

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)**

CASE NO: CA&R 181/2006

In the matter between:

THEMBEKILE GQOWA

Appellant

and

THE STATE

Respondent

JUDGMENT

EBRAHIM J:

Introduction

[1] The appellant was convicted in the Eastern Cape Division of the High Court of South Africa on three counts of rape and one count of assault with intent to do grievous bodily harm. On each count of rape the appellant was sentenced to imprisonment for twenty years, which are to run concurrently, and on the count of assault with intent to do grievous bodily harm to imprisonment for twelve months.

[2] The appeal to this Court is with the leave of the trial Judge (Maqubela AJ) and directed solely against the convictions.

Grounds of appeal

[3] The appellant did not file a formal notice specifying the grounds of appeal. The application for leave to appeal was based on the ground that another Court might conclude that the appellant's claim of a conspiracy to implicate him falsely was reasonably possibly true.

[4] In the appellant's heads of argument, the convictions are attacked on the ground that the complainant's identification of the appellant was open to doubt. This ground is amplified by the further contention that the complainant had been influenced by her aunts to identify the appellant falsely as the person who had raped her. Ms McCallum, when arguing the appeal, directed her submissions on the issue of identification in substantiation thereof.

Analysis of the submissions

[5] Two crucial questions arise for consideration in this appeal. The first is whether the complainant's identification of the appellant as the person who had raped her, is reliable. Second, is it reasonably possibly true that the identification of the appellant was tainted because of a conspiracy between the complainant and her aunts to implicate him falsely as the rapist.

[6] Before I deal with these questions, I need to address two other issues pertinent to the appeal. Neither the factual findings of the trial Court, nor its conclusions regarding the demeanour and credibility of the state witnesses and

the accused, were challenged. Ms McCallum conceded that absent any obvious misdirection by the trial Court these conclusions would not be disturbed on appeal. In any event, the appeal does not turn on any alleged misdirection.

[7] The trial Court's finding that the complainant, Ms Zimkitha Matshingana, was an impressive witness is thus unchallenged and is accepted. The same applies in respect of the other state witnesses, Ms Thembeke Rasmeni, Ms Nandipha Matshingana, Mr Shaun Daluxolo Mbaso and Detective Inspector Luyiso Mazitshana. The trial Court was impressed with their demeanour found them to be satisfactory witnesses.

Is the complainant's identification of the appellant reliable?

[8] The complainant testified her assailant held her captive from approximately 11.00pm on Saturday until after 6.00am the next morning, at least seven hours. Her assailant had undressed each time he raped her. It was dark on the first and second occasion and she could not see if he had any identifying features. However, it was light when he raped her for the last time, at about 6.00am. She had never seen him before and observed he had a tattoo that looked like a money-bag on the left side of his chest. He was a tall man with a dark complexion and long hair, referred to as dreadlocks. His upper and lower front teeth were missing and his lips were different in size, the lower lip being larger than the upper. She also noticed there was no zip in his jeans, his lumber jacket was white, and his 'takkies' were white, black and purple in colour. She had to

remain in his company for a further thirty minutes and when they arrived at a cliff, he told her to jump off it. She then had to plead for her life until he relented.

[9] It is evident that the complainant had more than sufficient opportunity to observe the person who was raping her. The distinctive physical features by which she identified the appellant as the rapist were never disputed. This is hardly surprising since these features are indeed those of the appellant, save that at the time of the trial the appellant, by his own admission, had shaved off all the hair on his head.

[10] Ms McCallum criticised the complainant's evidence that she had sufficient time to make a proper identification since she had not noticed the other tattoos on the appellant's arms. This argument is misconceived. The fact that she did not see any other tattoos does not diminish the reliability of her identification of the tattoo on his chest and other distinctive physical features. The complainant's identification of the appellant was manifestly honest and sincere and, more importantly, reliable beyond reasonable doubt.

Is the appellant's claim of a conspiracy reasonably possibly true?

[11] The appellant testified that the conspiracy to implicate him falsely had its genesis in an incident that occurred in 2002 while he was awaiting trial in the prison where Ms Thembeke Rasmieni, the complainant's aunt, worked. He had told her that his brother, with whom she was involved in a 'love' relationship, was

not the father of the child she was expecting, and it was a 'coloured child'. This ended his good relationship with Ms Rasmeni and she thereafter bore a grudge against him. He claimed she and her sisters were behind the conspiracy and the complainant with S D Mbaso and Inspector L Mazitshana were involved therein.

[12] The appellant's story of a conspiracy is improbable. Ms Rasmeni testified that the father of her child, who was born in 2002, was Mr Lunga Thile. In any event, if she had wanted to take revenge, she could have done so when the appellant was in the prison. It is unlikely she would wait more than three years for an opportunity and then in circumstances where the real rapist would be allowed to go free.

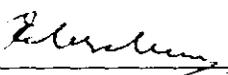
[13] The appellant's story that there was an intimate relationship between him and the complainant and she had slept with him at his grandfather's home for three days before her aunts came to remove her, is far-fetched and a fabrication. The same applies to his claim that she laid the charges of rape because he had not kept his promise to give her a cell phone. The complainant's denial of having seen him before and the existence of any prior relationship were clearly truthful.

[14] The state witnesses refuted the appellant's allegation. The trial Court was impressed with their testimony and found them to be credible witnesses. As I have stated previously there is no basis for rejecting these findings. The trial

Court correctly held that the appellant's claim of a conspiracy to implicate him falsely in the rape of the complainant was not reasonably possibly true.

Conclusion

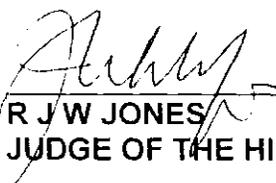
[15] There is no merit therefore in any of the grounds of appeal against the appellant's convictions on the three counts of rape and the count of assault with intent to do grievous bodily harm. In the result, the appeal is dismissed and the convictions are confirmed.



Y EBRAHIM
JUDGE OF THE HIGH COURT

24 AUGUST 2006

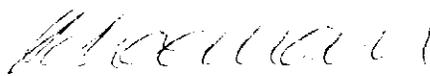
I concur and it is so ordered



R J W JONES
JUDGE OF THE HIGH COURT

24 AUGUST 2006

I concur



I SCHOEMAN
JUDGE OF THE HIGH COURT

24 AUGUST 2006