



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

**Not Reportable
Case No: 663/2017**

In the matter between:

LONWABO TETE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Tete v State* (663/2017) [2018] ZASCA 30 (9 April 2018)

Coram: Navsa, Majiedt, Dambuza and Mocumie JJA and Hughes AJA

Heard: 15 February 2018

Delivered: 9 April 2018

Summary: Rape – version of the complainant not corroborated – complainant’s evidence riddled with improbabilities – single witness – duty of prosecutors to act with objectivity and to protect public interest.

ORDER

On appeal from: Eastern Cape Division of the High Court, Port Elizabeth (Mbenenge J and Mabece AJ, sitting as the full court.):

1. The appeal is upheld to the extent set out in the substituted order below.
2. The order of the court below is set aside and substituted as follows.
 - ‘(a) The appeal is upheld.
 - (b) The order of the Magistrate’s Court is set aside and substituted as follows:
“The accused is acquitted of rape but is convicted on the lesser, competent verdict of common assault.
 - (c) The accused is sentenced to a fine of R1000 or 6 months’ imprisonment.”

JUDGMENT

Mocumie JA (Navsa, Majiedt, Dambuza JJA and Hughes AJA concurring):

[1] This is an appeal against an order of the full bench of the Eastern Cape High Court, Grahamstown, in terms of which an appeal was dismissed against the appellant’s conviction of rape by the Regional Court, Port Elizabeth and the related sentence of 10 years’ imprisonment. The present appeal is before us with the special leave of this court. The question before us is whether the evidence before the trial court justified the conviction.

[2] It is common cause that on 27 August 2007 the complainant, Ms Shelly Nogozolo Ngqezana and her friends, Ms Nomawethu Sofisa, Ms Bulelwa Katuli and Ms Stella Faku visited Siqalo tavern in New Brighton. There they consumed alcohol. Later that evening, around 21h00, the appellant arrived, greeted and conversed with them. The complainant chatted to and danced with the appellant. Around midnight, the

complainant and her friends left Siqalo tavern and travelled to Latida tavern, in Cleary Park. The appellant accompanied them. At Latida, the appellant paid the entrance fee for all. Around 02h00 the complainant left Latida tavern with the appellant in his friend, Sandile's, car. Sandile was also present. The four of them drove to the Sandile's flat in Central. They all spent the night there. The complainant left later that morning, between 07h00, according to the complainant, and 09h00 according to the appellant.

[3] The dispute between the State and the appellant centers around the circumstances under which the complainant entered into and remained at Sandile's flat. According to the complainant she was assaulted and dragged, against her will, from the car in which they had travelled, up the stairwell and into Sandile's flat and was then raped in a room adjoining the one which Sandile and his girlfriend occupied. According to the appellant, the complainant had agreed to go home with him after they had declared their attraction to each other and that intercourse had taken place consensually. He denied having raped or assaulted her.

[4] The problem for the State is that not only was the complainant's evidence in relation to the rape riddled with inconsistencies and improbabilities, but she was also contradicted by a material witness called in support of the State's case. Furthermore, the State failed to call essential State witnesses who appeared to have been at its disposal, namely, Sandile and his girlfriend.

[5] The complainant testified that the appellant had offered her a lift to her home in Sandile's car but that whilst they were travelling, he told her that it was necessary to stop briefly at Sandile's flat to charge his cell phone. Amazingly, she did not, either at that time, or during the trial, seriously question this implausible reason, or suspect anything untoward.

[6] Furthermore, she did not explain why no-one in the immediate vicinity, including Sandile and his girlfriend, reacted to her being assaulted and dragged into the flat.

[7] The complainant was emphatic that, soon after the alleged rape, she had phoned her friend, Ms Nomawethu Sofisa, to inform her of that fact. Ms Sofisa, however, in her evidence denied that this had occurred. This is a material contradiction further impinging on the acceptability of the complainant's evidence.

[8] It does not appear from her evidence that she called for help, which, in the form of Sandile and his girlfriend, was close by. The available medical report is also inconsistent with her description of how she was continuously being severely assaulted while being dragged up the stairwell.

[9] Counsel on behalf of the State conceded that it was standard practice for evidence to be gathered from all material witnesses which, in this case, would have included Sandile and his girlfriend. She could not provide an explanation as to why no statements had been obtained from them and why they had not been considered to be material witnesses. It is necessary to record that, according to the complainant, Sandile's girlfriend came to her room and was informed that she had been raped. The complainant testified that Sandile's girlfriend was taken aback because she thought that they were in a relationship. This detracts from the complainant's version of events and supports the appellant's version.

[10] The appellant testified about the incident as summarised in para 3 above. The regional magistrate did not have regard to any of the factors set out in the preceding paragraphs but found the complainant's evidence satisfactory in all material respects, stating that it was in 'accordance with the probabilities'. He recorded that it was consistent with the observations of Ms Sofisa when she met her in the morning and the medical report in that she had swollen and sore eyes. He rejected the appellant's version because it was not consistent with the probabilities. In evaluating the appellant's evidence the magistrate found it highly improbable that the complainant would fabricate a charge against a newly found love. He considered it significant that the appellant could not explain the injuries on the complainant's face.

[11] It is trite that a conviction can only follow upon proof beyond a reasonable doubt. The reference by the magistrate to probabilities is unhelpful, particularly since he discounted the negative factors set out above. It was never contended that the injury recorded in the medical report and observed by Ms Sofisa was serious. They do not appear to be of the kind described by the complainant in relation to her testimony that she was continuously assaulted while being dragged into the flat. The magistrate did not take into account the contradicting evidence by Ms Sofisa in relation to the report concerning the rape allegedly made to her.

[12] The full bench erred when it decided to discount all of Ms Sofisa's evidence including her testimony in relation to the report because, it reasoned, she had lied in other parts of her evidence. It also recorded, wrongly, as conceded by the State, that the appellant's counsel eschewed Ms Sofisa's evidence.

[13] For the reasons set out above the trial court erred in accepting the complainant's evidence regarding the rape. The full bench ought not to have confirmed the conviction. In that regard it erred.

[14] In cross-examination it was put to the complainant that the injuries depicted in the medical report had in fact been sustained by her when her boyfriend had assaulted her upon hearing of the complainant's sexual encounter with the appellant. This allegation was denied by the complainant. The appellant, when he testified, did not repeat that accusation. In any event, on the objective facts, there was no room for interaction with anyone between the time she had left Sandile's flat until the time she was seen by her sister and her friend and reported the matter at the police station and presented herself for medical examination. The injuries to the complainant's eyes could only have been inflicted by the appellant, as she testified. The circumstances in relation thereto are not clear. What is clear is that she was assaulted. The appellant therefore stands to be convicted of common assault, which is a competent verdict on a rape charge. Appellant's counsel conceded that on the facts he was unable to argue the contrary.

[15] In the premises, the following order is issued:

1. The appeal is upheld to the extent set out in the substituted order below.
2. The order of the court below is set aside and substituted as follows.

'(a) The appeal is upheld.

(b) The order of the Magistrate's Court is set aside and substituted as follows:

"The accused is acquitted of rape but is convicted on the lesser, competent verdict of common assault.

(c) The accused is sentenced to a fine of R1000.00 or 6 months' imprisonment."

BC Mocumie
Judges of Appeal

APPEARANCES:

For the Appellant:

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For the Respondent:

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Instructed by:

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