

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 957/2022

In the matter between:

THEMBA JUSTICE XIMBA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Ximba v The State* (957/2022) [2023] ZASCA 6 (19 January 2024)

Coram: NICHOLLS, MOTHLE, MABINDLA-BOQWANA and MEYER JJA and KATHREE-SETILOANE AJA

Heard: 02 November 2023

Delivered: 19 January 2024

Summary: Criminal Law – Rape conviction – whether finding of the trial court correct – held – the complainant was brutally raped – the appellant was the perpetrator – the appellant’s bare denial is not reasonably possibly true.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Adams J and Alberts AJ, sitting as a court of appeal):

The appeal against conviction is dismissed

JUDGMENT

Nicholls JA (Mothle, Mabindla-Boqwana and Meyer JJA and Kathree-Setiloane AJA concurring):

[1] The appellant was charged with the rape of an 18 year old woman during the period September and October 2015. He was found guilty by the Regional Court, Germiston and sentenced to life imprisonment. On 19 October 2018, the appellant's appeal against conviction and sentence was dismissed by the Gauteng Division of the High Court, Johannesburg (the high court). Special leave to appeal was subsequently granted by this Court on both conviction and sentence. The appellant has withdrawn his appeal against sentence and, accordingly, all that is before this Court is an appeal against conviction.

[2] There is no dispute that the complainant was brutally raped. The question is whether the appellant was the perpetrator, as alleged by the complainant. The appellant did not provide a plea explanation in terms of s 115 of the Criminal Procedure Act 51 of 1977. Instead, he elected to remain silent. As the evidence proceeded, it became apparent that his defence was a bare denial.

[3] The complainant is a vulnerable young woman. She was abandoned at birth and has lived in shelters and foster homes, in the Durban area, all her life. In 2015, she was living with her new foster mother, Ms N[...] M[...]. Living conditions were not ideal. Ms M[...] was unemployed and the family had to share one room. During this period Ms M[...] was visited by her friend, Ms Nthandazo Ndungane, who resided in Leondale, Johannesburg area. Ms Ndungane indicated that she needed a domestic worker at her home. It was agreed that the complainant should be sent to live with Ms Ndungane, to assist her with domestic work. The complainant did not meet Ms Ndungane while she was in Durban, nor was she consulted about this arrangement.

[4] In September 2015, as a result of the agreement between Ms M[...] and Ms Ndungane, the complainant boarded a bus for Johannesburg and was sent to live with Ms Ndungane. Ms Ndungane had a three bedroomed house and the complainant had her own bedroom. The appellant was Ms Ndungane's partner and the father of her two year old child who, at the time, resided in Zola with family members. The appellant resided in Vosloorus and would sleep over at Ms Ndungane's residence from time to time. It is in dispute whether he also visited during the week as alleged by the complainant or only over weekends as contended by the appellant and Ms Ndungane.

[5] The complainant gave evidence of the several times that she was raped by the appellant. She said that she was introduced to the appellant soon after she had arrived in Leondale. One night when Ms Ndungane was in Zola with her child, the appellant came into her bedroom and raped her. When Ms Ndungane returned the following day, the complainant did not inform her of what had transpired as they

were not well acquainted and the complainant was scared to inform her. In October 2015, the complainant returned to Durban. Although she did not tell Ms M[...] about the rape, she informed her that she did not want to return to Leondale. Her request was brushed aside and Ms M[...] told her that her bus ticket to Gauteng had been purchased and she had no choice but to return.

[6] On the complainant's arrival in Gauteng she was again met by Ms Ndungane. One night, the appellant came into her room while she was sleeping and started to undress her. When she resisted, he slapped her. Ms Ndungane came into the room while the appellant was on top of the complainant and told her that she must co-operate with the appellant. He then proceeded to rape her.

[7] After that incident, the complainant said that she became incontinent and was taken by Ms Ndungane to Chris Hani Baragwanath Hospital (Baragwanath Hospital). Three days after that, she 'fainted' and was taken back to Baragwanath hospital, where she was admitted. She was advised by the hospital staff that she had a problem with her womb. This was a pre-existing condition. The complainant did not inform the medical staff that she had been raped. Ms Ndungane and the appellant fetched her once she had been discharged.

[8] The complainant testified that on the same evening and once Ms Ndungane had left for Zola, the appellant was visited by four friends at Ms Ndungane's house. The appellant came into the complainant's bedroom and raped her. After he had wiped her vagina with a towel, he then let his friends 'take over'. When she started screaming, the appellant injected her in the buttocks. She began to feel dizzy and no longer put up any resistance. The first friend used a condom and he raped her; and the second man also raped her. When the third friend started raping

her, she tried to resist. The appellant picked up a stick that was being used to block off the door, and hit her on the head. She was again injected and the rape proceeded. The fourth man raped her.

[9] After the gang rape, the complainant said she had sent a text message to Captain Dube, a Durban based female police officer, who was the investigating officer in a case where the complainant had been gang raped in the Durban area a year earlier. Captain Dube responded that she would send police in Johannesburg to assist the complainant. When the Johannesburg police telephoned the complainant, she was unable to answer because the appellant and his friends were still present. They telephoned the complainant again, later, to request directions to the Leondale residence, which she was unable to provide.

[10] A few days later, the complainant 'passed out'. She was taken to Baragwanath Hospital, where she was admitted. Whilst in hospital, she communicated with Captain Dube, who promised to fetch her. She asked one of the sisters at the hospital to give Captain Dube directions. However, before Captain Dube fetched her from the hospital, the appellant and Ms Ndungane demanded her discharge and took her back to the Leondale residence. She did not tell Ms Ndungane that Captain Dube was coming to fetch her, as she did not want to alert her.

[11] According to the complainant, the three of them arrived at the Leondale residence at 11h00. Ms Ndungane went to work, and the appellant remained at the house. At around 14h00, the appellant began watching a pornographic video and insisted that she watch the video with him. After that, he instructed her to go into her bedroom. First, he inserted his penis into her vagina and then instructed her to

perform oral sex on him. Thereafter he told her to wash herself as she had been bleeding.

[12] On the date of her appointment for a medical check-up, Ms Ndungane took the complainant to Natalspruit Hospital and then went on to work. The complainant contacted Captain Dube and requested that she come and fetch her from the hospital. As Captain Dube did not know the way to Natalspruit Hospital, the complainant gave her the name of a mall within the vicinity of the hospital. Captain Dube, accompanied by Captain Muvango, collected her from the mall and drove her to Durban where she was put in a place of safety. A few days later, she was taken to a district surgeon, Dr Savvas Atholiades (Dr Atholiades). A statement was taken from the complainant at the Cato Manor Police Station, KwaZulu-Natal, by Captain Muvango. The statement made by the complainant does not differ in any material respect from her evidence.

[13] From her testimony, it seems that the complainant felt that she had no-one to turn to about her ordeal. Ms Ndungane telephoned Ms M[...], the complainant's foster mother in Durban, to complain that the complainant was not obeying the rules. The complainant was told by both Ms M[...] and Ms Ndungane to be obedient. Captain Dube was the only person whom she trusted sufficiently to confide in about the multiple rapes.

[14] Captain Dube corroborated the complaint's version that she had sent her various text messages informing her that she had been raped by the appellant. The first message from the complainant was to the effect that she was in Johannesburg, had a problem and wanted to communicate with Captain Dube. Because she was too busy, Captain Dube initially ignored the messages. Later, Captain Dube

received a message from the complainant in which she stated that she had been raped by the boyfriend of the “aunty” (Ms Ndungane). Captain Dube advised the complainant to inform the aunt of what was happening. The complainant told her that when she telephoned the aunt, she merely said that she must leave her alone. It is unclear whether this was a reference to Ms M[...] or Ms Ndungane.

[15] On another occasion, the complainant informed Captain Dube that she had been gang raped by the appellant and three other men. Captain Dube said that she had telephoned the police in Johannesburg to assist the complainant. However, because the complainant had given them the incorrect address, they were unable to find the house. The complainant had also informed Captain Dube that she had been assaulted by the appellant who had injured her arm during the course of the rape and she had been admitted to Baragwanath Hospital. She begged Captain Dube to fetch her from Johannesburg where she was being sexually abused. When Captain Dube telephoned the complainant the following day, the call was answered by a person who said that she was a nurse and that the complainant was in ‘a coma’.

[16] Captain Dube then made arrangements to go to Johannesburg with a colleague, Captain Muvango, to fetch the complainant and bring her back to Durban. When she telephoned the complainant to tell her that they were on their way, the complainant told her that she had been discharged by the appellant and Ms Ndungane. Because she was unable to provide them with her home address, they collected her at the Natspruit Mall. On 23 October 2015, Captain Dube and Captain Muvango drove with the complainant to Durban, where she was placed in a shelter for abused women.

[17] Captain Dube made a statement to Captain Muvango once they were in Durban. This statement was made with the aid of Captain Dube's cell phone records and was thus a more accurate reflection of the dates and times of calls and text messages that she received from the complainant. The first call was on 13 October 2015. The next day, Captain Dube received a text message asking why she had not responded as the complainant had a problem. Further calls and/or text messages were received between 15 and 16 October 2015. On 16 October 2015, the complainant sent Captain Dube text messages, at about 16h00 and 23h00, complaining she had been raped. On 22 October 2015, Captain Dube received a text message from the complainant asking to be taken to Durban and that she could be collected at Natalspruit Hospital where she had an appointment. She was finally collected from the Natalspruit Mall, at 12h00 on 23 October 2015, and taken to Durban.

[18] That the complainant had been raped was confirmed by Dr Atholiades, who examined her on 26 October 2015, and completed the J88 form. His extensive experience in examining gynaecological patients and rape and trauma victims was not challenged. On examination of the complainant, he found extensive swelling and bruising of the vaginal area: the frenulum of the clitoris was swollen, the labia minora was swollen; the cervix was swollen, but there was no bleeding or discharge. The hymen was so swollen that it was closed. The opening is usually measured in millimetres with a ruler. However, in this case there was no opening at all because of the swelling due to trauma of the alleged sexual assault. The digital and rectal examination did not support nor refute the allegation of anal penetration.

[19] Dr Atholiades could not determine what was used to penetrate the complainant. Nor was he able to determine exactly when the injuries occurred,

except to say they were fresh injuries in keeping with a recent sexual assault. This could have occurred three to five days before the examination; however, in his opinion it was definitely not a year ago. Dr Atholiades stated that the injuries were, in all probability, as a result of the alleged rape on 21 October 2015. When asked, in cross examination, whether it was possible that the complainant had had consensual sex, he responded that he did not think it appropriate to ask the complainant that question, 'because of the trauma in her genitalia, so much bruising and swelling and the tear'.

[20] The appellant denied ever having raped the complainant. In fact, he contended that he was never alone with her on any occasion. He testified that he lived 20 minutes away from Ms Ndungane's home and spoke to her daily on the phone. When the complainant was living with Ms Ndungane during September and October 2015, he was adamant that he only visited Ms Ndungane over weekends, and public holidays. He also recalled that he only ever came on Saturdays, not Fridays. It was on these occasions that he would see the complainant. He never accompanied her to hospital but was aware of her attending Natalspruit Hospital. On the day she was fetched by Captain Dube, he stated that he was asked by Ms Ndungane to check on the complainant at the hospital. When he got there he found Ms Ndungane outside the hospital. Ms Ndungane told him that the hospital had informed her that they had no record of the complainant having been there.

[21] Curiously, the appellant testified that he first saw the complainant in 2014, when she visited Ms Ndungane with her mother and younger brother. This was not a version put to the complainant or supported by Ms Ndungane, who said that the first time she met the complainant was in 2016 when she fetched her from the Germiston bus rank. She later changed this to 2015.

[22] The appellant's version that he was never alone with the complainant, was supported by Ms Ndungane. She testified that she had been in a relationship with the appellant for nine years and that he had never once visited her on a week day. He would always inform her telephonically beforehand that he was coming. Ms Ndungane was adamant that she never arrived home to find the appellant with the complainant and at no point were the complainant and the appellant left alone in the house. It was put to the complainant in cross examination that the appellant only visited on two occasions, and only at night on those two occasions. This was not the evidence of either the appellant or Ms Ndungane, who said the appellant was present over three weekends during the period that the complainant was working for her. Ms Ndungane's memory as to exactly when the appellant visited cannot be considered to be reliable in view of the fact that when she gave her evidence in November 2017, she could not properly recall whether these events occurred in 2015 or 2016.

[23] It was accepted by both the appellant and Ms Ndungane that the complainant had no friends in Gauteng and knew no-one. It seems that although she was 17 or 18 years of age at the time, the complainant looked very young for her age. The appellant referred to her as 'the child' while Ms Ndungane said she was surprised to find that she was so young and wanted to arrange schooling for her. By the time she testified, the complainant had passed her matric. She was clearly an intelligent young woman.

[24] Ms Ndungane described their relationship as being of a mother and child in the early stages. The complainant was clearly desperate for a mother figure and originally thought that she had found one in Ms Ndungane. Letters of love and

appreciation were written to Ms Ndungane. However, as testified to by both the appellant and Ms Ndungane, this relationship soon soured. Later, the complainant's behaviour towards Ms Ndungane changed to such an extent that she refused to come out of her bedroom and would only communicate with her by Whatsapp messages. Ms Ndungane attributed this to her refusal to give her consent to allow the complainant to be operated on at a hospital in Johannesburg.

[25] The trial court found that Ms Ndungane was a biased witness and that her version that the appellant and the complainant were never alone together fell to be rejected. The high court, although it did not deal directly with the evidence of Ms Ndungane, rejected the appellant's version as supported by Ms Ndungane. The irrefutable fact remains that the only truly independent witnesses were Captain Dube and Dr Atholiades, the district surgeon. Captain Dube's evidence, as the person to whom the complainant made the first report of the rape, was consistent with the version of the complainant that she had been repeatedly raped by the appellant, and that on one occasion she had been gang raped by the appellant and his friends. Dr Atholiades found evidence of a vicious sexual assault which was consistent with the allegations made by the complainant.

[26] Invariably, in any rape matter, the complainant will be a single witness. There is no formula for assessing the credibility of a single witness. A trial court should consider the evidence in its totality and should determine whether the truth has been told, despite any shortcomings and contradictions.¹ As has been repeatedly stated by this Court, 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,

¹ *S v Sauls* 1981(3) SA 172 (A) at 180F.

probabilities and improbabilities on both sides and, having done so, decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.² In other words, what is required is credible evidence which renders the complainant's version more likely that the sexual intercourse took place without her consent, and the appellant's version less likely that it did not.

[27] Adopting this approach and considering the evidence holistically, as every court is enjoined to do, the undisputed facts reveal the following: The complainant knew no-one in Johannesburg. Initially, she was loving and communicative with Ms Ndungane, but this changed to such an extent that in the end she would go into her room and only communicate with Ms Ndungane by Whatsapp messages. When she went back to Durban she told her foster mother, Ms M[...], that she did not want to return to Gauteng to live with Ms Ndungane. The complainant informed Captain Dube that she was being repeatedly sexually assaulted by the appellant. Captain Dube fetched her from Johannesburg and placed her in a place of safety in Durban. From there and a few days later, the complainant was seen by a district surgeon who found evidence of a violent rape having taken place in the previous few days.

[28] Despite there being some discrepancies in respect of dates and times, there can be no doubt that the complainant informed Captain Dube that she had been raped numerous times by the appellant. The report to Captain Dube supports the consistency of the complainant's version and therefore her credibility.³ Her subsequent behaviour of withdrawing, refusing to come out of her bedroom and

² *S v Chabalala* 2003(1) SACR 134 (SCA) para 15.

³ *S v Hammond* 2004 (2) SACR 303 (SCA); [2004] 4 All SA 5 (SCA).

only communicating with Ms Ndungane by Whatsapp messages is consistent with her emotional turmoil following sexual assaults in the home of Ms Ndungane. To find otherwise, would mean that the complainant was raped repeatedly by a stranger, or another person known to her. She then, for unknown reasons, decided to exonerate the true rapist and blame the appellant. There is no suggestion of the complainant even being acquainted with other people in Gauteng. Nor is there evidence that she had a motive to falsely accuse the appellant.

[29] On these facts, I am led to the ineluctable conclusion that the complainant was brutally raped, and that the appellant was the perpetrator thereof. The appellant's bare denial is not reasonably possibly true.

[30] The following order is made:

The appeal against conviction is dismissed.

C E HEATON NICHOLLS
JUDGE OF APPEAL

Appearances

For the appellant:

R du Plessis

Instructed by:

Bloemfontein Justice Centre, Bloemfontein

For the respondent:

J Masina

Instructed by:

Director of Public Prosecutions, Bloemfontein