IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A634/2010

DATE: 13 MAY 2011

In the matter between:

ATHINI VUMSINDO Appellant

and

THE STATE Respondent

J U D G M E N T

STEYN, J:

The appellant, who was represented, pleaded not guilty, but was convicted on 23 June 2009 in the Regional Court, Wynberg, on two charges of rape in contravention of the provisions of section 3 of Act 32 of 2007, the Sexual Offences and Related Matters Amendment Act. The appellant was also convicted on a charge of kidnapping. The appellant was warned that the offences attracted minimum sentences.

On 24 June 2009 the appellant was sentenced to effectively 20

years imprisonment on all three charges. Leave to appeal was refused by the court *a quo*, but appellant was granted leave by way of petition to appeal against his conviction and sentence.

It was alleged by the state that the appellant committed the two offences of rape by unlawfully and intentionally committing acts of sexual penetration with the complainant on 8 and 9 September 2008 respectively, at Philippi in the Western Cape. It was furthermore alleged that he was guilty of the offence of kidnapping and that he deprived the complainant of her freedom of movement by clapping her, hitting her with his fists and dragging her to his house against her will.

The appellant admitted that he had consensual sex with the complainant on 8 September 2008. He denied the other charges. The appellant was aged 22 and the complainant 16 at the time of the alleged offence.

The complainant testified that she was staying with her mother at the time of the offences. The appellant was a former boyfriend who lived with his family in close proximity to the home of the complainant. The appellant had terminated the relationship between himself and the complainant in February 2007. The complainant also testified that on the night when the incidents allegedly occurred, she left her home at half past

nine in the evening to fetch water from a tap outside. The appellant came around the corner and called her, she went to him. When she refused to leave with him, he started dragging her.

The complainant says she screamed, but no one heard her. The appellant assaulted her and kicked her while he was dragging her to his home. At one stage she fell. She was told to move and he smacked her with his open hand. After she had fallen, he kicked her in the stomach. Complainant indicated that the home of the appellant was a distance of approximately 500 metres from her own home. She did not see anyone at the appellant's home. They went to the bedroom where the appellant told her to undress and get into bed. She did not co-operate.

She was wearing a tracksuit top and a three-quarter pants. The shoes which she had been wearing were left behind in the tussle with the appellant and she said she was wearing only her socks. After the accused had fetched water and washed himself, he was naked and joined her in bed (later she said he was wearing his underwear after he washed). He undressed the complainant, who struggled. She said she became tired eventually and allowed him to have sexual intercourse with her. When the appellant saw she was crying, he smacked her

with his open hand.

The sex with the appellant was painful and last for 15 to 20 minutes. When he had finished, the complainant dressed herself and remained on the bed until the next morning, in the early hours of the morning. Initially she testified that when she woke up, she went home. After prompting, the complainant said that sexual intercourse occurred on two occasions. The last time was in the early hours of the morning before she left when the appellant insisted on having sexual intercourse again. According to her it was about six o'clock in the morning. She again tired of fighting and allowed him to proceed. On this occasion the sexual assault lasted for 10 minutes. Complainant then dressed and went home. The appellant allowed her to leave. There was no testimony about how she managed to leave if the door was locked as she later testified.

During cross-examination the complainant's version of exactly what happened in the appellant's bedroom, differed from her previous evidence in certain respects. She also testified that she did not run when the appellant went outside to fetch water, because the door was locked. There was no indication how she knew that the door was locked. She did not scream for help whilst she was inside the house, which was improbable. The appellant went home at about seven o'clock in the

morning. When she arrived at home, her mother was not there, but she arrived later. When her mother asked her where she had been, she started crying and told her what had happened. They went to the police station and to the hospital where she was examined. There was no evidence that she had changed her clothes before going to the hospital.

The injuries the complainant allegedly sustained were scratches on her knees. At a question from the court whether she did not sustain injuries from having been hit by the appellant, she said she sustained finger marks on the face. Her stomach ached where she had been kicked. The scratch marks on her legs were not explained to the medical practitioner who examined her, as she thought that these marks were not serious. Subsequently she changed this version of her evidence. Her evidence about what exactly she told the medical practitioner relating to her injuries was inconsistent and not very plausible. She could not explain why she did not tell the doctor about all her injuries.

According to the complainant her mother knew that the appellant was an ex-boyfriend. At the stage when the incident occurred, there was no longer a relationship between her and the appellant. They merely greeted each other in passing. She then said that they had had already parted company for a

year. This evidence, of course, was contradictory to previous evidence that they parted in February 2007. She said they parted because the appellant ignored her, he had another girlfriend. The appellant told her that they had to part ways and she accepted his view. She was hurt by his behaviour, but told herself to let it go. At the time when the incidents alleged occurred, she had another partner.

The complainant was asked why she did not scream while being held hostage by appellant the following day in the early morning. She said she told herself to give up because he got what he wanted. She was also asked why she did not go home after she had been raped on the first occasions and replied that it was night and she was scared to go home. Later she amended this evidence to say the door was locked.

When the complainant was dragged away by the appellant, her mother and apparently an older brother as well, were between 10 and 15 metres away watching television. She was asked how it was possible that the mother did not hear her and answered that she did not scream at first when she was so close to the home, but only screamed after they had turned around the corner. She then said, contradictory to previous evidence, that while she was crying, some other ladies came out, but they did not help her. At that stage she was screaming

and crying.

The replies of the complainant relating to her screaming when the appellant apparently started dragging her to his home, were often implausible and unconvincing. At one time when the appellant was kicking her on her stomach and she was crying loudly, they were in close proximity to other homes, but she says nobody came out to see what was happening. Later she changed her evidence to say people that she knew, including Nomsa, came out and she started running towards Nomsa. The appellant kicked her and she fell. Nomsa saw what happened, but they did not help her and did not report the incident at her home. She sat down and cried, but Nomsa and the others went into the home and ignored her.

During cross-examination the complainant also testified that she last saw the accused a week before the alleged incident. She did not speak to him. She was then asked pertinently whether she saw him on the day of the incident before he came to call her and she replied that she did, contradictory to her previous evidence. She saw him at her neighbour's home where his family resides. It was put to the complainant that she and the appellant were still in a love relationship on the day when the incident allegedly occurred. She denied this. It was then put to her that earlier on that same day she met up with the appellant, that he had given her his cell phone and

that the two of them had agreed that later that night he would phone to meet up with her.

Her strange reply was that he was not going to phone her since the phone was off. She did not deny that she received a phone from the appellant on the day of the incident. It was her testimony that the appellant gave her a phone and later came to fetch the phone from her at about 20:00 outside her house. He then left, but returned again later. The testimony of the complainant relating to how she came into possession of the cell phone of the appellant and how and when it was taken away from her again, was often confusing and completely unconvincing.

The complainant was evasive about her mother's views about her relationship with the appellant, but she did admit that he was not allowed to visit her at her home. She also admitted that she had a broken heart after the relationship between herself and the appellant was terminated.

The mother of the complainant, Ms Makinana testified. She confirmed that the complainant had left the home with a kettle to fetch water, but that she then disappeared. She says she inquired from neighbours within minutes whether they had seen her daughter, but they could not help her. She searched

for her daughter and found the kettle and some shoes. She then telephoned the police. The next morning the complainant's mother went to enquire from a friend if she knew what had happened. When she returned to her home, she found the complainant.

At this stage it was about half past nine on 9 September 2009. The complainant was wearing a track top with a broken zip and the buttons of her pants were also broken. She was crying when Ms Makinana arrived at home. This was contradictory to the testimony of the complainant that she started crying when her mother asked her where she had been. Complainant told her what had allegedly happened. According to complainant's mother, the appellant was staying next to her own house at his sister's place. This aspect, that the appellant actually resided right next to the complainant, testified to a few times, was never canvassed at the trial.

When Ms Makinana was questioned about the relationship between complainant and the appellant, she said the complainant and appellant broke up in 2007 and volunteered that the complainant had been pregnant and given birth to a baby during the time when she was not in a relationship with the appellant. This was news to everybody in court. At the time of the incident, the child was about eight months old and

according to Ms Makinana the father of her child was a man who lived in Mfuleni. On the day of the incident, complainant had left the child behind at home with her mother when she went outside to fetch the water.

Ms Makinana was not happy with the relationship between her daughter and the appellant. She gave a version of how the appellant used to hit the complainant who would run home, where he would then fetch her forcibly. Her evidence in this regard appeared to be fabricated. According to Ms Makinana she saw a scratch on the complainant's cheek. Complainant did not complain of any other injuries and she did not see any injuries. She also said that the complainant told her that the appellant had sex with her on three occasions. The complainant's mother testified that the clothes that the complainant was wearing on the day after the incident were in a state of disrepair. The zip was broken, the pants were torn between the legs. This version also appeared to be fabricated. It was not the testimony of the complainant.

The complainant's mother knew nothing about the cell phone that the complainant had in her possession at one stage that belonged to the appellant. She admitted that if the complainant had slept out of the house without her permission, she would have been in trouble.

Nomsa Nobe Duma (Nomsa) was also called to testified. She admitted that she had been asked to come to court by the complainant's mother. She could not remember the month or date of the incident that she had to testify about, but thought it was in 2009. According to her it was past eight one evening when she was coming from a shop, when she was called by the appellant who asked her to call the complainant. She went inside the house of the complainant to call her. Complainant later came out with a kettle. This kettle she put next to a tap outside the home, whereafter she was dragged away by the appellant. The witness kept on walking home and did not know what happened further.

The next morning the complainant's mother came to her home to enquire about her daughter. She told the mother that her daughter had left with the appellant and that she did not know where she was. She did not say she told her that the appellant had assaulted complainant in any way. Nomsa's evidence was contradictory to the evidence of the complainant and her mother in several material respects. Nomsa said she was alone. She knew nothing about other people with her when she witnessing the incident between complainant and appellant.

She could not explain why she did nothing to help the complainant. She could not explain why there was a contradiction between her evidence and the evidence of the complainant and her mother about the fact that she went to call the complainant at her home. When she could not explain this discrepancy, she testified that she whispered to the complainant that the appellant was calling her. No reason for whispering was given. This testimony appeared to be adjusted and fabricated evidence.

The J88 medico-legal examination report in this matter was handed up by agreement between the parties without leading the evidence of the medical practitioner who had conducted the examination of the complainant. From this document it is noticeable that at 15:30 on September 2008, a medical examination was conducted on the complainant. Her clothes were clean and not torn and there were no injuries noted. She was calm and co-operative. She had already experienced one pregnancy and had been sexually intimate with consent a month earlier. The conclusion of the medical practitioner was "normal findings, this however does not exclude possibility of sexual assault".

The appellant testified that he and the complainant had been in a love relationship from 2006 until the date of the alleged

offences, apparently with a break when he went on an initiation. During the love relationship, they occasionally had sex. On 8 September 2008, the date of the alleged offences, he handed his cell phone to the complainant when she left his home, where they had been watching a movie. They arranged that he would call her later. He did so, but she only arrived after nine o'clock in the evening. His mother was asleep in the home. Complainant's feet were bare and she explained that she had been hit by her mother. The complainant got into his bed and the two of them slept and later had consensual intercourse only once. In the morning the complainant left.

The appellant denied that he had asked Nomsa to call the complainant. He was asked a lot of question about who the father of the baby of the complainant was. It appeared that he thought he could be the father, but since he had not been asked to pay maintenance, he accepted that he was not regarded as the father.

In his judgment, the magistrate recorded that there was no onus on the appellant to prove his innocence. His version only needed to be reasonably possibly true. The magistrate noted that he accepted the testimony of the state witnesses and rejected the evidence of the appellant "as not reasonably possibly true" and "full of improbabilities". It is not clear on a

reading of the record why the evidence of the complainant was regarded as more reasonably possibly true and probable than that of the appellant.

The magistrate was misdirected in not considering or recording that he had considered the cautionary rule in relation to the single witness evidence on the charges of rape. Nor did he consider that he was dealing with the evidence of a very young girl. He completely disregarded the testimony relating to an ongoing relationship in circumstances where the complainant's mother did not approve of the complainant's boyfriend.

The magistrate was further misdirected in seemingly accepting the evidence of the complainant and finding it probable by speculating that she did not have a motive to falsely implicate the appellant. What he did not consider is why, when the appellant and the complainant apparently saw each other from time to time, and had even seen each other previously on the same day, he would suddenly abduct and rape her. Aspects of contradiction, improbability or inconsistency in the evidence of the state witnesses that were not scrutinised with the care these aspects deserved in the circumstances of the case, include the following:

1. The complainant failed to advise the court that she was

the mother of a baby who remained behind when she left her house to fetch water.

2. She failed to tell the court, despite direct questions in this regard, that the appellant had given her a cell phone to keep on the very day of the alleged offence.

3. Her evidence did not divulge that anybody else had called her to meet the appellant outside her house as later testified to by one of the state witnesses.

4. She never testified that the appellant had ever assaulted her during the time that they were in a relationship as testified to by her mother.

5. Complainant initially testified to being raped once only and this version was only amended after prompting by the prosecuting. According to her mother she had told her that she had been raped three times.

6. The complainant's explanation for shouting for help without being assisted and struggling with the appellant in view of others known to her, appears highly unlikely.

7. The complainant's mother's version that she went to look

for the complainant within minutes of her having left, is highly unlikely, because if that was the case, she would have witnessed what allegedly happened to the complainant.

8. Nomsa's evidence relating to why she did not help was highly improbable and her version that she was alone was contradicted by the complainant.

9. Nomsa's version of how she called the complainant at home and whispered to her, was not testified to by the complainant or her mother, is contradictory to her evidence, and sounds improbable.

10. Complainant's version of being hit, dragged, slapped and kicked seems unlikely considering the contents of the medico-legal report.

11. Complainant's evidence relating to what he told or did not tell the medical expert, was not consistent.

12. Complainant's testimony relating to why she did not scream at the home of the appellant or attempt to leave, was improbable and unconvincing.

13. The court did not take proper notice of the fact that the complainant's mother, according to her own testimony, disliked the appellant and that she said she would have been cross if the complainant had left the home on the particular evening to stay over at the home of the appellant.

14. The evidence of the complainant's mother of buttons on the complainant's pants that were broken and that her pants were torn at the crutch after their alleged offences, was probably fabricated and not testified to by the complainant herself.

As correctly pointed out by the counsel for the appellant, Mr Marais in this court, complaints relating to sexual offences are viewed in serious lights by our courts and need to be responded to in a manner that affords victims to such offences appropriate protection and redress. However, in considering whether or not claims are justified, care should be taken to ensure that evidentiary rules of procedure or safeguards are properly applied.

In relation to the cautionary rules applicable to single witnesses, the courts have found that the evidence of such witnesses should only be accepted of such a witness is

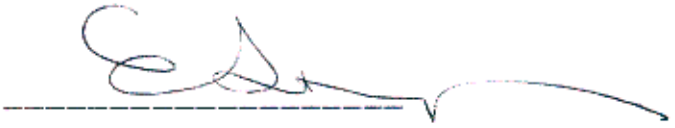
competent and his or her evidence is clear and satisfactory in material respects. The exercise of caution should, however, not be allowed to displace the exercise of common sense. It is trite law that the state has to prove the guilt of an accused beyond reasonable doubt. Coupled with this is the well known principle that if the version of an accused is reasonably possibly true, he is entitled to an acquittal. The *locus classicus* in this regard is R v Difford 1937 AD 370, where the following was stated by Watermeyer, AJA on page 373:

> "No onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

In order to ascertain whether the version of an accused is reasonably possibly true, the evidence presented in the trial should be viewed in its totality as set out in the case of S v Reddy 1996 (2) SACR 1 (A) by Zulman, AJA, in the following terms on page 8c-f. 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 202-203, where reference is made to the 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 reasonably inference from them, save the one sought to be drawn.

When the legal principles and the facts as testified to in this matter are evaluated in totality and the shortcomings in the evidence of the state are considered, including the improbabilities, contradictions and inconsistencies, this court cannot find that there is no reasonable possibility of the explanation of the appellant being true. I do not believe that the state has proved the guilt of the appellant beyond a reasonable doubt. In the circumstances the appellant should be entitled to his acquittal. I would accordingly order that the appeal succeeds and that the convictions on all three charges and the sentences are set aside.



STEYN, J

BINNS-WARD, J: I think it is clear from the detailed judgment given by Her Ladyship, Ms Justice Steyn, that the appeal must succeed. I am in general agreement with the reasons given in Her Ladyship's judgment and an order is made as proposed, the appeal is upheld, the convictions and sentences are set aside.

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BINNS-WARD, J