

**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: AR 228/2020

In the matter between:

**KHULEKANI NGUBANE**

**APPELLANT**

**And**

**THE STATE**

**RESPONDENT**

---

**ORDER**

---

**On appeal from:** Regional Court sitting at Greytown, KwaZulu-Natal (Magistrate C.F. Masikane):

1. The appeal against conviction is upheld.
2. The conviction and sentence are set aside.
3. The verdict of the regional court is set side and it is replaced with the following:  
'Found not guilty and discharged'.

---

## APPEAL JUDGMENT

---

**Mngadi,J:**

[1] The appellant having been convicted and sentenced to life imprisonment by a court of a regional division appeals against both conviction and sentence.

[2] The appellant was charged before the regional court with one (1) count of rape in contravention of s 3 of the Sexual Offences and Related Matters Amendment Act No.32 of 2007. The charge was read with the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act No. 105 of 1997. It alleged that on or about 19 April 2019 the appellant did unlawfully and intentionally commit an act of sexual penetration with T...N...(the complainant), aged nineteen (19) years, by inserting his penis into her vagina without the consent of the said complainant.

[3] The appellant who was legally represented when the charge was put to him pleaded not guilty to the charge. The appellant as the basis of defense, in terms of s 115 of the Criminal Procedure Act No. 51 of 1977, stated that he and the complainant had been in a love relationship since 2013 and that on the night in question he engaged with the complainant in two rounds of consensual sexual intercourse.

[4] The State adduced evidence of three (3) witnesses, namely; the complainant, Xolani Hlela (the complainant's boyfriend) and Bhekukwenza Mbanjwa (the police officer who arrested the appellant). The State with the consent of the defense handed in as evidence the medical report (J88) relating to the medical examination of the complainant. The appellant testified and he called one witness Philisani Nhlakanipho Ngubane (the appellant's brother).

[5] The complainant testified as follows. She knew the appellant from 2013 when they were in the same school but in different grades. The appellant proposed love to her but she did not accept the proposal. She told the appellant that she had a boyfriend but the appellant continued to propose love to her whenever he saw her until 2016. In 2016, she relocated to a school in another area. She thereafter did not see the appellant until on the date of the incident.

[6] She testified that on 21 April 2019 she had been at her home. She stayed with her mother, her sister and her younger siblings. She left at about 19h30 to see her boyfriend Xolani Hlela (Xolani). She had Xolani's cellphone, which she wanted to return to him. She took it from him the previous day when she had visited him. She walked to his place, which was about 30 minutes' walk away. She was used to walking to his home around that time. Near a bus/pick-up stop with a tavern nearby, she noticed the appellant following her. He caught up with her and he walked with her. They were walking and the appellant said where has she been, he had not seen her sometime. She told him that she had not been staying at her home. The appellant wanted to go with her to his home. His home was in the same area about 20 minutes' walk away. She told him that she was going to her boyfriend and that she could not go with him. The appellant pleaded with her to go with him but she refused.

[7] She testified that they proceeded walking and talking. They reached a certain spot above a certain homestead. The appellant started hitting her, he said he wanted to take her to his homestead by force. He hit her by slapping her. She fell on to the pavement. The appellant pulled her by her hair. She screamed. She then stopped resisting to stop the appellant from assaulting her. She then went with him. There were lighted homes nearby but there were no people on the road.

[8] She testified that they arrived at his home. He took her to his structure. There was another house, which was the main house. The lights were on in the main house indicating that there were people. They got into his room. She sat on the bed and he sat on the chair. She did not scream for help in fear that the appellant would hit her. The



appellant left her in the room and he went into the main house. He walked out and he said he would come back. She sent a 'please call-me back' to her boyfriend's sister. It did not go through since her cellphone was off. She did not have airtime on her cellphone for her to make a call. She did not open the door because it had been locked from outside.

[9] She testified that the appellant came back into the room. He made her lie on the bed by pushing her onto to the bed. He undressed her. She was wearing a jumpsuit pants, a t-shirt, a jacket, boots and a panty. He undressed himself. He put on a condom. He opened her legs. He inserted his penis into her vagina and he had sexual intercourse with her. She was crying and she had tears. She asked him to release her to go to her boyfriend but he refused. He finished having sexual intercourse and he sat with her. She was asking him to release her but he refused. He then told her to get on to the bed, to kneel on it and face away from him. She did so and he inserted his penis into her vagina from the back. He had sexual intercourse with her until he ejaculated. He then slept on his back. She also laid on the bed on her back. She pleaded with him to let her go but he refused. She then relaxed. She realized that he had fallen asleep. She got up and dressed herself but she did not find her panty. She opened the door and she went out. She closed the door with a latch from outside.

[10] She testified that she ran to Xolani's home. She arrived at about 23h00. She still had her cellphone with her. It took her about 20 minutes to reach Xolani's home. She found that Xolani was not at home. The door to his room was open. She entered and she waited for him. He arrived after about 10 minutes. He did not ask where she was coming from so late. She reported to him what happened to her and that the appellant raped her. Xolani phoned the police.

[11] She testified that Xolani had gone to look for her. He had been expecting her. She had his cellphone and he would not sleep without his cellphone. He knew that she was coming to his house that night. The police came and they took her to the police station. She was taken to hospital where the doctor examined her. She told the doctor what happened.

[12] The complainant testified that she had never visited the appellant before. The appellant used to come to her home when he came to buy something. Her mother used to sell liquor but she stopped. The complainant under cross-examination testified that the appellant slapped her once and she fell onto the pavement. She was soaked with rain. She said she did not go to the main house at the appellant's residence to seek help because she did not know how they would react. She said she did not have airtime, but she did think of sending 'please-call me' to Xolani's sister. She denied that on the previous day, she had arranged to meet with the appellant the following day, and that he met with her as arranged. She said she knew Philisani the appellant's brother and she knew nothing about Philisani's evidence to be given that she and the appellant were in a love relationship for a long time. She denied that the appellant took her to her home at about 22h30. She said she was not angry with the appellant for proposing love to her sister because she did not know anything about that.

[13] Xolani Hlela testified that he was the boyfriend of the complainant. He testified that the previous day he was with the complainant and he left his cellphone with the complainant. He went from a nearby tavern to look for her at her home but he did not find her. He used the usual sign of knocking at her bedroom and she would come out and go with him. She was sneaking out with him. He first went to look for her at 20h00 and again at 22h00. He could not phone her because his cellphone was with her. He then went to his home. He found the complainant in his room. She was crying. She screamed out to him and she wanted to hit him. She accused him of causing her to be raped whilst he was busy with other women. He stated that the arrangement was that he would go and fetch the complainant from her home. He went to look for her because he did not know that she had left. He used his cellphone to phone the police because her cellphone was switched off. He noticed that her face was swollen.

[14] Bhekukwenza Percival Mbanjwa testified that he was a police officer. At about 2am he received a report. He met with the complainant. He received a report from the complainant. He went to the place of the appellant with the complaint. He found the



appellant sleeping in his room. The complainant confirmed to him that it was the appellant who raped her. He then arrested the appellant.

[15] The appellant testified as follows. He was in a love relationship with the complainant. He arranged with the complaint on 20 April 2018 that she would visit him on 21 April 2018. They arranged that he would fetch her at the pick-up stop near her home at about 18h30. He met with her as arranged and he walked with her to his home. They went passed the councilor's house and other houses. They arrived at his room. She asked him to charge for her the cellphone which he did. They started kissing and engaged in foreplay. They had sexual intercourse. She asked him to put on a condom and he did so. In the second round, the condom burst. It was a cold day. They slept and then she said she had to go to her home because she stayed with small children. He told her that he too; he had to wake up in the morning in order to go to work. He then accompanied her back to her home. He left her near the pick-up stop. In the early hours of the morning to his surprise, she came to his place with the police. He was then arrested it being alleged that he raped the complainant. He thought the complainant decided to have him arrested because she was angry that he proposed love to her sister who was seducing him.

[16] The appellant testified that he knew Xolani Hlengwa but he did not know that he was a boyfriend of the complainant. In January, he proposed love to the complainant's sister. The complainant questioned him about it and he apologized. He testified that he was not communicating with the complainant by cellphone. He knew that she did not have a cellphone. He would send for her and she would come and meet with him. He insisted that in March he met with complainant and they had sexual intercourse. He did not see her in the whole of 2018; he thought he saw her once in 2017 and saw her three times in 2016. He did not see her in 2014 and in 2015. He said that due to the nature of his work he was not able to see the complainant for long periods. His brother told him that the complainant came to his home looking for him. The complainant told him that she did not have a cellphone.

[17] Philisani Nhlakanipho Ngubane testified that he was the brother of the appellant. He knew the complainant from her visiting the appellant at their home because she was in a love relationship with the appellant. He saw the complainant and the appellant as lovers on a number of occasions. He saw them arriving his home at about 18h30 on the day of the incident. On the day of the incident it had been a while when he last saw them. Except on the day of the incident he had never seen the complainant in his home.

[18] The medical report noted no injuries on the complainant. It also did no record that the complainant told the doctor that she was assaulted and that she fell onto the pavement. There were no physical signs of forceful vaginal penetration noted.

[19] The learned regional magistrate stated that the complainant gave good impression to the court. She gave her evidence logically and in a straight foreword manner. He found it unlikely that the complainant having arranged to visit her boyfriend she would arrange to visit the appellant at the same time. He also reasoned that complainant having accepted the appellant's apology for proposing love to the complainant's sister she could not for the same reason later accused the appellant for raping her. He found that the evidence of the appellant's brother was not consistent with the evidence of the appellant. He concluded that it was clear that the appellant and the complainant were never in a love relationship.

[20] In my view, although the evidence of the appellant on whether he had a love relationship with the complainant was very poor, except if it was a loose form of a love relationship it could be rejected as false. However, both the appellant and the complainant agreed that they knew each other over a long period and they had engaged in a love relationship talk. Philani in seeing the appellant proposing love to the complainant a number of occasions, he might have taken that as an indication of the existence of a love relationship. Further, the complainant's evidence was that when she walked into the room of the appellant she was not resisting or crying. If Philani saw her at that time, he could not have known that she was doing so against her will. It is strange



that the complainant did not tell Xolani and the police that she had to escape and in doing so, she left her panty in the room of the appellant.

[21] The State is required to prove the guilt of the appellant beyond reasonable doubt. The issue was whether the sexual intercourse took place with or without the consent of the complainant. The State relied on the evidence of the complainant. The complainant's evidence as evidence of a single witness was required to be clear and satisfactory in all material respect. In *S v Dyira* 2010 (1) SACR 78 (E) at para 6 the court held: 'In our law it is possible for an accused person to be convicted on the single evidence of a competent witness (section 208 of the Criminal Procedure Act 51 of 1977). The requirement in such a case is, as always, proof of guilt beyond reasonable doubt, and to assist the courts in determining whether the onus is discharged, they have developed a rule of practice that requires the evidence of a single witness to be approached with special caution (*Rex v Mokoena* 1956 (3) SA 81 (AD) at 85-86). This means that the courts must be alive to the danger of relying on the evidence of only one witness because it cannot be checked against other evidence'.

[22] The learned regional magistrate overlooked that the State was relying on the evidence of a single witness and that the court was required to approach the evidence with the necessary caution. There is no indication on the record that the trial court noted that the State was relying on the evidence of a single witness, that it warned itself of the danger of relying on the evidence of a single witness or that it approached the evidence of the complainant with caution. The exercise of caution entails appreciating the danger of relying for a conviction on the evidence, approaching the evidence with caution by closely scrutinizing the evidence to take note of its unsatisfactory features and seeking safeguards that the evidence can safely be relied upon. See *S v French-Beytagh* 1972 (3) SA 430 (A) at 446A.

[23] In my view, there are unsatisfactory features in the evidence of the complainant, namely;

1. The complainant testified that the appellant slapped her once. This took place on the road when he wanted her to go with him. It was still about 20 minutes' walk to the



appellant's home. It is inexplicable that such an isolated single assault would cause the complainant to submit and put up no resistance after it.

2. The complainant did not try to run away or cry for help. Even in the room when the sexual intercourse was about to take place she put up no resistance at all.
3. The appellant left the in the room. The complainant did not attempt to leave. She would not have known that the door was locked from outside. It is unlikely that the room (a separate structure) would have no windows.
4. The complainant at all times had in her possession two cellphones. Her cellphone was working because she used it to send a 'please-call-me.' If Xolani's sister's phone was off, why did the complainant not send 'please-call-me' to other persons? Xolani used his cellphone from the complainant to call the police. There is no explanation, why the complainant did not use the same cellphone to seek help.
5. The complainant if she was locked in the room and she could not escape, it would have been expected that she would tell the police and the police would inspect the room whether one could escape from it or not.
6. The complainant as the reason for submitting mentioned the assault. There is no recording in the medical report that she told the doctor that she was assaulted. If her face was swollen because of the assault the doctor would have noted the injury on the medical report.
7. The complainant testified that after the appellant had fallen asleep she left her panty in the room when she escaped. However, there is no evidence that she told the police that she left her panty in the room for the police to assist her to retrieve it. It also would have shown that she left escaping held against her will.

[24] In *S v Francis* 1991 (1) SACR 198 (A) at p204 it was reiterated that the powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection, the trial court's conclusion, including its acceptance of a witness evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness's evidence. However, a court of appeal would be at large to disregard the trial court's findings where the record reveals material misdirection of fact. In the absence of such misdirection, the appeal court will only reverse the trial court's conclusion where it is convinced that it is wrong. In that case, the appeal court would be at large to disregard the findings of fact, even though based on credibility and come to its own conclusion in the matter. See *R v Dhlumayo and another* 1948 (2) SA 677 (A) at 706.

[25] The learned regional magistrate, in my view, failed to approach the evidence of the complainant with the necessary caution. The evidence of complainant approached with the necessary caution exhibits some unsatisfactory features. It is no sheer coincidence, in my view, that despite the complainant having the opportunity and the means to do so, there was no evidence of the complainant's resistance to the appellant taking her to his residence; that there was no evidence of resistance by the complainant to the appellant having sexual intercourse with her; that there was no evidence of an attempt by the complainant to escape. These factors render the appellant's version that she consented to sexual intercourse to be reasonably possible true. There are no safeguards and it is not safe, in my view, to rely on the single witness evidence of the complainant to convict the appellant. In the result, the State failed to prove the guilt of the appellant beyond reasonable doubt.

[26] I propose the following order:

1. The appeal against conviction is upheld.
2. The conviction and sentence are set aside.

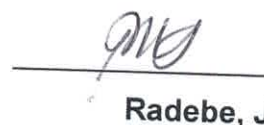


3. The verdict of the regional court is set aside and it is replaced with the following:  
'Found not guilty and discharged'.

  
\_\_\_\_\_

**Mngadi, J**

I agree, and it is so ordered.

  
\_\_\_\_\_

**Radebe, J**

## APPEARANCES

Case Number : AR 228/2020

For the appellant : Ms. Andrews

Instructed by : Legal Aid SA  
Pietermaritzburg

For the respondent : Mr. Sokhela

Instructed by : Deputy Director Public Prosecutions  
Pietermaritzburg

Matter argued on : on 28 May 2021

Judgment delivered on : 04 JUNE 2021