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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG

AR 9/2019

THULANI KHULU **APPLICANT**

and

THE STATE **RESPONDENT**

ORDER

I make the following order herein:

1. The appeal against conviction is dismissed.

APPEAL JUDGMENT

Delivered on: 6 December 2019

GOVINDASAMY AJ:

[1] The appellant, a 29 year old male, is charged with the one count of rape in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the provisions of section 51(1) of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, in that on or about 19 July 2015 and at Mondlo in the Regional Division of KwaZulu-Natal, he did unlawfully and intentionally commit an act of sexual penetration with the complainant, N[....] Mn[....] , by inserting his penis into her vagina without her consent; and that he raped the complainant more than once.

[2] At the commencement of the trial the minimum sentences were explained to the appellant, who was legally represented. The appellant confirmed that he understood both the charges and minimum sentencing regime applicable to him, in the event of him being convicted of rape in terms of the charges proffered against him. The competent verdicts were also explained to him by the magistrate.

[3] The appellant pleaded not guilty to the charge of rape. He denied that he had sexual intercourse with the complainant. On 26 January 2018, the appellant was convicted of rape and was sentenced to eight years imprisonment.

[4] The appellant appeals against his conviction, leave to appeal having been granted by the learned magistrate, Mr E N Ntaka.

[5] The issue on this appeal is whether the evidence presented on behalf of the State was reliable enough to sustain a conviction on the charge of rape. In other words, was the evidence of a single witness, implicating the appellant, sufficiently reliable for proof beyond a reasonable doubt?

[6] The following facts are common cause or not seriously in dispute:

6.1 Prior to the date of the alleged incident the complainant and the appellant knew each other and resided in the same neighbourhood. They went to the same church. Significantly, the complainant referred to the appellant by the name of T[….].

6.2 On the day of the alleged incident of rape both the complainant and the appellant met in the vicinity of the local shop when the complainant was on her way to work.

6.3 The appellant had approached the complainant, greeted her, and requested that he accompany her to her place of employment.

6.4 Prior to and up to the date of the incident both the complainant and the appellant were not involved in any intimate relationship.

6.5 On the very same evening the complainant ended up in the appellant's outside room close to the main house of the appellant's homestead.

6.6 When the appellant and the complainant arrived at the appellant's homestead, T[….] X[….], the sister of the appellant was inside the main house.

6.7 When the complainant was inside the appellant's room she had at some stage screamed and cried, the sister of the appellant, and his mother went to the appellant's room to find out what was happening.

[7] What is in dispute is, firstly, whether the complainant was accosted by the appellant by force and at knifepoint when she was on her way to work; and secondly, whether at the time when the complainant was in the room with the appellant, he had sexual intercourse with her without her consent.

[8] In finding the answers to the two areas of dispute, the learned magistrate, considered the evidence that was tendered by the State, through the evidence of the complainant; Ms T[….] B[….] N[....] , the mother of the complainant; Ms T[….] X[….], the biological sister of the appellant; and finally Dr Buthelezi, the supervisor and medical manager of Vryheid Hospital, where the complainant was examined after the incident. It needs to be said that a J88, medical legal report, completed by Dr T[....] Z[….], was handed in after the testimony of Dr Buthelezi. Dr Zulu could not be found and therefore his expert testimony relating to the J88 medical legal report could not be obtained. The appellant's evidence was also thoroughly analysed by the learned magistrate.

[9] Counsel for the appellant, Ms Marais, in her heads of argument, submitted that the learned magistrate erred in rejecting the appellant's version as being improbable and inherently false. She however, did not advance any reasons for her submission, which is baffling. Usually the foundation for any submission, such as the one made by Ms Marais should be built on a painstaking examination of the minutiae of the evidence for the State with a view to accessing as many inconsistencies and contradictions as could be found, in support of any real doubt in respect of the State's case and so lead to the acquittal of the appellant.[1]

[10] The complainant, who is a single witness, testified that when both she and the appellant entered the appellant's room, the appellant told her that he wanted to sleep with her. He undressed himself and instructed her to undress herself. When she refused, he took out a knife and undressed her by force. She was crying during the sexual encounter. At that stage she heard voices of people who were outside and they asked what was going on. At that time the appellant was with her inside the room. He then got up from her and gave her, her cell phone and handbag. When the people who were outside had gone and were no longer outside, the appellant opened the door for her. She left the appellant's room and proceeded to the main house. Inside the main house she found the appellant's mother and the appellant's sister who was known to her. She told them that the appellant has grabbed her and slept with her by force. The complainant contacted her mother who came to fetch her from the appellant's homestead. At the appellant's homestead, she told her mother that the appellant had slept with her by force. A case was opened the very same evening. She was thereafter taken to Vryheid Hospital where she was medically examined and cleaned.

[11] In cross-examination the complainant went on to describe how the appellant was having sexual intercourse with her as follows:[2]

'According to your statement and according to the charge sheet which is confirmed according to your statement the appellant had sexual intercourse twice? Yes.

According to your statement you are saying that he put the condom first and had sexual intercourse with you and thereafter he again he put another condom and had sexual

[1] *S v Hadebe & others* 1997 (2) SACR 641 (SCA) at 645.
[2] Record at page 68 line 2 to page 69 line 11.

intercourse with you? – Yes, he did have sexual intercourse with me but I did not see him putting on a condom.

COURT Did he sleep with you twice, in other words, were there breaks because you were given a chance to testify in chief in respect of that, so now the Court wants to know whether he had sex with you, stopped at some stage and then after some time again had another round of sex with you? – There were two rounds.

MS MAVIMBELA Ma'am in your evidence-in-chief you told the Court that he had sex with you, he ejaculated and thereafter he continued, which is different from what you are telling in your statement? – Yes.

COURT So if that is your evidence-in-chief, I'm just trying to clarify that, he only had sex with you once and it was a continuous transaction so to say or it was a continuous act.

At no stage did he have to pull out from inside your vagina and then again insert his penis for the next round? – He took his penis out and he inserted it again.

6. What was he doing when he took it out, did you see what he was doing when he took it again …. He was inserting it and taking it out and inserting it again.

What was he doing when he took it out, did you see what he was doing when he took it again… He was inserting it and taking it out and inserting it again.

INTERPRETER … the witness is even making movements.

COURT So he was taking it out at the time when he was making those movements during the action? – He was making movements of putting it in and out.

I see, and he didn't take long breaks, so for instance to go somewhere else, put in a condom and then come back, it was during that act when he was moving up and down that his penis would happen to come out of your vagina? … He was still moving.'

[12] In so far as the sexual act is concerned what is evident is that the appellant was making continuous movements, with his penis which sometimes slipped out of her vagina. I accept that the magistrate was in the best position to observe the complainant as she gave her evidence and that there was no break or disruption in the chain of a single act of sexual intercourse as demonstrated by the complainant. Therefore the allegations in the charge sheet that the appellant had allegedly raped the appellant more than once cannot be sustained.

[13] The evidence of Ms B[….] T[….] N[....] corroborated the complainant's version. What is striking is that she had to leave her home to go to the appellant's homestead, after she was telephoned by her daughter, the complainant, who was then in the company of the appellant's mother and sister. When she arrived at the

homestead, the complainant reported that the appellant had sexual intercourse with her, without her consent. There and then the appellant's mother suggested that the incident be reported to the police.

[14] The biological sister of the appellant, Ms T[….] X[….], also corroborated the version of the complainant. She heard the complainant crying and went to investigate. When the appellant refused to open the door to his room, she left to go back to the main house with her mother. Surely, something must have been going on in the appellant's room, for the complainant to be heard crying?

[15] The evidence of Dr Buthelezi is clear. The complainant, according to the medical legal report, was sexually penetrated.

[16] It is trite that the evidence of a single witness must be approached with caution. In *Haarhoff and another v Director of Public Prosecutions, Eastern Cape*,[3] Molemela JA, said that:

'The court has to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in material respects. The court is to look for features, in the evidence, which bear the hallmarks of trustworthiness to substantially reduce the risk of wrong reliance upon the evidence of a single witness. The judgment of the trial court demonstrates that it was alive to the application of the cautionary rule on account of the complainant being a single witness to the rape.'

[17] The evidence of the complainant is not without flaws. There are minor inconsistencies between her oral evidence and some aspects of her written statement made to the police. She adequately explained these minor inconsistencies. Otherwise her evidence is clear and satisfactory in every material respect.

[18] In addition, the following was also stated by Diemont JA in *S v Sauls* and others:[4]

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[3] *Haarhoff and another v Director of Public Prosecutions, Eastern Cape* 2019 (1) SACR 371 (SCA) para 37.
[4] *S v Sauls & others* 1981 (3) SA 172 (A) at 180E–G.

‘There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of RUMPFF JA in *S v Webber* 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by DE VILLIERS JP in 1932 may be a guide to a right decision but it does not mean
"that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded".’

[19] The appellant’s version is that of a bare denial. What is clear however is that he was the only male person to be seen or heard in the company of the complainant on the evening in question. The appellant’s brother was not at home. The complainant said that it was the appellant who had forceful sexual intercourse with her. She does not point to anyone else. If, as he explained, he wanted to assist the complainant to provide shelter for her, why did he not take her to his mother and sister who were in the main home. He was unable to explain his conduct in this regard. In addition, if he proposed love to her, as he had done in the past, why did he simply go to bed, after the alleged incident, ignoring the complainant who he wanted to help and to whom he showed an interest. This is not the conduct of a person, who was bent on protecting a woman who was in need of accommodation for the evening and to whom he took a fancy or liking. The appellant’s conduct leaves much to be desired. At the end of the day, he took advantage of an innocent woman, who he followed from the shop to the river, in pursuance of an ulterior motive. I pause to mention that his denial of putting a knife to the back of the complainant, causing her to become fearful of him, in the vicinity of the river, is rejected as improbable. The only plausible explanation for her to have gone to the appellant’s homestead, is that she was threatened with a knife by the appellant. The complainant’s home was a mere 500 metres from his homestead. He could have easily taken her to her home, from the prying eye of thugs in the area, as he wanted the trial court to believe. It is baffling to me, when he said in evidence that his mother was at the water tank outside his home and the question which arises, is why he not immediately introduced the complainant to his mother so that his mother could attend to the accommodation needs of the complainant. In regards to how his room got locked

with the complainant inside, I too, like the magistrate, cannot make sense of what he was trying to convey. His explanation is found wanting and highly unsatisfactory. His story just does not make sense and is rejected as false. It cannot be reasonably possibly true.

[20] It would be appropriate, to re-iterate what Marais JA said in *S v Hadebe*[5] that:-

'there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary.'

[21] After a comprehensive analysis of all the evidence, the court a quo concluded that the evidence against the appellant was so compelling, and appellant's own evidence so improbable and unimpressive that his conviction for the rape of the complainant was justified.

[22] In my view, the trial court correctly rejected the appellant's version as it could not be reasonable possibly true. Any weaknesses in the complainant's evidence has to be considered against the totality of the evidence. She was correctly described as an honest, reliable and credible witness. It is also significant that many aspects of the complainant's evidence are either undisputed, corroborated by objective facts and the appellant's own version, despite his denial that he had sexual intercourse with the complainant.

[23] In the circumstances, I am satisfied that the State has proved its case beyond a reasonable doubt and accordingly the appeal against the appellant's conviction is dismissed.

[24] There is no appeal against sentence. In any event, I am satisfied that the trial court correctly applied the principles of sentencing and it does not call for the court to

[5] *S v Hadebe & others* 1997 (2) SACR 645E-F.

interfere, *mero motu* with the punishment meted out to the appellant. The sentence of the appellant stands.

I make the following order herein:

1. The appeal against conviction is dismissed.

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GOVINDASAMY AJ

I agree, and it is so ordered.

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NKOSI J

DATE OF HEARING:	6 December 2019
DATE OF JUDGMENT:	6 December 2019
FOR THE APPLICANT:	Ms L Marais Instructed by PMB Justice Centre 183 Church Street PIETERMARITZBURG
FOR THE RESPONDENT:	Mr M Mlotswa Instructed by The Director of Public Prosecutions PIETERMARITZBURG