

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No: A104/2009

In the matter between:

NKWENKWANA JULY

Accused

Versus

THE STATE

JUDGMENT DELIVERED ON 15 MAY 2009

Allie, J

[1] On 10 July 2008, the appellant was arraigned in Atlantis Regional Court on a charge of rape. The appellant, who had legal representation pleaded guilty. He was convicted of rape on 30 July 2008 and sentenced to 18 years direct imprisonment. He appeals against both his conviction and sentence.

[2] The state alleged that he raped the complainant, a 14 year old minor who is the appellant's half sister's daughter on 24 November 2007 at her home.

[3] On the evening in question the complainant's mother who is the sister of the accused was away in the Eastern Cape. She left Busisiwe, a 21 year old friend to take care of her four children. The appellant drank alcohol with Busisiwe at the complainant's home. The house comprised a RDP house with two adjoining wood and zinc structures attached. The four children which includes the complainant were sleeping in the house on a three quarter sponge mattress which was situate to the right of the main house entrance.

[4] "**N S**", the complainant testified that when she awoke, the appellant was on top of her with his penis in her vagina and he was moving up and down. The other children remained asleep. She wanted to scream but he kept her mouth closed. He also pressed her eyes closed. He pressed down on her and she could not move her arms and legs. She realised then that her clothes at the bottom of her body i.e. her panty and pants were off. She does not know who took them off. She said that the appellant kept his pants on and merely opened his zip to take out his penis. She said that she felt pain around her vagina. Then Busisiwe came in by the door and the appellant climbed off her. He went to sit on a chair. Busisiwe spoke to the appellant and asked him what he was doing. She said when the appellant got off her. She stood up and dressed herself. The complainant went outside and did not hear their entire conversation.

[5] Thereafter she went to sleep again. The next morning Busisiwe asked the complainant what had happened. The complainant's mother came back the Sunday, i.e. the day after the incident at approximately 5pm. She told her mother what had happened. Her mother took her to the police and to the doctor that Sunday night.

[6] The complainant was cross examined about the various discrepancies between her statement to the police and her testimony in Court. She said that the female police officer who took down her statement allowed her to tell the story in Xhosa, and then the police officer wrote it down in English and then read it back to the complainant in Xhosa. Her mother and Busisiwe sat in the same room where she gave her statement. She admitted that there was a prior incident where the appellant pushed over a room

divider and broke some crockery of her mother.

[7] **Busisiwe Bangeli** testified that on the night of the incident she was outside while the appellant was drinking inside the house of the complainant's mother. The four children as well as her baby were sleeping in the house. When she walked back into the house, she saw the appellant on top of "N" moving up and down. Nisiwe's one pant's leg and panty was on one leg only. She noticed that Nisiwe's one leg was wide apart from the other and was against the room divider. When she asked the appellant what he was doing he stood up pulled his pants up. She became scared of the appellant. She went to look for her friends outside. She did not find them. She came back inside. The appellant was drinking further. She asked the appellant what he thought the complainant's mother would say about the incident. She inspected "N" and noticed that she was wet at the bottom. She told the appellant to leave. She told the complainant's mother the next day about the incident.

[8] She was also cross examined about the contradictions between her statement to the police and her evidence in Court. She explained that the statement was taken by the same police officer and under the same circumstances as that of Nisiwe.

[9] **Lisiwe July** the complainant's mother testified. She said that the appellant is her brother. When he first arrived in Cape Town she assisted him so that he could attend school. She trusted him around her children. She agreed that the appellant pushed her room divider and broke some of her crockery on a previous occasion some time before the rape. He later apologised and offered to pay for the items that he broke but she

said that it was alright. She also admitted that previously the appellant accused her of witchcraft which he claimed caused his girlfriend Ntombevuye, to not conceive. She told him not to repeat that allegation to their mother because it would upset her. The witness and the appellant were on speaking terms when the rape occurred. The complainant and the appellant had a good relationship.

[10] She confirmed that to see the sponge on which the complainant and the other children slept that night, one would have to walk to the right of the entrance door once inside.

[11] Ms Busula the police officer who took down the statement of the complainant, her mother and Busisiwe testified that she could remember vaguely what the complainant said independently from what was written in her statement. She said that she allowed the complainant to give her version in Xhosa. Thereafter this witness wrote the statement in English and read it back to the complainant in Xhosa. She understood naked to mean only the bottom clothes such as the pants of a person were off. She clearly displayed a poor command of English by virtue of the grammar and vocabulary she used to write down the statement. She conceded that she could have made a mistake in taking down the statements and translating them.

[12] **Dr A M Jacobs** testified in place of Dr Groenewald who was not available to testify. Dr Groenewald completed the Medico-Legal Report i.e. the J88. The doctor confirmed the clinical findings noted on the report. They were as follows. There was a half centimetre tear at the inferior position of the posterior fourchette. There was increased friability i.e. an inflamed and tender area. The hymen was torn with an

irregular border and was swollen. There were clefts and bruising. Blood and a discharge were noticed. There were small tears in the front of the vagina. The finding of Dr Groenewald is that there was evidence of sexual intercourse with injury to the hymen, posterior fourchette and the vagina with a yellowish discharge. The medical evidence supports unequivocally the complainant's and Busisiwe's allegation of rape.

[13] **The appellant** alleged that he had a sexual relationship with Busisiwe but he also had a girlfriend called Ntombevuye. He said that he and Busisiwe slept together in the house of the complainant's mother on the night in question. He alleged that Busisiwe wanted R50 from him but he refused to give it to her. He alleged that he left the house the next morning and he did not rape the complainant. Despite his legal representative stating during cross examination that the complainant's mother and the appellant had a hostile relationship, he confirmed that after he pushed Lisiwe's room divider and broke some crockery, his child was born. He and Lisiwe came together again and were on good terms. He alleged that he was not very drunk on the night in question even though the complainant said that he was not steady on his feet. Despite the prior allegations and insinuations by his legal representative that Busisiwe was angry with the appellant because he had a relationship with Ntombevuye too, during cross examination he conceded that she had no grudge against him.

[14] **Ntombevuye**, the girlfriend of the appellant testified that she got along well with Busisiwe and did not suspect her of having a relationship with the appellant. She also got along well with the complainant's mother.

[15] The appellant's legal representative put a proposition to Lisiwe, the complainant's mother that the appellant spoke to Busisiwe about ending their alleged relationship. This proposition was not put to Busisiwe. The appellant alleged that the complainant's mother previously alleged that "N" was raped by a relative in the Eastern Cape but it was a false allegation. This allegation was not put to the complainant or to her mother, Lisiwe during cross examination. The appellant's girlfriend could not corroborate his allegation that Busisiwe had a grudge against him and that she had a relationship with him.

[16] It is clear that the appellant adapted his defence as he went along.

[17] Although there were contradictions between the version of the complainant and that of Busisiwe with regard to what the complainant wore or whether the appellant's pants was pulled down while he committed the rape, it does not point to a lack of credibility. It is trite that a court may reject part of a witness' evidence and accept part. The complainant was asleep immediately prior to the rape. Her powers of observation with regard to the pants of the appellant because he had a relationship with Ntombevuye too, during cross examination he conceded that she had no grudge against him.

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[18] Busisiwe's evidence and the medical evidence lends support for the complainant's allegation that the appellant raped her.

[19] The appellant's evidence does not cast any doubt on the state's case.

[20] I would accordingly confirm the conviction.

[21] The sentence of 18 years direct imprisonment is however startlingly inappropriate in as much as the appellant is a 24 year old first offender and alcohol played a role in the commission of the offence. The appellant only completed standard six. On the other hand he has violated a young girl closely related to him who trusted him.

[22] I would set aside the sentence imposed by the court a *quo* and replace it with the following sentence.

[23] The appellant is sentenced to 12 years direct imprisonment.

ALLIE, J

I agree

BROWN, AJ