IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A340/2010

DATE: 6 MAY 2011

In the matter between:

MOSAKHANE NTSHEWULA Appellant

and

THE STATE Respondent

J U D G M E N T

BINNS-WARD, J:

With the leave of the trial court, the accused, who was convicted of the offence of rape in terms of section 3 of the Sexual Offences & Related Matters, Act 32 of 2007, comes on appeal before us against his conviction. The magistrate found that the appellant had, while in detention in the Mbekweni Police Cells at Paarl on night of 11 October 2008, raped the complainant per anum.

It is common cause that both the appellant and the

complainant were detained in the police cells at the time. It is common cause that at the time of the appellant's detention in the cell, the complainant and another prisoner were already there. It is also common cause that the other prisoner was released. It is not altogether clear whether that release occurred simultaneously with the admission of the appellant to the cell or shortly thereafter.

The complainant's evidence was that after the admission of the appellant to the cell and the release of the third prisoner, the appellant had approached him in an aggressive manner and forced him, whether by threat or by deed is not altogether clear, to lie down on some bedding which the appellant had allegedly prepared on the floor of the cell. The complainant testified that he complied with the appellant's demands, because he feared being assaulted. He indicated that the appellant was behaving in a particularly aggressive manner.

According to the complainant, the appellant ordered him to pull down his underpants, which the complainant did. While the complainant was lying flat on his front, as he described, he said the appellant raped him from behind. The degree of penetration and the extent of penetration is not clear, but on the complainant's evidence, as soon as he felt the appellant's penis entering him, he felt pain and cried out, and also moved

away from the appellant. (How he did that in the position described by him, is not altogether clear and was not investigated at the trial.)

The complainant testified that as soon as he cried out, the appellant desisted from further assault and withdrew with the bedding to a corner of the cell where he lay down and covered himself with a blanket. The complainant says he went to the door of the cell, shouting and banging for attention. He says that shortly thereafter the police details arrived from the charge office and he made a report to them that he had been sexually assaulted or raped by the appellant. He indicated that he wished to lay a charge at that stage, but that the police had said there was no time available for them to accept the charge. He was, however, removed to another cell where he spent the rest of the night and, on the next morning, according to his evidence, after both he and the appellant were released from the cells, laid a charge which led to the appellant's re-arrest.

The complainant was medically examined within hours of the formal complaint being received. The medical report in respect of that examination was produced in evidence, although the medical officer who had examined the complainant, was not called to testify. It is apparent from the

medical report that the only indication of significance that the medical officer was able to find on an examination, was a fissure, an anal fissure described as a linear fissure in the skin surrounding the orifice, the anal orifice and the medical officer noted, it is not altogether clear, but it appears to read "not fresh, healing in progress". Needless to say the doctor's conclusion was that the fissure found by him may or may not have been associated by the alleged assault described by the complainant. The doctor observed that it is also difficult for one to say with certainty if anal sex had occurred or not.

The state closed its case after leading the evidence of the complainant. The appellant then gave evidence and his version of events amounted to a denial of the complainant's allegations. The appellant testified on his admission to the cell, he noticed that the complainant appeared to be jumpy and agitated, as he put it "jumping about". He said that the complainant told him that he had been raped by the other person with whom he had been in the cell before the appellant's arrival there. The appellant, according to his evidence, indicated to the complainant that nothing of that nature would happen while he was in the cell.

In any event, as indicated earlier, the other prisoner was removed from the cell virtually contemporaneously with these

events described in the appellant's evidence. The appellant said it was cold and he organised for the police to bring him a blanket and he made a bed in the corner of the cell to which he retired. On the appellant's evidence, during this period, the complainant appears to have continued in a state of some agitation. He made some reference to the complainant mumbling or talking to himself. He then said the complainant suddenly leapt up, shouted and screamed and banged on the cell door for attention, which prompted what the appellant described as an immediate response from the police details.

When the police arrived - the police being Constable Solomons and an IsiXhosa speaking colleague called Ndledle - the appellant said that the complainant then made a report to the police that he had been raped by the appellant. The appellant was outraged at what he heard. He leapt up from the bed on which he had been lying, went to the door where the policemen were standing and vociferously took issue with the allegations made against him. The appellant testified that he insisted at that stage that he and the complainant be separated and held in different cells. The police acceded to this request and it is common cause that the complainant was removed to another cell. Appellant testified that during the night policemen walked past the cell at various stages and he heard remarks being made, which he understood to be made about himself, to the

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effect that the rapist was being held in the particular cell in which he was. This upset him further.

It is common cause that on the following morning both the appellant and the complainant were released from the cells in which they were held. The appellant testified that at that stage, being insistent on the opportunity to clear his name, he demanded that the complainant put the allegations he had made the previous night to the proof by formally laying a complaint against him. The appellant said he made it apparent to the complainant that if this was not done, he would assault the complainant outside the police station.

The state obviously realised, after the evidence of the appellant had been given, that it had not succeeded in discharging the onus of proving beyond reasonable doubt that the appellant was guilty as charged. This resulted in an application by the prosecutor to reopen the state case to call the police details. The application was granted, but as it happened only one of the attending police details was called, Constable Solomons. Constable Ndledle had apparently been subpoenaed, but on two occasions had failed to attend court.

Constable Solomons gave evidence as to his observations on the evening in question and on the events the following

morning. Constable Solomons, however, laboured under a material disability in respect of critical aspects of the events. Both the complainant and the appellant are IsiXhosa speaking men and Constable Solomons does not speak that language. Constable Ndledle, on the other hand, did. It is apparent from Constable Solomons' evidence that the conversation that occurred between the police details and both the appellant and the complainant when, as a result of the ~~(illegible~~ hne) and cry raised by the complainant, they attended at the cell door, was in IsiXhosa. As regards its contents, Constable Solomons was reliant on what he said Constable Ndledle told him later.

It is, however, apparent from Constable Solomons' evidence that he was able to observe by the appellant's demeanour that the appellant was agitated in response to the report made by the complainant to Constable Ndledle. And it is also important that Constable Solomons conceded that he could not deny that it was at the appellant's insistence that the complainant and the appellant were at that stage placed in separate cells. Constable Solomons' evidence as to events on the following morning, is not altogether satisfactory and in a material respect, contradicted itself.

He also, before one deals with those events, contradicted the complainant's evidence that the police had refused to take a

report from him initially because of a lack of time. Instead, Constable Solomons stated that the report had not been investigated at the time, because the complainant was obviously intoxicated. I should say in that regard that intoxication indeed appears to have played a role in the decision by the police to detain both the appellant and the complainant, but more so in the case of the complainant.

The following morning, Constable Solomons initially testified - consistently with the evidence of the appellant - that the charge of rape had been formally accepted as a result of the insistence by the appellant that a charge be laid. Later in his evidence he gave to understand that the charge had been laid because of advice given by him to the appellant, when the appellant had again raised the allegation of rape after the complainant was released from the cells.

That was the evidence led at the trial.

It is trite, but it bears restating, that the onus in criminal matters is on the state to prove the guilt of an accused person beyond reasonable doubt. And an incidence of that principle is that if, at the end of the case, on the consideration of the evidence as a whole, it is reasonably possible that the accused person's evidence could be true, the accused person is

entitled to an acquittal, and the state in those circumstances fails to discharge the burden of proof beyond reasonable doubt.

The magistrate in his assessment of the evidence found nothing much to choose between the credibility of the evidence of the complainant and that of the appellant. In my view he cannot be faulted for that conclusion. Where the magistrate, in my judgment, went astray was to adopt the attitude in the circumstances just described of approaching the matter on the basis of characterising the evidence of Constable Solomons as decisive in the circumstances. That was not a proper approach. But even in adopting that approach, the magistrate was impelled to recognise that the evidence of Constable Solomons in certain respects supported the complainant and in other respects supported the conflicting version of the appellant.

The magistrate, however, attached his own scale of materiality to these aspects of support and contradiction and on the basis of the weight being given by him in that regard, came down against the appellant. That was a misdirected approach. But in adopting it, the magistrate misdirected himself in respect of the evidence. The magistrate, in conflict with the evidence and the concession of Constable Solomons, accepted for the

purposes of his judgment, that the separation of the complainant and the appellant after the allegation of rape had been made, had been at the instance either of the complainant, or, independently, by the police. He overlooked entirely Constable Solomons' concession that the separation might well have occurred, as testified to by the appellant, that is at the appellant's insistence. Also, in dealing with the events of the following morning, the magistrate accepted from the contradictory version given by Solomons as to the circumstances in which the complaint came to be formally laid, the version that counted against the appellant, overlooking entirely Constable Solomons' earlier evidence as to a version which supported the appellant's version.

In all the circumstances, it seems to me the magistrate was also misdirected in holding that the inherent probabilities favoured the complainant's version. In my judgment, if the evidence of the appellant to the effect (i) that he had protested the accusation as soon as it was made, (ii) that he had insisted on the separation of the complainant and himself, and (iii) that he had insisted the following morning on a charge being laid were taken into account, those are all factors, in my view, indicating an inherent improbability of those actions being consistent with those of a guilty person. They are rather, inherently, more probably the conduct of an outraged innocent

person in the circumstances.

In the result I am of the view that the magistrate was misdirected in concluding that the state had discharged the onus. The appellant, therefore, should have been given the benefit of the doubt, which follows from the fact that his evidence could reasonably possibly be true and in the circumstances the appellant should have been acquitted.

In my view the order that should be made is that the appeal against conviction should be upheld and that the conviction and sentence should be set aside.

OLIVIER, AJ: I agree.

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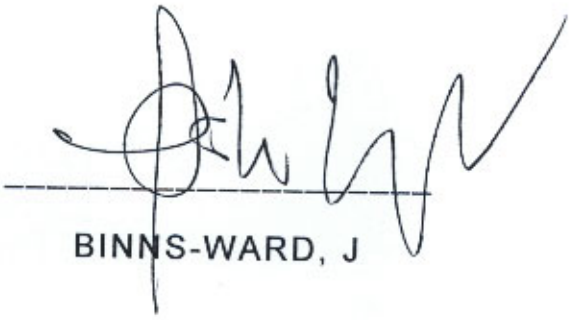
OLIVIER, AJ

BINNS-WARD, J: So ordered.



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