THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 570/11
Not reportable

In the matter between:

DANNY PILLAY **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Pillay v The State* (570/11) [2012] ZASCA 43 (29 March 2012)

Coram: Cloete, Mhlantla, Bosielo, and Tshiqi JJA *et* Petse AJA

Heard: **23 February 2012**

Delivered: **29 March 2012**

Summary: **Appeal – conviction against charges of rape and indecent assault on two complainants – reliability of the evidence of state witnesses – whether the court a quo applied the necessary caution.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Phatudi J and Tokota AJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

BOSIELO JA (CLOETE, MHLANTLA, TSHIQI JJA AND PETSE AJA CONCURRING):

[1] The appellant was convicted in the regional court, Pretoria on one count of rape and one of indecent assault. The two counts were treated as one for purposes of sentence and the appellant was sentenced in terms of s 276(1)*(h)* of the Criminal Procedure Act 51 of 1977 (CPA) to three years' correctional supervision subject to certain conditions and a further imprisonment for five years wholly suspended for five years on certain conditions.

[2] Aggrieved by the sentence imposed, the respondent appealed in terms of s 310A of the CPA. The appellant cross-appealed against his conviction. The respondent's appeal against the sentence succeeded whilst the appellant's appeal against his conviction failed. The sentence by the trial court was set aside and replaced with a sentence of imprisonment for five years in respect of the rape charge and in respect of the indecent assault charge, three years' imprisonment wholly suspended for three years on condition that the appellant was not convicted of indecent assault or rape committed during the period of suspension. The appellant is appealing against his conviction with the leave of the court below.

[3] At the heart of this appeal is the reliability and credibility of the two cardinal state

witnesses, who incidentally are the complainants.

[4] The salient facts leading to the conviction can succinctly be stated as follows: The two complainants are cousins to the appellant's wife. They are P who was 18 years old and S who was 19 years old at the time. The alleged incident occurred on 7 November 2007, when they were both at the appellant's home, to celebrate Diwali, a festival celebrated by adherents of the Hindu faith. It appears from the evidence of the appellant, his wife, K and their son, V that the complainants drank some intoxicating liquor during that evening. According to the appellant and his wife, this was Klipdrift brandy mixed with coke. The complainants admit that they drank some beverage offered to them by the appellant at his home. However, they deny that they knew that it contained alcohol. They were, according to them, under the impression that they drank coke and not intoxicating liquor.

[5] Soon after they had drunk the drinks offered by the appellant, P started feeling so dizzy that she could not stand on her own. P then left the group and went to rest in the bedroom of the appellant's son. As she could not walk properly, the appellant's son assisted her. These facts are common cause. What follows is the disputed version of P. The appellant followed her into the bedroom. (There was some confusion in P's evidence regarding whether the appellant's wife had entered the bedroom at all at that stage. The statement made by P to the police suggested that she had. But that was not her evidence. Ultimately, it appeared that only the appellant entered the bedroom at that stage, but that both the appellant and his wife did so at a later stage when S was indecently assaulted.) After P lay down on the bed, the appellant started to undress her. At this stage she was drowsy and was passing out intermittently (presumably due to the alcohol that she had consumed). She then became unconscious and cannot remember what happened. When she regained her consciousness, she was in the main bedroom and she was naked. The appellant and his wife were also in the room, both naked. The appellant's wife had a vibrator in her hand. Whilst P lay on the bed, the appellant spread

her legs apart, fondled her, sucked her vagina and inserted his penis in her vagina. P testified that at this stage the appellant did not have a condom on. P could not remember if the appellant ever put a condom on. All she remembered was that the wife told him to put one on but if he eventually put it on or not she could not be certain. As the sexual intercourse was painful she cried. She then started to vomit. The appellant then stopped and went to fetch water for her. This was on the instructions of appellant's wife. The appellant and his wife then carried her to the shower where they turned on the cold water tap. Later on, the appellant's wife dressed her in her own clothes.

[6] They then took her to their son's bedroom where she found her sister S sleeping. According to P she was still drowsy at this stage. The appellant and his wife entered the bedroom where S was sleeping with their younger daughter. Both were still naked and the appellant's wife still had the vibrator. They started to fondle S. The appellant apparently left the room. The appellant's wife told S that the appellant was waiting to have sex with her at the swimming pool. However, S resisted, claiming that she was tired and pretended to be asleep. The appellant then re-entered the room, apparently to check on the progress. The appellant's wife then told him to wait outside as S would be coming. As S resisted all attempts to get her out, the appellant's wife finally gave up and left the room.

[7] In the morning, P reported to S that she had been raped the previous night. P testified that she was a virgin at the time and further that she did not give the appellant consent to penetrate her carnally. She was 18 years old at the time.

[8] S confirmed that, together with P, they enjoyed some drinks which were offered to them by the appellant whilst they were at his house. She denied that she drank alcohol. According to S, she and P drank coke. However after drinking the 'coke' offered to her by the appellant, she felt dizzy and nearly fell over. Whilst on the veranda, P complained that she was not feeling well and wanted to sleep. She left for the house. S

remained on the veranda with the appellant's children after the appellant and his wife had followed P into the house. She then started to pass out intermittently. Later she asked the appellant's son to help her to the house where she ended up in the same bedroom where P was sleeping. Significantly, she realised that P's hair was wet. The appellant's wife then came and pulled her to their bedroom where she was shown several pornographic movies on a laptop. She then left them and returned to the room where she had been sleeping. The appellant's wife later returned to her room where she fondled her and stroked her with a vibrator on her chest after she had opened her pyjama top, whilst at the same time kissing and touching her body. The appellant then touched her twice on her vagina outside the pyjamas. The appellant's wife tried to get her to go to the appellant at the swimming pool. S successfully resisted all these attempts, claiming that she was tired. The appellant and his wife then left her room.

[9] After the appellant and his wife had left the room, P started to cry and complained of pains in her private parts. When they woke up the next morning, S then discovered that P was dressed in different clothes. She had a brown top on and a pair of black trousers with no bra. Inside the shower they saw P's pyjamas under the appellant's clothes. P then told S that she could remember what had happened and reported that she had been raped by the appellant. During the morning both the appellant and his wife pretended as if nothing had happened. They appeared to P and S still to be drunk.

[10] After they had had their breakfast, the appellant's wife took them home. Upon arrival at home, they did not report this incident to their parents immediately as they found them on their way to some shopping mall. Instead, P went to her friend's house where she reported this to her friend's father who advised them to report the matter to the police. They then went to the police station to report the incident. P was later examined by a district surgeon, Dr Martinez.

[11] Dr Martinez examined P on 8 November 2007. He observed the following: a

fresh tear on the fossa navicularis; a swelling of the hymen and a fresh tear of the hymen. His conclusion was that the genital injuries found on P were consistent with penetration of a large object beyond the labia majora, for example an erect penis. He also concluded that there was forceful penetration which in his estimation had occurred within the previous 72 hours.

[12] The appellant testified in his defence. He conceded that the two complainants were at his home on 7 November 2007 until they went home the next day. He testified that his house was securely locked and that nobody entered or left his home that night. He was the only adult male person in the house that night. He testified that both complainants drank Klipdrift brandy mixed with coke at his home. According to the appellant the two complainants became 'paralytically drunk' whilst drinking the Klipdrift and coke. They kept on falling down. According to the appellant the two complainants drank the Klipdrift and coke knowing what they were drinking. He denied having had any sexual intercourse with, or indecently assaulting, either of them. The appellant contended that the charges were fabricated. The reason he advanced is that he had had some dispute with their parents in the past. However, it was later clarified that as at the time of the incident, the dispute had been resolved.

[13] Counsel for the appellant launched a strong attack against the acceptance of the complainants' evidence. He submitted that on their own version, they were so inebriated that they even suffered several bouts of loss of consciousness. The submission is that the complainants were so drunk that they were unable properly to recall the events of the day. It was contended further that on their own version, they were so drunk that they experienced intermittent bouts of loss of consciousness as a result of the alcohol which they drank. Based on their state of intoxication, it was contended that their evidence is like that of a drunkard and should have been approached with caution and rejected as being unreliable.

[14] Undoubtedly the evidence in this matter called for a cautionary approach. This is

because both complainants were seriously under the influence of intoxicating liquor.

[15] Counsel also criticised the complainants for their behaviour which on the face of it appears to be improbable. First, the complainants failed to telephone their parents, despite having a cellular phone, to alert them to their predicament. Second, instead of fleeing home in the morning, they elected to make and enjoy breakfast at the appellant's home. The argument is that they did not behave like rape victims. In evidence, the complainants had testified that the appellant and his wife were still drunk in the morning and behaving in a rather peculiar manner. Concerning their failure to phone their parents, S explained that she did not have a charger and the batteries to her cellular phone were low. In any event the appellant's wife offered to take them home. Given the traumatic experiences they lived through the previous night, I do not think that this behaviour can seriously detract from their credibility and reliability. At the available opportunity, P reported to S that she had been raped by the appellant. On the evidence this report was spontaneous.

[16] In evaluating the evidence, the court below acknowledged that the two complainants were under the influence of intoxicating liquor when the incidents described herein allegedly occurred. Importantly, the court below accepted that due to the effect of alcohol, their evidence was not reliable. In exercising caution, the court a quo found the doctor's evidence regarding recent penetration of P to be irrefutable. The only vexed question which remained was who the perpetrator was. P testified that the appellant penetrated her carnally. Importantly, the evidence is that, except for their 13 year old son, there was no other male person present at the appellant's house on that night. Assuming that the son may have been sexually active, the possibility that he may have been the perpetrator can safely be excluded for there was no reason for P to blame his father and implicate his mother if he had raped her. The appellant admitted that he was sexually active. It is common cause that the house was fitted with adequate security to exclude any possible intruders. There is therefore no suggestion that another

man could have gained entry into the house stealthily overnight and raped the complainant. The possibility that P could have left the house voluntarily and had sexual intercourse with an unknown person can also safely be excluded ─ she was in no condition to have done so. It was suggested by the appellant's counsel that it may have been the vibrator that caused the injuries to P's genitals found by Dr Martinez. Theoretically it could have been, but such a hypothesis is inconsistent with P's evidence that after the appellant penetrated her, his wife told him to put on a condom, whereupon he withdrew from her and thereafter re-entered her. There would have been no point in the appellant's wife telling him to put on a condom if he was using a vibrator to penetrate P.

[17] But whatever the shortcomings of the complainants' version, the medical evidence of fresh tears on P's hymen and clear signs of recent penetration beyond the labia majora by a large object like an erect penis, makes the conclusion inescapable that P was sexually assaulted that night. The only possibility other than rape by the appellant is that P had sexual intercourse a day or so prior to the visit and she and her sister decided for some reason to blame the appellant for her loss of virginity.That is too far fetched to contemplate. Why would the sisters concoct so complex a story? Given the fact she was at all material times in the appellant's house, the inference that it is the appellant who had sexual intercourse with P on that night is, to my mind, the only reasonable inference to be drawn from the proven facts.

[18] It is a trite principle of our law that the state bears the burden to prove the guilt of an accused beyond reasonable doubt and not beyond any shadow of doubt. As Malan JA aptly held in *R v Mlambo* 1957 (4) SA 727 (A) at 738A-B:

'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the

guilt of the accused. An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.' See also *S v Ntsele* 1998 (2) SACR 178 (SCA) at 182b-e.

[19] Based on the conspectus of the evidence, I cannot find any fault with the reasoning and conclusion of the court below. In particular, I find that the cumulative effect of all the evidence points inexorably to the appellant as the person who raped P on the night in question. Because the version of the appellant and his wife about the events of that night fall to be rejected so far as the rape of P is concerned, and because there is corroboration by P of S's evidence that S was indecently assaulted, I consider that the appellant was correctly convicted on this latter count as well. Consequently, I am satisfied that the appellant's guilt was proved beyond reasonable doubt on both counts.

[20] In the result, the appeal is dismissed.

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L O BOSIELO

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	J J Strydom SC Instructed by: O J Botha Attorneys, Montana Park Honey Attorneys, Bloemfontein
For Respondent:	M J Makgwatha Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein