

Reportable

**IN THE KWAZULU-NATAL HIGH COURT,
PIETERMARITZBURG REPUBLIC OF SOUTH AFRICA**

AR431/09

Nthuthuko Msomi

Appellant

versus

The State

Respondent

Judgment

Delivered on 6 April 2010

STEYN J

[1] The Appellant was convicted on 21/01/08 of one count of rape in the regional Division of KwaZulu-Natal, held at Pietermaritzburg court. Upon his conviction he was sentenced to 12 years' imprisonment. He now appeals against his conviction and sentence.

[2] The appeal is broadly based on whether the court *a quo* erred when it found that the appellant participated in the rape

as an accomplice and whether his liability was proved beyond reasonable doubt. With regard to the sentence imposed it has been submitted that the court misdirected itself by underemphasising the personal circumstances of the Appellant, especially the fact that the Appellant was a first offender. Respondent opposed the grounds raised by the Appellant and asked that the appeal be dismissed and that both conviction and sentence be confirmed.

[3] **Background facts are as follows:**

The Appellant was charged with Wiseman Mkhize, who absconded after closure of the State's case. The trial of the Appellant proceeded in the absence of Mkhize after an order by the court to separate the trial.

The salient facts relied upon by the State in the court *a quo* can be summarised as follows: The complainant, a young girl of 15 years' of age, was called by the Appellant and Mkhize to their taxi. When she refused to respond, the Appellant approached her and dragged her into the taxi. Both men took

her to a secluded place at Spitzkop, where Mkhize tried to rape her but she resisted and managed to escape.

The Appellant then chased her, apprehended her and took her back to Mkhize. At this stage the complainant pleaded with the Appellant not to take her to Mkhize. Once back in his 'possession' Mkhize persisted in his attempt to rape the complainant and then, after a struggle, succeeded in raping her next to the taxi. The evidence shows that he had throttled and hit her to bring her under his control. Once the complainant was delivered to Mkhize, the Appellant went to sit in the taxi. The Appellant and Mkhize hereafter left the complainant at the spot where she was raped.

She was later assisted by Mrs Pillay, who, with her husband, picked her up from the side of the road.

- [3] The doctor who examined the complainant testified and confirmed the injuries inflicted on her and her emotional state; in addition it was stated that her clothes were covered

with grass and mud. There were soft tissue injuries to the face, the cheek and her neck. In addition the gynaecological examination showed that there were bumps and bruising of the hymen and a superficial tear of the anus. The medical evidence conclusively shows that the complainant was raped and sodomised.

- [4] The Appellant testified on behalf of the defence. His version was that the complainant and Mkhize were having an affair at the time of the incident. His version was that he and Mkhize had left the complainant in the company of two girl friends. The identity of the girls was revealed and they were then summoned to come to court. Despite their presence the Appellant still elected not to call them to testify and confirm his version of the events.

- [5] It is evident from the judgment of the learned regional Magistrate that he was cautious in the consideration of the testimony of the complainant and was alive to the fact that he should look for corroborative factors in support of the

complainant's testimony. After a careful analysis the evidence of the complainant was found to be reliable and truthful. On the evidence as a whole, I can find no misdirection, either on fact or on law in evaluation of the evidence by the learned Magistrate. In my view the court correctly rejected the Appellant's evidence as being not reasonably possibly true.

- [6] The issue that therefore remains is whether the Appellant's conduct sufficiently proved that he is criminally liable as an accomplice to the act of rape committed by Mkhize given the facts of this case. It is therefore important to consider the legal position as well as the factual matrix.

In *R v Jackelson*¹ the court defined the classical test for the conviction of an accomplice as follows:

All persons who knowingly aid and assist in the commission of a crime are punishable just as if they had committed it.

¹ 1920 AD at 486.

In *S v Kimberley and Another* 2005 (2) SACR 663 (SCA)

Zulman JA has put it in context:

An 'accomplice' (medepligtige) is one who takes part in the commission of the crime other than as a perpetrator (dader) and other than as an accessory after the fact (begunstige) (Burchell - South African Criminal Law and Procedure - Vol 1 p 322). The matter is put succinctly by Joubert JA in S v Williams 1980 (1) SA 60 (A) at 63 A-B in these terms:

"n Medepligtige se aanspreeklikheid is aksessories van aard sodat daar geen sprake van 'n medepligtige kan wees sonder 'n dader of mededaders wat die misdaad pleeg nie. 'n Dader voldoen aan al die vereistes van die betrokke misdaadskrywing. Waar mededaders saam die misdaad pleeg, voldoen elke mededader aan al die vereistes van die betrokke misdaadskrywing. Daarenteen is 'n medepligtige nie 'n dader of mededader nie aangesien die dader se actus reus by hom ontbreek. 'n Medepligtige vereenselwig hom bewustelik met die pleging van die misdaad deur die dader of mededaders deurdat hy bewustelik behulpsaam is by die pleging van die misdaad of deurdat hy bewustelik die dader of mededaders die geleentheid, die middele of die inligting verskaf wat die pleging van die misdaad bevorder.²

The scholar, Snyman,³ defines an accomplice as:

1. *A person is guilty of an offence as an accomplice if, although he does not satisfy all the requirements for liability contained in the definition of the offence and although the conduct required for a conviction is not imputed to him by virtue of the principles relating to common purpose, he unlawfully and intentionally engages in conduct whereby he furthers the commission of an offence by somebody else.*

² Also see *S v Paulus* [2008] ZANHC 38 (29 August 2008).

³ *Criminal Law* 4th edition (2008) p. 269.

2. *The word 'furthers' in rule 1 above includes any conduct whereby a person facilitates, assists or encourages the commission of an offence, gives advice concerning its commission, orders its commission or makes it possible for another to commit it.*

In *S v Gaseb and Others*⁴ O'Linn AJA considered the conduct of an accomplice in the case of a rape matter:

*It seems logical and in accordance with common sense and fairness, that once the evidence proves these elements of the crime in regard to a perpetrator and the accomplice or accomplices if any, then the crime of rape has been proved in regard to that perpetrator and the accomplice or accomplices if any. Any repetition thereafter, fulfilling the same requirements, constitutes further crimes of rape*⁵.

[7] Having considered the aforementioned academic views and the dicta, I shall now apply the applicable principles to the facts of this case and judge the learned Magistrate's judgment accordingly. The evidence before the court *a quo* reveals that the Appellant was fully aware of the intentions of Mkhize, and by fetching the complainant, dragging her to the taxi against her will and thereafter, when she attempted to escape the ordeal, to apprehend her and to bring her back to

⁴ 2001 (1) SACR 438 (NmS). Also referred to in *S v Saffier* 2003 (2) SACR (SE).

⁵ The case of *Gaseb* has been applied in the unreported full bench decision of this division *Mvelase v S*, case number CC23/2000, Pietermaritzburg, delivered 14 May 2001.

the perpetrator, shows that that the Appellant facilitated, furthered and encouraged the rape being committed by Mkhize. The Appellant was well aware of the intention of Mkhize to have sexual intercourse with the complainant against her will. Based on the aforementioned conduct the Appellant associated himself with the act of Mkhize to rape the complainant.

- [8] In my view the learned Magistrate was alive to the criminal principles and carefully applied them to the facts of this case. I am not persuaded that the learned Magistrate misdirected himself either on law or on fact. In my view there is no merit in the challenge on the conviction.

Ad Sentence

- [9] It is clear that the court had due regard to the personal circumstances of the Appellant when it considered a sentence less than that prescribed by the legislature. The sentence is not disproportionate to the offence committed.

[10] Accordingly I propose that the appeal against conviction and sentence be dismissed.

Steyn, J

Gorven, J: I agree and it is so ordered.

Date of Hearing: 21 January 2008

Date of Judgment: 6 April 2010

Counsel for the appellant: Mr M Tenza

Instructed by: Pietermaritzburg Justice Centre

Counsel for the respondent: Adv T Ramkilawon

Instructed by: Director of Public Prosecutions, Durban

