

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NO: A28/2021

- (1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES:  
YES/NO  
(3) REVISED.

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DATE

In the matter between:

**FOKOBE THABO BAFEDILE**

Appellant

And

**THE STATE**

Respondent

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**JUDGMENT**

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**MAKUME, J:**

[1] The Appellant stood trial in the Regional Court sitting at Randfontein on a charge of Rape read with the provisions of Section 51(2) (b) of the Criminal Procedure Act 105 of 1997.

[2] The allegations against him being that on or about the 3<sup>rd</sup> February 2019 at or near Brandvlei within the Regional Division of Randfontein the Appellant

forced himself onto the Complainant Johana Phiti a 37year old woman and had sexual intercourse with her without her consent.

- [3] The Appellant was legally represented throughout the hearing and pleaded not guilty to the charge. In his plea explanation in terms of Section 115 of the Criminal Procedure Act he indicated that the sexual intercourse took place with the consent of the Complainant. The admissions to the act of sexual intercourse were noted as admissions in terms of Section 220 of the Criminal Procedure Act.
- [4] At the conclusion of the hearing the Appellant was convicted as charged and sentenced to an effective term of six years' imprisonment on the 15<sup>th</sup> September 2020. He was subsequently granted leave to appeal against conviction on the 5<sup>th</sup> October 2020 and released on bail pending the outcome of this Appeal.
- [5] The issue in this appeal as it was at the trial is whether or not the Complainant agreed or consented to have sexual intercourse with the Appellant or not.
- [6] The Medico-legal report compiled by Dr Kasif was submitted by agreement into the record including the Doctor's Section 212 Statement.
- [7] Dr Kasif consulted the Complainant at 15h00 on the 3<sup>rd</sup> February 2019 at Leratong Hospital. He noted as follows:

“Condition of clothing – same intact and as stated an adult female in English that today 03 February 2019 at +/- 5am in the early hours of the morning in Randfontein area she was at the tavern...of by an unknown male then taken to a shack where he sexually abused her without her consent and condom.”

There was no physical harm noted. Her mental health and emotional status was reported as “upset”

Gynaecologically all her pubic or female private parts were noted as intact there was no swelling or fresh tearing noted.”

- [8] The Complainant told the Court that she was at Davids Tavern in Brandvlei. She and a friend arrived there at about 7pm on the 2 February 2019. At about 5am on the 3 February 2019 the accused approached her and told her that he knows where “Magauta” lives and offered to show her the place.
- [9] It would appear that whilst they were all sitting and drinking she handed her cell phone to Magauta for safe keeping. Magauta then left with her phone. It turns out that Magauta is the girlfriend to the Complainant’s younger brother or cousin.
- [10] Her evidence is that she walked with the Appellant to a place where there was a main house and two shacks or zozo as she explained.
- [11] The Appellant opened the door of one of the shacks and forced her in. She does not explain how she was forced into the shack. It must be recalled that this was at about just after 5am and by that time being summer it was already light.
- [12] The Appellant tried to undress her and then threw her onto the bed and had sexual intercourse with her. The door was locked at that time and after the Appellant had finished she stood up dressed herself and left. This is after the Appellant had opened the door for her.
- [13] She said that she requested help from his next door neighbour who refused to help. She is then taken to the committee by another lady they also refused to help her.
- [14] She then meets with one John and asks for his phone. When John asked what she wants the phone for she does not tell him she just says “borrow me your phone because I have problems”

- [15] The whole ordeal according to her lasted for 30 minutes. When she went to look for the accused with the police the accused ran away but the police did not chase him. Appellant was later arrested at a tavern around April 2019.
- [16] Under cross-examination she told this Court that she and Tshepang who is her younger brother's girlfriend left Wolwekrans to Brandvlei to have drinks on the 2 February 2019. They first bought liquor at a bottle store and later went to David's tavern.
- [17] She was sitting all by herself in the tavern until about 5am on 3 February 2019 when the Appellant approached her and offered to show her Magauta's place.
- [18] When she is asked who between Tshepang and Magauta left the tavern first she suddenly asks for water and for an adjournment.
- [19] Thereafter she tells the court that she is not in the correct state of mind to proceed. The case was postponed after she simply said "I need time" The case was then postponed on the 1 October 2019 to 8 October 2019 for further cross-examination.
- [20] When proceedings resumed on the 8 October 2019 the Prosecutor informed the Court that the Complainant told her that she is not comfortable with the family of the accused being present in Court. The Court was cleared.
- [21] A question was put to her as to what the problem was with her on the last occasion only then did she tell the Court that "when I look at Thabo and then remember what he did to me I do not feel good in my heart. I fell scared but today I feel strong I will be sharp."
- [22] Tshepang left first then Magauta left. Magauta is a girlfriend to her cousin. She was not meeting her for the first time. She used to live with her at Wolwekrans until Magauta moved to RDP houses in Brandvlei.

- [23] She could not explain why Tshepang and Magauta left her at the tavern. She has not seen or met Tshepang since the incident.
- [24] She does not know where Tshepang lives. At paragraph 20 she says “to tell the truth I do not know how did this guy knew that I am looking for a phone and I do not know where he got the information that I am looking for Magauta.”
- [25] The further cross-examination brought about more confusion as to exactly whose phone was taken hers or Magauta’s phone.
- [26] A question was put to her as follows “Because you and the accused did not know each other so the accused was in no position according to you to know that the fight over this phone was actually the fight over your phone? She answered yes it is true.
- [27] She then became very evasive and shifty when further questions and statements were put to her and kept on asking that questions put to her be repeated. This behaviour drew the attention of the Magistrate who asked her if she is not listening. The whole anomalous version about the Appellant having approached her about the phone when Appellant did not know her and was also not aware that Magauta had taken her phone was indeed the breaking point in her version that she did not know the Appellant. When the Magistrate asked her how did the Appellant come to know about the phone her answer was a simply “it also surprised me.”
- [28] When she was pressed further about the loss of her phone she suddenly broke down in tears and when she is asked if she is ok she responded that the questions are getting too long. She was once more given a short break to compose herself and was specifically advised to clear her mind and explain about how the Appellant could have had knowledge about her phone.
- [29] She confirmed that she had consumed a lot of alcohol but was not drunk. She shared drinks with her cousin Tshepang and Magauta. She stopped

drinking towards the early hours of the morning at around 4 or 5am. Her version as to who left the tavern first between Magauta and Tshepang became more and more confusing as she changed versions.

[30] The version of the Appellant was put to her namely that she the Complainant approached the Appellant and asked him to buy her a drink called "Strong bow" also that it was not the first time they did meet previously at David's tavern and on that day they ended up sleeping together and had sexual intercourse at the Appellant's place. She denied this and said "to tell the truth I do not know Thabo."

[31] She agreed when it was put to him that at the time that she and the Appellant as well as one Jesse were sitting together drinking, Magauta and Tshepang were not there. The Appellant bought not only cigarettes for her but food as well as more beer which they took away with. Along the way from David's place the accused bought her food being pap and steak because she said she was hungry all this she denies. She says she brought herself food with her own money.

[32] When they arrived at the Appellant's shack they passed his sister who was standing near the window of the main house and saw them enter the shack. After eating the food they went into bed and had sexual intercourse she denied this and said "Thabo threw me on top of the bed and he fought with me and he then forcefully slapped me."

[33] When it was put to her that during the sexual intercourse there was no struggling or resistance, her response was that she bite him as the Appellant was strangling and suffocating her.

[34] It was put to her that after having sex she dressed up and then told Appellant that she is going to report Magauta to the police for having stolen her phone and when she asked the Appellant to give her R100.00 for transport Appellant told her that he does not have money whereupon she stood up banged the door after telling him to expect the police van.

- [35] When questioned further as to whether she said she was strangled she changed and said that the Appellant was just suffocating her by placing his hand over her mouth and nose. She says Appellant did that so that she must open her legs.
- [36] She testified further that she sustained injuries which she did not show to the doctor and when asked why she did not do that she replied that she was frightened or shocked and surprised.
- [37] The matter was then postponed to a further date for purposes of a state witness and on the return date the docket was missing. It was after Counsel for the Appellant opposed a second postponement that the Appellant was only then released on a bail of R1 000.00. The case was postponed to the 19<sup>th</sup> November 2019 on which day the state's application for a further postponement for its witness was refused. The state closed its case and the Appellant testified in his defence.
- [38] The Appellant repeated the version that had been put to the Complainant and finally told the Court that the only reason that he thinks why the Complainant laid this charge against him was because he did not have the R100.00 to give to her. That version was repeated under cross-examination. He further told the Court that both he and the Complainant were drunk but he could appreciate what was happening. He told the Court that the Complainant undressed herself and went inside the blankets.
- [39] It is trite law that the burden is always on the state to prove the guilt of the accused beyond reasonable doubt (See: **S v Jackson 1999(1) SACR 470 SCA**). The accused bears no onus to prove his innocence and if there is a possibility that the version of the accused is reasonably possibly true then such an accused person is entitled to be acquitted (See: S Matjeke).
- [40] The SCA in **S v M 2013 (2) SACR 111 at page 119 – 120** said the following:

“Consent specifically the lack thereof is therefore an essential element of the crime and thus consent of the Complainant should it have been given would nullify or vitiate the unlawfulness of the conduct.”

[41] The state’s case rests on the version of a single witness which then calls upon this Court to apply the cautionary rule. There was no additional evidence which supported the version of the Complainant. The J88 medico-legal report only confirmed that sexual intercourse did take place it however, could not assist the Court to determine if indeed the Complainant was penetrated without her consent. The circumstantial evidence in respect of what took place before and after the act does not support the lack of consent.

[42] Heher AJA as he then was in the matter of **S v Chabalala 2003 (1) SACR 134 SCA** in addressing the conflict between the version of the Complainant and the accused said the following:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt to the accused guilt.”

[43] The Complainant’s version is littered with improbabilities. Firstly, it is about her cell phone. She confirmed that when the dispute about her cell phone was taking place outside the tavern the Appellant was not there which made it improbable that he could have then approached her in the early hours of the 3<sup>rd</sup> February 2019 to offer her assistance about the cell phone.

[44] Secondly she insisted throughout the hearing that she was seeing the Appellant for the first time on that morning and did not know him and yet she readily agrees to walk with him at that time of the night.



- [45] Thirdly, after the whole incident she leaves the home of the Appellant and despite her approaching people no one was prepared to assist her. Also she says when she came to the Appellant's place with the Police the Appellant ran away and the police gave no chase. When she consulted with the doctor on the afternoon of the 3<sup>rd</sup> February 2019 she did not show or tell the doctor about her injuries.
- [46] Lastly, the person who she is supposed to have reported the incident to refused to come and testify. All these taken together puts a damp on her version firstly that she was seeing the Appellant for the first time. It actually supports the Appellant's version that they knew each other. The possibility exists that the people who saw her with the Appellant or heard about the story dismissed it as rape because they knew that it was not the first time that Appellant and the Complainant had been together.
- [47] Her demeanour in answering questions under cross-examination leaves much to be desired. She on more than three or four occasions kept on referring to the Appellant by his first name and then on one occasion she told the court that she does not feel free to continue testifying in the presence of the family members of the Appellant. That also goes a long way to prove that indeed she and the Appellant have known each other even before the incident.
- [48] It is also worth mentioning that the Complainant gave a completely different version of events when she consulted with the Social worker who was completing a Victim report. In that Consultation the Complainant said that the person who took her cell phone was her cousin Tshepang. She never mentioned Magauta. She also for the first time told the Social Worker that the Appellant dragged her into the shack and that she was screaming and wrestling. The Social Worker told the Court that does not dispute the fact that the Complainant was inconsistent and that she struggled to get information from her. The Complainant told her that she is having ancestral spirits as a result she gets confused.

[49] It is well settled law that in deciding a case especially where the versions conflict that the evidence must be looked at holistically. In my view not only was the evidence of the Appellant clear and concise it has a high element of honesty and consistency and in my view suffices to sustain an acquittal.

[50] On the other hand the same cannot be said about the Complainant. She was evasive and shied away from answering questions directly. She on two occasions when pressed for answers requested an adjournment. Her attempts when pressed to explain glaring improbabilities in her evidence were sometimes almost ludicrous and invariably unconvincing. In short her evidence crawls with contradictions and inconsistency and should never have been accepted to sustain a conviction.

[51] In the result this appeal is upheld and the decision of the Trial Court is hereby set aside and substituted with the following:

ORDER

1 The Accused is found not guilty and discharged.

Dated at Johannesburg on this day of August 2023

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**M A MAKUME  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, JOHANNESBURG**

I agree:

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**D. DOSIO  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, JOHANNESBURG**

