THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 123/11

In the matter between:

NDOYISIWE PAULOS NOTITO **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Notito v The State* (123/11) [2011] ZASCA 198 (23 November 2011)

Coram: MTHIYANE, MHLANTLA, BOSIELO, SERITI JJA and MEER AJA

Heard: 15 August 2011

Delivered: 23 November 2011

Summary: Criminal Law ─ rape ─ indecent assault ─ theft ─ appeal against conviction ─ assessment of evidence ─ whether all elements proved ─ guilt of appellant established beyond a reasonable doubt ─ no reason for appeal court to interfere ─ conviction confirmed.

ORDER

On appeal from: Free State High Court (Bloemfontein) (Hancke J sitting as court of first instance):

The appeal against the conviction in respect of all counts is dismissed.

JUDGMENT

MHLANTLA JA (MTHIYANE, BOSIELO, SERITI JJA and MEER AJA concurring):

[1] This is an appeal against convictions on five counts of rape and one count each of indecent assault and theft. The appellant was arraigned in the Free State High Court, Bloemfontein, sitting in Virginia circuit court (Hancke J), where he faced a total of 18 charges, made up as follows: rape (counts 1 and 2); theft (count 3); rape (count 4); robbery with aggravating circumstances (count 5); rape (count 6); theft (count 7); indecent assault (count 8); rape (count 9); theft (count 10); indecent assault (count 11); rape (count 12); theft (count 13); rape (count 14); theft (counts 15 and 16); indecent assault (count 17); and theft (count 18).

[2] The incidents giving rise to the convictions are alleged to have occurred in Welkom, Kroonstad and Odendaalsrus in the Free State province during a period of over two years from May 2005 to August 2007. The State alleged that the appellant adopted the following modus

operandi in each instance ─ he would target and approach any female walking alone in town and inform her that he was a prophet, that she had been bewitched and that he could help her. In order to render such help he told each victim that he required hair from her head, armpit and the pubic area. Once the woman succumbed to his request he would touch her private parts and then have sexual intercourse with her. In certain instances the personal items of the victims were also stolen.

[3] During the trial, the State tendered the evidence of the complainants, medical evidence where available, as well as the evidence pertaining to the arrest of the appellant and the procedure at the identification parade. The appellant testified in his defence. At the end of the trial, Hancke J convicted the appellant on seven counts of rape, eight counts of theft and two counts of indecent assault.

[4] The appellant was sentenced to a total of 120 years' imprisonment. The learned judge considered the cumulative effect of the sentence and with a view to ameliorate any harshness, ordered that the appellant serve an effective term of 28 years' imprisonment. The court below granted the appellant leave to appeal against his convictions in respect of the rapes, that is, counts 1, 2, 6, 9 and 14 respectively; count 3 for theft and count 17 on the indecent assault charge.

[5] The issue before this court is whether the court below was correct in convicting the appellant and in particular:

(a) whether the State had proved its case on the charges of rape in respect of counts 1 and 2, and whether the appellant had been properly identified as the person who committed the said offences;

(b) whether the charge of theft in respect of count 3 had been proved;

and

(c) whether tacit consent had been given by the respective complainants through their conduct in respect of the rape charges (counts 6, 9 and 14) and the indecent assault charge (count 17).

[6] It must be borne in mind that each case must be considered against the setting of its own facts and circumstances. In this appeal, the subjective state of mind of the complainants is an important consideration in the assessment of the entire evidence. It is appropriate to start by briefly considering the definition and the elements of the crime of rape and the general principles applicable. As the law then stood at the time of the alleged commission of these offences common law rape was defined as the unlawful and intentional sexual intercourse by a male person with a female without her consent.[1] Consent has to be free, voluntary and consciously given in order to be valid. Where sexual intercourse takes place with a woman who is unconscious (as is alleged to have occurred in counts 1 and 2 which are discussed fully below), there can be no consent as she is incapable of consenting. In *R v K* 1958 (3) SA 420 (A) the court had to deal with a question of consent. Schreiner JA had occasion to remark that:[2]

'The position is more difficult in cases where the woman has been defrauded into consenting and more difficult still when her mind is affected not by the accused's threats or fraud but by a pre-existent disability, such as that produced by mental disease, hypnosis, drugs or intoxicating liquor ... At the one end of the scale, if the woman is insensible from any cause she clearly cannot be a consenting party, nor is it easy to see how the impression could arise that she was consenting.'

[7] Similarly, consent is invalid where it was obtained in a fraudulent

1 The common law crime of rape has been repealed by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and replaced with an expanded statutory crime of rape.
2 *R v K* 1958 (3) SA 420 (A) at 421G-H.

manner. The authors, Jonathan Burchell and John Milton,[3] state the following:

'There is no real consent where the woman is mistaken as to the nature of the act to which she consents. This so-called *error in negotio* exists where she fails to appreciate that what she is consenting to is sexual intercourse and thinks that it is an act of a different nature, such as a medical operation.

If she appreciates that what the man is doing is sexual intercourse, but wrongly supposes that it will have certain consequences, the consent is real even though the man may have deceived the woman, there is no rape.'

[8] The author Snyman,[4] states:

'For consent to succeed as a defence, it must have been given consciously and voluntarily, either expressly or tacitly, by a person who has the mental ability to understand what he or she is consenting to, and the consent must be based on a true knowledge of the material facts relating to the intercourse.'

Snyman goes on to state that consent obtained as a result of force, intimidation or threats of harm does not constitute valid consent. I agree with the above authors' (Burchell & Milton and Snyman) exposition of the law on the question of consent.

[9] Against this background, the issues on appeal have to be decided with specific reference to the facts before the court. It is therefore necessary to analyse and assess the evidence relevant to each count separately.

[10] I now proceed to deal with the appeal against conviction on count 1 (the rape count). This relates to an incident that occurred in Welkom during May 2005 and involved Ms Diemo Nkoata, who was at that time, 18 years old. She testified that a certain man, whom she identified as the

3 *Principles of Criminal Law* 3 ed (2005) at 710-711. See also C R Snyman *Criminal Law* 5 ed (2008) at 364; *S v W* 2004 (1) SACR 460 (C).

4 C R Snyman *Criminal Law* 5 ed (2008) at 364.

appellant, approached her. He told her that he was a prophet and informed her that she had been bewitched. He offered to reveal to her, through the medium of a mirror, the identity of the witches and how they had bewitched her. He also informed her that there were worms inside her body and that she would die within three days if no treatment was administered to her. He however, never explained the manner in which such treatment would be provided. He took her to an old building and instructed her to undress and sit on a box. She partly removed her trousers as well as her underwear, at which time the appellant went into another room. She noticed, upon his return, that his trousers had been lowered to his knees.

[11] The complainant testified that she thereafter lost consciousness. When she regained consciousness she found the appellant standing next to the door. He informed her that he needed hair from her head, armpit and pubic area. He thereupon removed the hair and placed it in a piece of toilet paper which he put inside his trouser pocket. He instructed her to get dressed. At that point she discovered that her private parts were wet and felt pain inside and outside her vagina. Curiously the appellant remarked: 'I felt you are not that bad'. The complainant did not comprehend what he meant by this.

[12] The complainant subsequently reported the incident to the police after listening to a radio bulletin about a man pretending to be a prophet. She later attended an identification parade where she positively identified the appellant as the person who had committed these offences against her.

[13] Testifying in his defence, the appellant denied any involvement in the commission of the offences in question. He told the court that he did

not know the complainant and had no recollection of ever meeting her.

[14] The trial court rejected the appellant's version and accepted the complainant's evidence. The judge found that the complainant had not given any consent prior to losing consciousness and that she could not have done so while in that state. He was accordingly convicted of rape as charged.

[15] Before us, counsel for the appellant submitted that the court below erred in convicting the appellant of rape. He contended that the State had failed to prove the act of sexual intercourse. He further argued that even if this were proved, the commission of the offence as well as the identity of the perpetrator had not been established.

[16] This submission cannot be sustained. It is so that there is no direct evidence concerning what transpired when the complainant was in a state of unconsciousness. The question to be asked is what could have caused that pain and brought about the wetness? In *S v Reddy*,[5] Zulman AJA said the following regarding the assessment of circumstantial evidence:

'In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted *dictum* in *R v Blom* 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such "that they exclude every reasonable inference from them save the one sought to be drawn".'

5 *S v Reddy* 1996 (2) SACR 1 (A) at 8c-e.

[17] In the present case, the physical condition of the complainant as described above (the wetness and the pain on her vagina) indicates that sexual intercourse between her and another person did place. The appellant was the only male person in her immediate vicinity. There is no evidence of any other person being present. The only reasonable inference to be drawn is that it is the appellant who had sexual intercourse with the complainant. There is nothing to suggest that the complainant consented to sexual intercourse at any stage. The remark by Schreiner JA in *R v K* referred to in para 6 above, is apposite in this case as the complainant had lost consciousness. It follows that the State had succeeded in proving the guilt of the appellant beyond a reasonable doubt. The court below correctly convicted the appellant of raping the complainant, referred to in count 1.

[18] I turn now to consider the appeal against conviction on counts 2 and 3 (the rape and theft charges). Ms Malefu Kutu testified that she was approached by the appellant in Welkom on 5 June 2005, whilst on her way to a garage to buy pre-paid electricity. The appellant told her that he was a member of St Paul's Church. He informed her about her personal problems with her family, but she ignored him. She entered the shop, bought the electricity and left. The appellant caught up with her. He held a white substance in his hands and touched her on her shoulder whereafter she lost consciousness.

[19] When she regained consciousness, she was alone next to a railway line. Her trousers and underwear had been lowered to her knees. She discovered that her private parts and underwear were wet and a dirty substance ─ liquid in form ─ came out. Her handbag, containing her cellphone, bank cards, electricity coupon and cash, had been stolen. She

surmised that the appellant had taken these items as he was the last person in her company before she lost consciousness. She reported the incident to the police and was examined by a professional nurse. She also attended an identification parade where she pointed out the appellant.

[20] Ms Ceba, a professional nurse, testified that she had examined the complainant a day after the incident. A gynaecological examination revealed a profuse yellowish discharge. According to Ms Ceba, her findings did not exclude evidence of the alleged sexual assault.

[21] The appellant stated he had no recollection of ever meeting the complainant. He denied the allegations against him. The trial court accepted that the State had relied on circumstantial evidence. The judge found that the appellant was the last person to be seen in the company of the complainant and whilst she was still in possession of her belongings. The judge accordingly found the appellant guilty as charged.

[22] The basis of the appeal against conviction on these counts is that the trial court erred in accepting the circumstantial evidence. Counsel for the appellant submitted that there was no evidence to establish that sexual intercourse had taken place and if so, that there was insufficient evidence to link the appellant to the commission of these offences.

[23] In my view, this submission is devoid of merit in view of the following factors: First, the testimony of the nurse, Ms Ceba, that evidence of sexual assault could not be excluded, remained unchallenged. It is clear therefore that someone had sexual intercourse with the complainant whilst she had lost consciousness. It is evident that the complainant did not give consent prior to losing consciousness nor could

she have done so once unconscious. It follows that the sexual act took place without her consent. The only issue that has to be established is the identity of the perpetrator. Second, there is a striking similarity to the facts of the rapes in counts 1 and 2: the rapes were committed within a period of four weeks of each other and in the same area, namely Welkom. The pattern of behaviour of the perpetrator is the same: he approached a female person; informed her that she had been bewitched; offered to help her; and the female lost consciousness whilst in the company of the perpetrator.

[24] In this appeal, there is no evidence to suggest that another man could have had sexual intercourse with the complainant and no suggestion to that effect was made during the trial. Similarly, there is no evidence to suggest that any other person could have committed the theft. There is thus no reason for the court to speculate in that regard. In light of the totality of the evidence, the inference is irresistible that the appellant committed the offences notwithstanding the lapse of time and distance between the two places. It follows that the court a quo correctly convicted the appellant in respect of counts 2 and 3 respectively.

[25] I turn now to consider the appeal against the convictions of rape in respect of counts 6, 9, and 14 as well as the indecent assault conviction, being count 17. I propose to deal with the issues raised on appeal together as the defence raised relates to all these counts. The main submission advanced on behalf of the appellant was that the complainants in these counts, through their conduct, had consented to have sexual intercourse with or to be touched on their private parts by the appellant. Counsel for the appellant further submitted that their consent was real, despite any misrepresentation that may have occurred. For this proposition counsel

relied on, inter alia, *R v K* 1966 (1) SA 366 (SRA); *R v Williams* 1931 (1) PH H38 (E) and *S v W* 2004 (1) SACR 460 (C). In my view these decisions are of no assistance to the appellant. I will show how the facts of these cases are distinguishable from the facts of this case in so far as they bear on the question of consent.

[26] I must mention here that the issue of consent as a defence in respect of the allegations in these counts, was raised for the first time on appeal, as the appellant had throughout his trial presented a bare denial of the allegations. Regarding the appellant's decision to raise this defence on appeal, I accept that there is no onus on the appellant. However, one would have expected him to have pertinently raised this issue during the trial. Be that as it may, my view is that since the outcome of this appeal turns, inter alia, on the element of consent, it will therefore be necessary to consider the possibility of consent even where the appellant had denied sexual intercourse.[6]

[27] The appeal in respect of count 6 (the rape charge), relates to an incident which occurred in Odendaalsrus on 22 November 2005 involving Ms Seipati Sefothelo, a 13 year old girl. The complainant testified that the appellant approached her and told her that he was a prophet. He informed her that she had been bewitched and offered to reveal the identity of the culprits by using a mirror. He led her to an area underneath a bridge. He informed her that the people had taken hair from her head, armpit and pubic hair. He stated that he would have to extract hair from these areas as well, to prevent the people from further bewitching her. He then removed hair from these areas, wrapped it in a piece of paper and placed it underneath a stone.

6 See *S v York* 2002 (1) SACR 111 (SCA) para 19.

[28] He instructed her to remove her trousers and underwear and stated that he needed semen from a male person because a 'tokoloshe' had sexual intercourse with her during the night. He told her to face the wall and bend down. She complied, but realised that the appellant had removed his trousers. She sought an explanation for his actions, but the appellant did not respond and proceeded to have sexual intercourse with her. She felt some pain and started crying, whereafter the appellant stopped. The complainant testified that she never consented to have sexual intercourse with him. She told the court she resisted when he raped her by pushing him backwards. She was not aware that the appellant would have sexual intercourse with her during the healing process. She also identified the appellant at an identification parade.

[29] As against the State's version, the appellant denied any involvement in the commission of the alleged offence. The trial court rejected the appellant's version as false. The judge reasoned that the complainant's consent was not based on true knowledge of the reasonable facts relating to the intercourse. The court below accordingly convicted the appellant of raping the complainant.

[30] In this court, counsel for the appellant, as I have already alluded, raised a new defence of consent and relied on the cases referred to in para 25 above. He submitted that since the complainant was 13 years old, the court below ought to have convicted the appellant of contravening s 14(1) *(a)* of the Sexual Offences Act 23 of 1957 and not rape as the complainant had consented to the sexual act through her conduct.

[31] In my judgment the submission that the complainant had given

consent falls to be rejected. It is evident that the appellant never explained to this child that the 'treatment' would include having sexual intercourse with him. In my view, the circumstances in *R v K* 1966 (1) SA 366 (SRA), *R v Williams* and *S v W* are different as the complainants in those matters were aware that the act of sexual intercourse would take place and had consented thereto. It follows that the appellant's reliance on those cases is misplaced. They cannot assist the appellant with regard to the facts relating to this count as there was no prior consent when he had sexual intercourse with the complainant. The misrepresentation in this case related to the act of sexual intercourse, and not the results of the treatment. In the circumstances, it cannot be said that the complainant consented ─ tacitly or otherwise ─ to sexual intercourse. Furthermore her evidence that she resisted by pushing him clearly militates against consent. It follows that the appellant was correctly convicted of rape involving the 13 year old girl.

[32] This brings me to the appeal against the conviction of rape on count 9. The testimony of Ms Florence Nkosi, a 19 year old student, related to an incident that took place in Welkom on 17 September 2006. She testified that she was approached by a man, wearing a badge of the Zion Christian Church. She identified this person as the appellant. The man used the same modus operandi as described above. In this complainant's case, he told her that some eggs had been inserted inside her body and that he could remove them. She believed him, as she had previously been informed about the same issue by another man. The appellant took an amount of R20 from her. He removed hair from her head, armpits and pubic area. He initially inserted his finger into her vagina stating that he was trying to find the 'sperm'. Thereafter, he told her to remove her trousers and underwear. She demanded an explanation

for this but he became aggressive and stated that she should not question his motives if she needed his help.

[33] She eventually complied and removed her clothing. He demonstrated to her the manner in which she should sit and instructed her to open her legs. She duly complied as she believed that he was helping her. He instructed her to close her eyes and pray. She did as she was told, but when she opened her eyes, she was surprised to see the appellant half-naked kneeling in front of her. He proceeded to have sexual intercourse with her and ordered her not to make any noise as he was helping her. The complainant testified that she did not have an opportunity to prevent the appellant. He also did not explain the manner in which some 'sperm' would be extracted from her. She further told the court that she had screamed because she felt pain and tried to push him away. She had not given him permission to have sexual intercourse with her and had not expected him to do so. After the incident, the complainant left the park with the appellant. She also pointed out the appellant during the identification parade.

[34] The appellant denied ever meeting the complainant. He further denied the allegation of rape. The court below rejected the appellant's version and convicted him as charged.

[35] Counsel for the appellant submitted that the complainant had through her conduct consented to the sexual intercourse. This submission cannot be sustained as the appellant used the same modus operandi with this complainant as with the others. He had ordered her to sit like a person who was having sexual intercourse and became aggressive when she refused to undress. It is also clear that the appellant never told her that

sexual intercourse would be part of the treatment. He instructed her to close her eyes, effectively taking her by surprise. That she screamed and tried to push him away, clearly points to lack of consent. In the circumstances, the complainant did not give valid consent. In the result the appellant's guilt in respect of count 9 was properly established. His appeal against this rape conviction cannot succeed.

[36] Regarding the appeal against conviction of rape (count 14), Ms Selloane Makoro testified about an incident which occurred in Welkom on 26 April 2007, when she was aged 19. She told the court that the appellant had approached her as she was leaving a doctor’s office. He told her that he was a prophet and that she was sick. He offered to help her and suggested they proceed to a quiet place where he would reveal everything to her in a mirror. They walked together until they reached a spot with a tree trunk where he instructed her to pray. The appellant also pointed out two other men in the nearby surroundings. He instructed her to undress, turn around and hold onto the tree trunk which she did. He ordered her not to look at him. She felt him penetrating her. She wanted to scream for help but did not do so, as she was frightened and under the impression that the two men she had seen earlier and who were still standing under a tree were the appellant's friends. According to the complainant, the appellant did not explain the manner in which he would help her. Nor did he tell her that the healing process would entail having sexual intercourse with her. She stated that she would have declined his offer, had she been aware of his motives. The appellant also took her wallet, cellphone, medication and left. The complainant pointed out the appellant during the identification parade.

[37] The appellant denied the allegations against him. He told the court

that he saw the complainant for the first time during the identification parade. The court below rejected the appellant's version and convicted him of rape.

[38] In this court, counsel persisted in his argument that tacit consent had been given by the complainant. In my view, this argument is fallacious. It is evident that the complainant was frightened and under the impression that the two men she saw earlier, and who were still in the vicinity, cooperated with the appellant. It is clear that she submitted due to fear. There can be no consent under such circumstances. It follows that the court below was correct in convicting the appellant of raping the complainant.

[39] I am satisfied that in none of the above cases of rape was the consent of each of the respective complainants obtained.

[40] The final count relates to conviction on the charge of indecent assault (count 17). The testimony of Ms Gloria Vatsha related to an incident which occurred in Welkom on 26 August 2007. The appellant approached her and introduced himself as a prophet. They walked together and met an unknown female. They went to a park where the appellant instructed her to pray and left with the other woman. The complainant stated that she had some reservations about the appellant's motives and upon his return told him that she was no longer interested.

[41] The appellant replied that the rejection of his offer could lead to her death. She became alarmed and decided to stay and accept the appellant's assistance. He instructed her to hand her belongings to the other female. She did so – assuming this was for safekeeping. The

appellant and the complainant left the other woman, whereafter he informed her about her problems. He extracted some hair from her head and armpit. He also informed her that she would not be able to conceive as some of her eggs were blocking her uterus and offered to remove them. He instructed her to unzip her skirt, pull down her underwear and open her legs. He inserted his finger into her vagina and also pulled out pubic hair. She testified that she was not comfortable but did not stop him because she was under the impression that he was helping her.

[42] The appellant told the court that he had no recollection of the incident. He averred that he would never attack a stranger in such a manner. The court below rejected his version as false and convicted him.

[43] Before us, counsel re-iterated in his submissions the defence of consent on this count as well. This argument cannot prevail. First, the test pertaining to indecent assault is an objective one. It has nothing to do with whether the complainant objected or not. In *S v F*,[7] the court held that regard must be had to the expressed motive or intention of the accused as conveyed to the complainant (whether by words, conduct or implication), in determining whether an assault amounted to an indecent assault. It further held that the particular part of the body of the complainant at which the assault was directed, was not of decisive importance in determining the 'indecency' of the assault. In *S v Kock*,[8] Heher JA remarked that:

'Indecent assault is in its essence an assault (not merely an act) which is by its nature or circumstances of an indecent character.'

In this case, the appellant's conduct of inserting his finger into the complainant's vagina is objectively indecent.

7 *S v F* 1982 (2) SA 580 (T).
8 *S v Kock* 2003 (2) SACR 5 (SCA) para 9.

[44] Second, it is evident that the appellant never explained the manner in which the eggs would be removed from the uterus and therefore it was clear that the complainant did not have full appreciation of what she was consenting to. It is clear that consent was secured by clandestine machinations amounting to fraud. In the result, the appellant was correctly convicted of indecent assault.

[45] In my judgment, whilst the facts of the cases relied upon by the appellant correctly reflect the state of the law in relation to those cases, it however does not assist the appellant on the facts of this appeal for the dicta were premised on entirely different contexts. In those cases, the complainants had consented to sexual intercourse. Put differently, they had a full appreciation of what they were consenting to, that is, that sexual intercourse would take place. That is not the case in this appeal.

[46] In my view, on the totality of the evidence tendered, the appellant's version was correctly rejected as not reasonably possibly true. The complainants targeted by the appellant were relatively young and disconcertingly gullible. They appeared to have had some personal problems and were thus taken in by the appellant. The complainants referred to in counts 1 and 2 respectively were in no position to consent as they were unconscious when the acts of sexual intercourse occurred. Similarly, in respect of the complainants in counts 6, 9, 14 and 17 respectively, there was no consent. There was duress, intimidation or fraud which nullified valid consent. I agree with counsel for the State that the defence of consent raised on appeal, was not a true defence, but a contrived afterthought by the appellant in an attempt to escape liability for his deeds. I am accordingly satisfied that the State has proved the

guilt of the appellant beyond a reasonable doubt. There is thus no basis to disturb the trial court's findings. It follows that the appeal must fail.

[47] For these reasons the appeal against the conviction in respect of all counts is dismissed.

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N Z MHLANTLA
JUDGE OF APPEAL

APPEARANCES

For Appellant: P W Nel
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