

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

CASE NO:

A13/11

DATE:

18 MARCH 2011

5 In the matter between:

THABO MATHOPE

Appellant

and

THE STATE

Respondent

10

JUDGMENT

SABA, AJ

15 The appellant in this case was legally represented throughout the proceedings, and he was convicted of rape in Blue Downs Regional Court on 28 February 2008; he was sentenced on the same date to ten years imprisonment. With the leave of the court *a quo* he now appeals against his conviction.

20 It is common cause that the complainant, the appellant, Lucinda and one Mitchell ended up at Mitchell's house on the evening of 28 February 2004. It is also common cause that they drank some liquor before they went to Mitchell's house.

25 The State's case is based on the evidence of the following
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witnesses; Abigail van den Bergh, the complainant, who testified that on their arrival at Mitchell's house the appellant offered them drinks, that is Jack Daniels with Coke. She poured herself a drink, but when she realised that it had a
5 funny smell, as if something had been added to it, she threw it away. Lucinda and the others passed out after taking this Jack Daniels whiskey. She also felt drowsy and went to lie in between Lucinda and Bernie at the foot of the mattress. When she woke up some time later she saw the appellant kneeling
10 down a small distance away from her on the mattress. She realised that her top was undone and one of the legs of her pants was halfway down, although her clothes were normal before she slept. She tried to wake Lucinda and the others up but they did not wake up. She asked why appellant took off
15 her pants and her top and appellant became aggressive. The appellant threatened her with an empty bottle of Jack Daniels whiskey and pulled her to the bathroom. She screamed and the appellant grabbed her head and pulled her out to the back of the house.

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He then threatened to disfigure her face with the empty bottle of Jack Daniels whiskey. The appellant then picked up stones and knocked her on the face. He pulled her hands against the wall with one hand and untied her pants with another hand.
25 He then untied his pants and then pulled down her panty. He

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put his penis into her vagina while they were both standing and made some movements inside her vagina. He then turned around as he wanted to urinate. Complainant pulled her pants up quietly, took her shoes and ran to Lucinda's house and
5 knocked at the door. Aunt Lorna, Lucinda's mother, opened the door. The appellant came after her, running without a shirt on, and Lorna asked what happened and she told her. Lorna smacked the appellant and then went to Mitchell's house with Uncle John. The appellant unlocked the door and Lorna woke
10 Lucinda and took her away. The complainant said she sustained a minor injury to her face and received medical treatment at Karl Bremmer Hospital on Saturday morning. She said she felt dirty after the rape incident.

15 Dr Ebrahim Manuel, a District Surgeon at Karl Bremmer Hospital, said he examined Abigail van den Bergh on 28 February 2004. During examination the complainant told him that she was raped by a man while she was standing against the wall. She also told him that she was hit with a stone on
20 the face. He did not see any injuries on the face of the complainant, but he made the following findings after examination; that complainant had one small fresh tear in the area called posterior fourchette, which was less than 24 hours old. She had multiple tears in the area called fausa naviculars
25 which were less than 24 hours old. He concluded that the

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vaginal injuries were consistent with a recent and forced sexual intercourse and that a significant amount of force was needed to cause that type of injury. He stated that a person can get those injuries regardless of the position she was in at the time of the sexual intercourse, and such injuries could occur in the context of consensual intercourse but that would be unusual.

Lorna Douglas, the mother of Lucinda, then said on the morning of 28 February 2004 Abigail knocked at her door and told her that appellant was chasing her. She knew the appellant as he used to stay just across the street from her house during that period. Although it was early in the morning street lights were providing some light so she saw the appellant clearly as he came running around the corner at a distance of seven metres wearing pants and having no clothes on his upper body. When the appellant saw her standing at the door he turned around. She said the complainant was in a terrible state and was crying when she talked to her. She gave her water with sugar and then went across the street to where the appellant stayed to look for her daughter, Lucinda. The appellant unlocked the door and she asked what he did to the complainant. The appellant denied doing anything wrong and said it was Mitchell who did something to the complainant. She slapped the appellant for lying to her because the man he

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was accusing was fast asleep. She woke Lucinda up and they went home. On their arrival home the complainant told her that the appellant raped her and she phoned the police.

5 Lucinda Alexander then testified that she and the complainant were invited by Mitchell and the appellant for a drink at their house. They went to their house and the appellant poured liquor for them and they drank. The complainant drank a little and threw the rest of the drink away. She passed out after
10 finishing her drink and was woken up by her mother.

Appellant then testified that on the day of the alleged rape he was with Bernie and they met the complainant and her friend at a tavern. He proposed to the complainant and she said that
15 they should talk about that the following day. He talked to the complainant again when they were drinking beers at a park. Later on they all went home. They wanted to drink Jack Daniels whiskey but there was no Coke to mix it with so he decided not to drink it. He took out a mattress and
20 complainant slept next to him. Lucinda and Bernie slept next to each other. After ten to fifteen minutes the complainant said she wanted to go and urinate outside. He opened the door for her and she went outside. While she was outside the complainant shouted the name of Lucinda and said they should
25 go. He went out and asked why she was shouting the name of

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Lucinda, and the complainant just ran away. He went back to the house. He denied threatening the complainant with an empty bottle and raping her. He said Lorna was lying when she said she saw him without a shirt on. After the complainant
5 had run away Lucinda's mother and father came and called Lucinda and left with her. He said Lucinda and her mother, Lorna, stayed across the road from where he stayed, and that he never had any problems with them.

10 This Court is mindful of the fact that the trial court's findings of fact and credibility are presumed to be correct, because trial court has had the advantage of seeing and hearing the witnesses and is in a better position to determine where the truth lies. This was said in S v Dhlumayo and Another 1948(2)
15 SA pg 677 (A), at 705. In S v Hadebe 1997(2) SACR pg 641 SCA at 645, para e-f the following was stated:

20 "In the absence of demonstrable and material misdirection by the trial court its findings are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong."

In his judgment the magistrate cautioned himself about the fact that the complainant was a single witness on the rape
25 itself. He further stated the following at pgs 129-130 of the

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record:

5 "The complainant in this case made a good impression on
the Court. The Court is convinced that despite the
shortcomings and contradictions that were between her
evidence and that of the other witnesses the Court never
got the impression that the complainant was not telling
the truth. These few contradictions are more of an
indication that there was no conspiracy between the
witnesses and the complainant impressed the Court as
10 an honest and credible witness."

On a careful perusal of the record I am of the view that the
magistrate's evaluation of the complainant's testimony is
15 correct, complainant may not have seen or removed her
clothes but her evidence is not based on speculation, because
the record reveals that when she woke up and realised that
she was partly undressed the only person who was awake and
not far away from her was the appellant. The appellant himself
20 confirmed this.

The complainant's evidence of rape is corroborated by Dr
Manuel who examined her less than a day after the alleged
rape on the complainant. According to Dr Manuel the fresh
25 tears he saw on the complainant's vagina were consistent with
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the forced sexual intercourse. The report the complainant made to Lorna Douglas shortly after the alleged rape and while she was still in an emotional state indicates consistency in her evidence. I am also in full agreement with the magistrate that

5 the emotional state the complainant was in according to Ms Lorna Douglas justifies the differences in her version and that of Ms Douglas regarding the sequence on how the events of that day unfolded. If the appellant had known Ms Douglas, the complainant and Lucinda for long and there was no bad blood

10 between them the magistrate was quite correct in finding that the version of the appellant could not have been reasonably possibly true.

It is clear from the record that the evidence against the

15 appellant was damning and it is my view that his conviction on the rape charge must be confirmed. The applicable minimum sentence on a charge of rape is ten years imprisonment unless there are compelling and substantial circumstances justifying the imposition of a lesser sentence. After considering the

20 personal circumstances of the accused, the seriousness of the offence, as well as the interest of the society without overemphasizing any, the magistrate found that a sentence of ten years was proper in the circumstances. There exist no bases upon which this Court can interfere with that sentence;

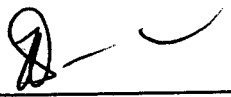
25 therefore the following order is proposed:

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The APPEAL AGAINST CONVICTION IS DISMISSED.

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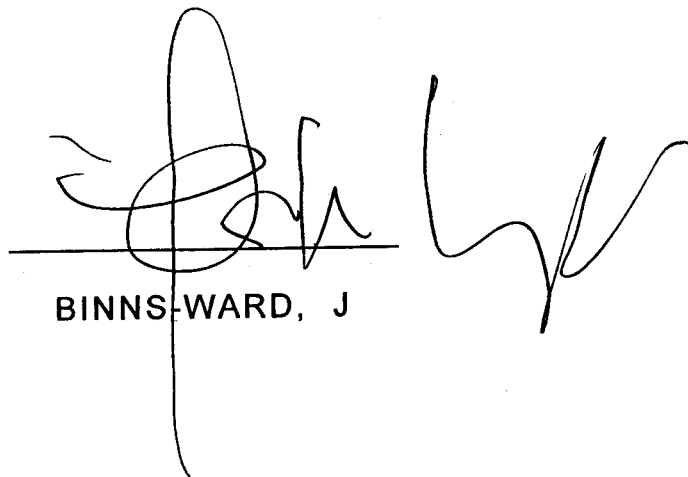
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SABA, AJ

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I agree that there is no merit in the appeal against the appellant's conviction and an ORDER IS MADE DISMISSING THE APPEAL.

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BINNS-WARD, J