleep and she ran away. When she left the house, after finding the keys on top of the couch, she was completely naked. She went to Gugu's place and arrived there crying. She asked Gugu to phone the police, but they never arrived at Gugu's place. She then slept at Gugu's place that night.

[8] The following day, the appellant came to Gugu's house to bring the complainant her clothes and shoes, and asked her to forgive him. She then told Gugu that she is going to the police to lay a charge of rape against the appellant. She was

then taken to East Rand Hospital for a medical examination and she had marks on her body; the left side of her face was swollen and painful, her private parts were also painful, as well as her neck, where she was strangled by the appellant.

[9] Mr Frank Shongwe, a professional nurse, examined the complainant and completed a J88 medical report. The history obtained from the complainant was that she was sexually penetrated by a known male person, who forced himself on her and she did not consent to such intercourse. On the clinical findings, he found that the complainant's left lower jaw was swollen and painful, and her neck was tender on touch. There was also a fresh tear at the posterior forchette which is a sign of recent penetration with a blunt object, like an erect penis.

[10] Ms Gugulethu Tshabangu ("Gugu") confirmed that the complainant arrived at her place of residence while she was watching a soapy called "Generations" on television. At that stage, the complainant was only wearing a top which reached her waist area and she was naked on the bottom half of her body. The complainant informed her that the appellant had raped her and she left his place while he was sleeping.

[11] She further confirmed that the complainant requested that she phone the police, who never arrived, and she slept at her place. Before they went to sleep, she received a phone call from the appellant enquiring about the whereabouts of the complainant and she told him that she was with the complainant. The appellant came to her place and she met him at the gate. He denied ever raping the complainant. He denied that he raped the complainant, this time in the presence of the complainant and that is when she demanded her panty from the appellant, which he had earlier torn. He denied ever tearing the panty, but he went to his place to collect the panty, which the complainant maintained was not her panty that she was wearing before the incident.

[12] The following day, the appellant arrived there with the complainant's clothes, except for her tekkies, which he later went home to fetch.

[13] After the State closed its case, the appellant closed his case without testifying and he did not call any witnesses in his defence.

AD CONVICTION

[14] The applicable test in criminal proceedings is that the State bears the onus to prove the guilt of the accused person beyond reasonable doubt. In the matter of ***S v Mbuli 2003 (1) SACR 97 (SCA)*** at para 57, the SCA quoted with

approval, from the matter of ***S v Hadebe and Others 1998 (1) SACR 422 (SCA)*** at 426f-h;

> *"The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."* (see also ***S v van der Meyden 1999 (2) SACR 447 (W)***).

[15] In the matter of ***S v Chabalala 2003 (1) SACR 134*** at 139 para 15, the SCA stated 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 of 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. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear."*

[16] The complainant was a single witness to the rape incident. Section 208 of the Criminal Procedure Act 51 of 1977 makes the following provision;

> *"[208] An accused may be convicted of any offense on the single evidence of any competent witness."*

[17] In the matter of ***R v Mokoena 1932 OPD 79*** at 80, the following was stated;

> *"Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by [the section], but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse of the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation etc."* (see also ***S v Abdoorham 1954 (3) SA 163 (N)*** at 165e-f).

[18] The court *a quo*, when admitting the evidence of the complainant exercised caution and in *obiter*, remarked as follows;

> *"The complainant is a single witness when it comes to certain aspects in her evidence. In dealing with the evidence of a single witness, the court must be satisfied that the evidence is reliable and satisfactory in all material respects."*

[19] The court *a quo* also took note of the contradictions in the State's case, especially in relation to the evidence of the complainant and Gugu, when the following was indicated that;

19.1. when the complainant testified that when she arrived at Gugu's house, she was completely naked, whereas Gugu testified that when the complainant arrived at her place, she was wearing a top and was she was naked from the waist down, and;

19.2. also, that the complainant testified that the appellant only came to Gugu's place the following morning after the incident when he brought her clothes, whereas Gugu testified that the appellant arrived on the same night of the incident at her place and had an argument with the complainant over her panties.

[20] The court *a quo* noted that the appellant admitted to being at Gugu's place on the night of the incident and found no reason to reject that version as it corroborated Gugu's version. The contradictions, which in my considered view is correct, were found not to be material and the evidence of Gugu and the complainant was found to be reliable.

[21] The court *a quo* did not err in finding the complainant to be a competent witness and subsequently convicting the appellant on the uncorroborated evidence of the single witness. The complainant did not contradict herself when testifying and she did not indicate any bias towards to appellant. She admitted that she was still in a relationship with the appellant, despite having moved out of the appellant's place, a fact she could have simply lied about.

[22] It is not disputed that the complainant and the appellant were at the appellant's place after he went to fetch her. It is also undisputed that the main purpose for the two of them being together was to discuss the broken phone of the complainant. The appellant never, nor was it put to the complainant that there was a stage that such a discussion regarding the phone took place. She refused to have sexual intercourse with the appellant, but he forced himself on her after he threw her onto the bed. The complainant tried to resist by closing her thighs tightly, but the appellant overpowered her and forcefully penetrated her. He also tore her panties, which does not suggest that there was consensual intercourse.

[23] It is trite law that mere submission by the complainant in a sexual act does not amount to consent. For the crime of rape to be committed, the act of sexual penetration must take place without the consent of the complainant. Section 1(2) of Act 32 of 2007 defines consent as voluntary or uncoerced agreement. Section 1(3) of Act 32 of 2007 sets out circumstances under which the conduct of the person who is sexually penetrated cannot amount to consent, more especially where force, intimidation, threat of harm or abuse of authority characterises such conduct.

[24] The complainant, after being sexually penetrated as was admitted by the appellant, left the appellant's house naked and while he was sleeping. When she arrived at Gugu's house, she immediately asked Gugu to phone the police, who unfortunately never arrived there. The following day, she reported the matter to the police. This is not the behavior which can be expected from a person who consented to a sexual act. She was also injured on her face and as was said by the forensic nurse and also confirmed by the medical report, as a result of the conduct of the appellant. The court *a quo*, in my considered view, rightfully rejected the version of the appellant and admitted the complainant's version.

[25] The appellant also asked for forgiveness which in itself amounts to an admission of unlawful conduct. There is no reason for him to ask for forgiveness if the complainant consented to a sexual act, but upon hearing the complainant say that she was going to lay a rape charge against him with the police, he apologized, despite having initially denied it to Gugu and then again to the complainant that he raped her.

[26] The appellant closed his case without testifying. The SCA in the matter of ***S v Boesak 2000 (1) SACR 633 (SCA)***, at paras 46 and 47, when dealing with the accused's failure to testify in the case where the State presented a case which requires the accused to answer to, stated that:

> *"[46] It is trite law that a court is entitled to find that the State has proved a fact beyond reasonable doubt if a prima facie case has been established and the accused fails to gainsay it, not necessarily by his own evidence, but by any cogent evidence. We use the expression "prima facie evidence" here in the sense in which it was used by this Court in Ex parte The Minister of Justice: In re R v Jacobson & Levy 1931 AD 466 where Stratford JA said at 478:*
> *"'Prima facie' evidence in its more usual sense, is used to mean prima facie proof of an issue the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus."*
>
> *[47] Of course, a prima facie inference does not necessarily mean that if no rebuttal is forthcoming, the onus will have been satisfied. But one of the main and acknowledged instances where it can be said that a prima facie case becomes conclusive in the absence of rebuttal, is where it lies exclusively within the power of the other party to show what the true facts were and he or she fails to give an acceptable explanation. In the present case the only person who could have come forward to deny the prima facie evidence that he had authorised, written or signed the letter, is the appellant. His failure to do so can legitimately be taken into account."*

[27] In the absence of an explanation in light of a *prima facie* case presented by the State, the court *a quo* did not err in drawing inferences which point to the guilt of the appellant. The court *a quo* stated as follows;

> *"The facts that the accused elected not to satisfy in the light or in the face of the evidence that calls for an answer do not in any event breach or limit his right to remain silent. If there is evidence calling for an answer and an accused person remains silent in the face of it a Court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused."*

[28] The court's finding is that the court *a quo* did not err in convicting the appellant either on the question of facts or law and there is no need for us to interfere with the court *a quo*'s findings.

ORDER

[29] In the consequence, the following order is made;

29.1. The appeal against conviction is hereby refused.

MJ MOSOPA

JUDGE OF THE HIGH

COURT, PRETORIA

I agree,

JS NYATHI

JUDGE OF THE HIGH

COURT, PRETORIA

APPEARANCES

For Appellant:	Adv JL Kgokane
Instructed by:	Legal Aid SA
For Respondent:	Adv S Scheepers
Instructed by:	The DPP

Date of hearing:	3 August 2022
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