IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A371/12

DATE: 12 October 2012

In the matter between:

THULANG MOTOBOLI Appellant

and

THE STATE Respondent

JUDGMENT

BOZALEK, J

The appellant was convicted in the Regional Court, Wynberg, on a charge of contravening Section 3 of the Criminal Law Amendment Act, 32 of 2007 and sentenced on 26 January 2012 to eight years imprisonment. With the leave of the magistrate he now appeals against conviction and sentence.

The appellant pleaded not guilty to the charge and was legally represented throughout his trial. He offered no plea explanation but as the trial proceeded it appeared that he admitted to sexually penetrating the complainant, his defence being that this was by consent. The State's case comprised the evidence of the complainant, a 21 year old woman, her older sister, Ms

Nomfuzi Ntunzi, and an affidavit and J88 form admitted by agreement which was completed by the forensic nurse who examined the complainant shortly after the incident. The appellant gave evidence in his own defence and he called two witnesses.

In brief the complainant's evidence was that she had known the appellant and been friendly with him for several years. On the night in question she popped into the informal dwelling which he occupied in the grounds of his sister's house in order to borrow a few rand from him since she was short of the amount required to purchase airtime. The appellant had locked the door of his dwelling, told her that she had been toying with his feelings for a long time and then commenced advances upon her. When she rejected them he slapped her a few times in the face, threw her onto his bed and forcibly penetrated her. When intercourse was complete he allowed her to leave the dwelling but had accompanied her towards her home, repeatedly asking her for forgiveness.

The complainant testified that she had not previously had intercourse and when she arrived home her dress was bloodied and blood was running down her legs. She immediately told her sister that she had been raped by the appellant and her sister and her husband had gone to the appellant's home to confront

him. He was not to be found however and they returned and took the complainant to the police station where criminal charges were laid and a medical examination was arranged. It was common cause that the forensic nurse found fresh tears and bruising of the patient's hymen, as well as tenderness, swelling and redness of the complainant's clitoris, frenulum, urethral orifice and para-urethral folds.

The appellant testified that there had been a romantic relationship between him and the complainant for some time, that in the absence of his partner that weekend the complainant had visited him and they had for the first time engaged in consensual sex. He denied locking the complainant in his room or assaulting her in any manner. He confirmed that she had sought to borrow a small amount of money from him but denied noting any signs of the complainant bleeding.

The appellant's first witness was his sister who testified that the complainant would come on an occasion to their house to look for the appellant, and that she suspected that they were more than friends. His second witness, a Mr Themba Nglovu, testified that he also lived on the property adjacent to the appellant, and he too believed that there was more than a simple friendly relationship between the complainant and the appellant.

The magistrate accepted the complainant's evidence, stating that she had left a very favourable impression upon him. He noted that she was a single witness in regard to the sexual penetration and that her evidence that the intercourse was not consensual was strengthened by the medical report and the evidence of her sister to the effect that the complainant had immediately complained of being raped.

The magistrate analysed the probabilities and noted that it was most improbable that the complainant, if she had indeed been in a romantic relationship with the appellant, would have rushed home and complained of being raped. He noted too that despite the complainant's denial that there was a key and that the door to his dwelling could be locked from the inside, his sister had confirmed that the door could be locked with a chain, padlock and key which the appellant kept.

On appeal it was contended on behalf of the appellant that the magistrate erred in accepting the complainant's evidence in as much as she had untruthfully minimised the relationship between her and the appellant and, furthermore, that her evidence that the door could be locked from the inside was unsubstantiated and at odds of that of the appellant and his sister. It was also contended that the medical evidence was

also consistent with the appellant's version of events, that the complainant had over-dramatised her account of what took place and that the magistrate erred in finding that the lack of any motive on the part of the appellant indicated that the complainant had indeed been raped. In this latter regard reliance was placed on the dictum in S v Ipeleng 1993(2) SACR 184(T) at 189 b-I, to the effect that it is dangerous to convict an accused person on the basis that he cannot advance any reasons why the State witnesses would falsely implicate him.

Before dealing with these criticisms it should be remembered that, as was stated in S v Sauls and Others 1981(3) SALR 172(a):

> "There is no rule of thumb, test or formula to apply when it comes to a consideration of the credibility of a single witness. Ultimately the Court must be satisfied of the witnesses credibility and that the truth has been told after the merits and demerits of the witnesses evidence have been weighed."

A further well known dictum in this regard is that the cautionary rule applicable to witnesses does not mean that "the appeal must succeed if any criticism, however slender, of the witnesses evidence were well founded" and the exercise of caution must

not be allowed to displace the exercise of common sense.

Furthermore a trial court's findings of fact will be presumed to be correct "in the absence of demonstrable and material misdirection" and will "only be disregarded if the recorded evidence shows them to be clearly wrong". S v Radebe & Others 1997(2) SACR 641 SCA at 645 e to f. So too, a Court of appeal will generally be hesitant to interfere with the credibility findings of a trial court, although less so when these are based upon inferences and other factors than upon probabilities. See Minister of Safety & Security v Craig and Others NNO 2011(1) SACR 469 SCA at para 58.

The question of the extent of the prior relationship between the complainant and the appellant really boils down to the word of the appellant against that of the complainant. The evidence of the appellant's witnesses as to the existence of a romantic relationship was very slender and based upon little more than their suspicions. In any event this aspect has, in my view, limited relevance, since it was common cause that this was the first occasion of sexual intercourse between the parties and the real issue was whether it was consensual and not whether it was accompanied by a romantic relationship or not. Furthermore, if indeed there had been a romantic relationship between the parties this would render it all the more unlikely

that the complainant would falsely accuse the appellant of raping her. As regards the issue of the door being locked, the complainant's testimony was simply that the appellant locked the door, and put the key in his pocket. She was not asked to describe the nature of the locking mechanism, nor did she do so in cross-examination or otherwise. It was put to her that there was no key and no lock to the door simply a sliding nail which kept the door closed, to which the complainant responded that that there was a key and that the door could be locked.

Her evidence was borne out in due course by that of the complainant's sister to the effect that the door could be locked with a chain and padlock which had a key which the appellant kept. Although there was evidence that the door would be locked with a chain and padlock only at times, there was no evidence to the effect that this could not be done from the inside which, of course, would be entirely consistent with the complainant's evidence that the appellant in fact did so before he made advances to her.

In regard to the injuries which the complainant suffered to her genitalia, whilst these are not inconsistent with consensual intercourse, the appellant's account of the difficulty which he had in penetrating the complainant would, if anything, point rather to non-consensual intercourse. Furthermore,

notwithstanding counsel's submissions I do not consider the complainant's evidence that the appellant acted like an animal or her general description of his behaviour prior to sexual penetration was melodramatic or clearly exaggerated, particularly when account is taken of the fact that it was being translated form Xhosa to Afrikaans.

Counsel devoted much of his heads of argument to criticising the magistrate's reliance, in rejecting the appellant's version, on the lack of any motive on the part of the complainant to falsely implicate the appellant. However, on a fair reading of the judgment there is no suggestion that the magistrate accepted the complainant's evidence or rejected the appellant's version simply or primarily because of an apparent lack of motive for a false allegation of rape. What he did was to consider all the evidence and the inherent probabilities and to find in effect that these strongly favour the evidence given by the complainant.

These factors included, but were not limited to, the fact that there had been no problems between her and the appellant before, the lack of credible reasons as to why she would falsely allege rape if the intercourse were consensual and the failure to wash and clean herself of blood before going home although these facilities were available to her in the appellant's dwelling,

why, if the romantic relationship were a secret one she would draw attention thereto by false allegations of rape and, finally, the appellant's clear feelings for and desire to have sexual intercourse with the complainant. I can find no fault with the magistrate's reasoning in this regard. In my view, having regard to the evidence as a whole, the magistrate neither erred nor misdirected himself in any way in rejecting the appellant's version as false beyond reason doubt.

As regards the appeal against sentence it is trite that an appeal court will not interfere with a discretion exercised by the trial court unless it appears that such discretion was not properly or reasonably exercised. S v Peters 1987(3) SALR 717 at page 727. The appellant qualified for a minimum sentence of ten years imprisonment. The magistrate found substantial and compelling circumstances justifying a lesser sentence in the appellant's favourable personal circumstances and the fact that he had spent close to two years in custody awaiting trial. He noted however that a 20 year old virgin had been raped by someone whom she had known and trusted and who had shown no remorse for his actions.

Due consideration was thus given to the appellant's personal circumstances and I can detect no misdirection on the part of the magistrate in over-emphasizing the interests of the

community or under-emphasizing the appellant's personal circumstances, these being the grounds of appeal against sentence. In the circumstances there are no grounds to interfere with the sentence in my view and for these reasons I consider that the APPEAL AGAINST CONVICTION AND SENTENCE SHOULD BE DISMISSED.

It is so ordered then, the APPEAL AGAINST CONVICTION AND SENTENCE IS DISMISSED.

BOZALEK, J

I agree,

MANSINGH, AJ