THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 45/13
Not Reportable

In the matter between:

TSHIFHIWA TSHISILINGO NEMAVHOLA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Nemavhola v State (*45/13) [2013] ZASCA 81(30 May 2013)

Coram: CACHALIA, PETSE JJA and ERASMUS AJA

Heard: 23 May 2013

Delivered Order: 23 May 2013

Reasons Delivered: 30 May 2013

Summary: Rape – conviction – sufficiency of proof – evidence of penetration not established – alibi in defence reasonably possibly true.

ORDER

On appeal from: Limpopo High Court (Thohoyandou) (Hetisani J sitting as court of first instance):

1. The appeal against both the conviction and sentence is upheld.
2. The conviction and sentence are set aside.
3. The appellant is to be released from custody forthwith, unless he is held on a legal warrant other than the warrant of detention in this matter.
4. Reasons for the order are to follow.

REASONS

ERASMUS AJA (CACHALIA and PETSE JJA concurring):

[1] The appellant was charged and convicted of rape in the Venda High Court on 10 March 2006. He was sentenced to life imprisonment. On appeal to this court and having considered the record of proceedings in the court below and hearing argument on the merits of the appeal, this court issued an order in the following terms:

1. The appeal against both the conviction and sentence is upheld.
2. The conviction and sentence are set aside.
3. The appellant is to be released from custody forthwith, unless he is held on a

legal warrant other than the warrant of detention in this matter.

4. Reasons for the order are to follow.

These are the reasons:

[2] It was alleged that the appellant raped the complainant, a thirteen year old girl, on 24 June 2004 at Vondwe in the vicinity of Thohoyandou. The appellant pleaded not guilty to the charge and denied the offence, he did not disclose the basis of his defence at the plea stage. It later seemed evident that he also raised an alibi. It was therefore incumbent upon the State to prove all the elements of the offence, including the identity of the perpetrator, beyond a reasonable doubt.

[3] The respondent conceded in argument that the conviction of the court a quo falls to be set aside. I shall consequently confine myself to the two issues which fatally undermine the finding of the court below. The first is whether the State succeeded in proving that the complainant was penetrated,[1] in a legal sense by the perpetrator and secondly, whether in any event it could be found that the alibi raised by the appellant was reasonably possibly true and therefore caused a reasonable doubt as to the identity of the perpetrator.[2]

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1 See *S v MM* 2012 (2) SACR 18 (SCA).

2 *S v Jochems* 1991 (1) SACR 208 (A); *S v Malefo and another* 1998 (1) SACR 127 (W) 1998 (1) SACR 127 (W).

[4] The complainant testified that after sunset on 24 June 2004 she was accompanied by two friends, en route from a shopping centre. They were approached by two male persons, one of whom she identified as a person by the name of Tshisilingo Tshiphoto. This person was pointed out by her in court as the appellant. Immediately upon encountering them, the appellant assaulted her and dragged her into a bush. At that stage her friends ran away. In the bush the appellant undressed her and called his friend, Ramatu, who held her legs whilst the appellant 'was having sexual intercourse' with her. Later the appellant stopped what he was doing when she screamed. They then left for a place next to a shop, where Ramatu assaulted her with an open hand and cut her hands with a knife. In the meantime, the complainant must have run away. The complainant mentioned an incident where a friend of hers by the name of Sheila was assaulted by Ramatu before the appellant took her into the bush. This is in total contradiction with the evidence of other witnesses.

[5] In cross-examination of the complainant it was put to her by the appellant that she was falsely implicating him because he had been the cause of the dissolution of a previous relationship of hers, which she denied.

[6] One of the friends of the complainant, Daisy Gwedugwedu, testified that she accompanied the complainant on the night of the incident. Although she never spoke to the appellant she knew him from sight. According to her the incident happened after sunset at six o'clock on 23 June 2004. When asked how she knew that it was six o' clock her answer was as follows:

'we have had been told that my lord.

By whom? By the police.'

According to her, when the appellant approached them he said that he 'wanted' the complainant and slapped her with an open hand. She asked him where he was taking her, whereupon the appellant dragged her into the bushes. She remained behind. After a while they left and called the police. It became clear from the cross-examination that this incident happened outside a busy business centre where the public was moving around and is adjacent to a police station. The friends of the complainant did not alert the general public of the fact that the appellant took the complainant into the bushes as Daisy wanted to see what Ramatu was up to. This explanation seems strange.

[7] The investigating officer testified that he searched for the appellant, under the

name Tshiphoto, for about a year and could not find him. Ultimately, the appellant was traced, apparently after his father informed the police that he was in custody in a different town. The appellant was identified by the complainant at a prison as the person who had raped her.[3] The manner in which the court dealt with the identification of the appellant was inadequate.

[8] The court record reflects that the presiding judge, in an attempt to clarify the issue of the appellant's names, ventured into a line of questioning with the investigating officer about the criminal record centre and therefore the history of the appellant.

[9] The report of the doctor who examined the complainant shortly after the incident, reveals that the complainant reported having consensual intercourse three days prior to the alleged rape. He concluded that there was evidence of penetration and there were no injuries and he does not exclude penetration. No further evidence is given as to the time when, if any, penetration may have taken place other than the consensual intercourse three days prior.

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3 Such witness identifications are to be approached with great caution. See *S v Mthetwa* 1972 (3) SA 766 (A), which case deals with jail-cell identifications and wherein the court enunciates the rule that, inter alia, the court must have regard to whether or not the circumstances of the identification were such as to suggest the identity of the accused to the witness. See also PJ Schwikkard and SE Van der Merwe, *Principles of Evidence* 3rd Edition (2010) 548; *Law of South Africa*, Annual Cumulative Supplement 2011, Volume 9, para 837; Sukwana v S [2007] JOL 19396 (C).

[10] The appellant elected to testify and called witnesses to confirm his alibi and the complainant's motive to falsely implicating him in the rape. The appellant's evidence was simply, that he had left for Seshego in Polokwane during May 2004, where he worked at a construction company. He was not in the area on 23 June 2004 when the incident is alleged to have occurred and it was therefore impossible for him to have committed the offence. The evidence also revealed that the distance between the two places is approximately 170 kilometres. The appellant was extensively cross-examined by the prosecutor as to his whereabouts and his evidence remained unshaken.

[11] Regarding his assertion that the complainant had a motive to falsely implicate him, he called a witness by the name of Vhutshilo Demana. I find the trial judges' response to the evidence of Mr Demana disturbing, the following passage from the record is illuminating:

'Mr Demana, I put it to you that you are just here to protect your cousin and friend. --- I was trying to speak the truth my lord.

Ja, but your truth does not involve the period in which the incident took place. --- No.

Do you know when this alleged incident took place? --- I only heard that Lufuno had been

raped and how it happened I do not know.

Accused told the court that the complainant, Lufuno, your ex-lover, according to you, have laid a false charge of rape against him. In other words, according to, since you also say you know that she had been raped, he says she was raped by someone else, but because she hated him, because she alleged that he caused the fall out between you and herself, she then laid a charge against him, having been raped by someone else, either from Zimbabwe or Mozambique, she did not worry about that person. She only laid the charge against him because she hated him because she thought he interfered in your love affair. Did you know that? --- I know nothing about that my lord.

Are you sure you do not know? --- Yes, my lord.

Thank you, you are excused Mr Demana. You may go and sit in the gallery or you may go home.'

It is instructive to note that the trial judge was putting statements to the witness that were not borne out by evidence before the court.

[12] The appellant insisted that he wanted to call his employer where he allegedly worked at the time of the incident. He was taken by the investigating officer to look for his employer, but the employer could not be found.

[13] The trial court had accepted the evidence of the complainant that she was

raped by the appellant on the said day, solely on the basis that the complainant testified to that effect and rejected the appellant's version as not reasonably possibly true thus concluding that the appellant must be guilty. This approach is unacceptable.[4]

[14] In order for a conviction of rape to be sustained, the state has to prove beyond a reasonable doubt that all the elements of the offence are present and that the act was committed by the person so charged. An important element of the offence that the state must prove is that penetration took place as is required in law. In the instant matter the court a quo found reliance on the medical evidence to confirm that penetration took place. In his judgment the learned judge remarked inter alia as follows:

'Then the court called Dr M P Thilivhali of Donald Fraser.'

…

'There is also the evidence of Dr … (indistinct) … who then gave, who read the report, the J88 and gave evidence and was cross-examined.

He came to the conclusion, according to him, that she has been assaulted by the accused. There is evidence of penetration as shown by an open hymen. Although there is no injury,

4 See *State v Sauls* 1981 (3) SA 172 (A) at 180.

this does not exclude penetration.'

[15] There are two problems with the way the judge dealt with the medical evidence. The doctor did not testify by reading the report or giving evidence or being cross-examined. The report was handed in by consent at the outset of the trial without any oral evidence having been led. There is further no indication in the report to support the conclusion as given by the judge. There is no indication of the identity of the perpetrator as the judge states in his summary.

[16] The only evidence by the complainant was that the appellant had 'sexual intercourse'. There is no evidence on record of what the complainant's understanding of the term was, nor, was she asked to explain this.[5] It is trite that this is not enough. The court further found that 'Later the accused cut her with a knife', but on the State's own evidence that was not correct.

[17] In dismissing the appellant's evidence that he must have been at his work place on the date in question, the court a quo found that by reason of the fact that the day in question was a Saturday, the appellant would not have worked and would have travelled home for the weekend.

[18] There was no evidence that 23 June 2004 was on a Saturday. The judge a

5 See *S v MM,* supra, note 1.

quo raised this for the first time in argument with counsel. The record reflects:

‘HETISANI (J): Now the fact that he said he was at Seshego, did you check that 24 June 2004 was a Saturday?

MR MANWADU: I did not check.

HETISANI (J): The date of the incident is 23 June 2004. So normally what you do, you check, this year June, what date will … (indistinct) …

MR MANWADU: Sorry, my lord, you said a Saturday?

HETISANI (J): The one on which this incident took place, 23 June 2004, was it not a Saturday? You only work backwards, you look at this year 2006, and then you go back to 2005, you get 2004 will be a Saturday. It was on a Saturday.

MR MANWADU: Unfortunately … (intervene)

. . . .

MR MANWADU: I am a little bit lost my lord.

HETISANI (J): No, I am talking about the alibi, which he raised, that, among other things, “I, the accused, I was at Seshego, I was working an now the incident, if you look at the incident, it is alleged to have occurred on 23 June 2004. Now, I am just drawing your attention, are you aware that this thing happened on a Saturday?

MR MANWADU: I was not aware of the fact that it happened on a Saturday.

HETISANI (J): Then I am making you aware. What is your comment there?

MR MANWADU: My lord, unfortunately I do not know whether at that construction they used to work from Monday to Friday or from Monday to Saturday. On that basis I will leave that in the hands of the court to make a decision.

HETISANI (J): I just wanted to make you aware of that point.'

[19] The quote above illustrates how the court came to the conclusion that 23 June 2004 was a Saturday. Not only is this approach to determine dates and the days of the week upon which it fell novel, it is also not supported by a search of calendars for the year 2004.[6] The 2004 calendar reveals that 23 June 2004 did not fall on a Saturday as stated by the judge a quo, but rather on a Wednesday. The basis of the court's rejection of the appellant's version in this regard is therefore fallacious.

[20] In my view, the state failed to prove all the elements of the offence, more particularly sexual penetration. The evidence of the appellant was of such a nature that, properly evaluated, the conclusion that it is not reasonably possibly true cannot be reached. Consequently, the appellant is entitled to an acquittal. Hence the order in para 1 was made.

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6 The court can take judicial notice of the day of the week upon which a particular date fell with reference to a calendar, as determined in *R v Dube* 1915 AD 557 at 562.

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N C ERASMUS

ACTING JUDGE OF APPEAL

APPEARANCES

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