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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A91/2017
6/3/2018

In the matter between:

STANLEY MOTHASEDI

First Appellant

DESMOND CHRIS MOTHASEDI

Second Appellant

and

THE STATE

Respondent

JUDGMENT

TEFFO, J:

[1] The two appellants who are cousins, were arraigned in the Regional Court, Potchefstroom where they faced two counts of rape in contravention of section 3 of the Sexual Offences and Related Matters Act 32 of 2007. They were both acquitted on one count of rape. The second appellant was convicted on one count of rape while the first appellant was convicted as an accomplice to the rape of the complainant by the second appellant.

[2] They appeal against their convictions with the leave of the trial court.

[3] The first appellant who was the complainant's boyfriend at the time, challenges his conviction on the following grounds: He contends that the court *a quo* erred in convicting him as an accomplice to the rape of the complainant by the second appellant in that there was no evidence presented that he played any role prior to the sexual intercourse between the second appellant and the complainant. He contends that the Learned Magistrate erred in finding that he covered up for the second appellant by saying that he was the person who had penetrated the complainant. He further contends that the Learned Magistrate further erred by convicting him on what was never the State's case. The State's case was premised on allegations that both appellants sexually penetrated the complainant on the night of the incident. The court *a quo* misdirected itself in that it accepted that no evidence was presented to the effect that the first appellant ever penetrated the complainant that night. The State did not apply for an amendment of the charge-sheet. In convicting him as an accomplice, he argues that the Learned Magistrate implied that he had a common purpose with the second appellant to rape the complainant. He was not warned at the commencement of the trial that the State intended to rely on common purpose.

[4] The second appellant criticises his conviction on the following grounds: He challenges the trial court's finding that the consent given by the complainant was not validly given as she was intoxicated. He contends that the Learned Magistrate erroneously misdirected herself by making that finding as that was not the State's case. By making the finding that there was consent to the sexual intercourse, the Learned Magistrate agreed with the second appellant. She should therefore have acquitted him and not qualify the consent to the sexual intercourse. The finding that the complainant was intoxicated to the extent that she was not able to see what was happening around her was not supported by any evidence.

THE EVIDENCE

[5] The State called 3 (three) witnesses in support of its case namely; Ms L I (Ms I); Ms L X (Ms X); Constable B Dorah R (Constable Rampore), while the two appellants also each testified in defence of their cases.

[6] Ms I testified as follows: On Thursday, 8 October 2015 she was at home at approximately 18h00 busy doing her laundry. She received a telephone call from the first appellant who asked her to go out with her that evening. She accepted the invitation and they agreed that he should come and fetch her at 20h00. The first appellant came to her homestead to fetch her at 20h00 accompanied by the second appellant. She left with them and they went to O'Hagans restaurant where they had some drinks. She consumed three glasses of vodka and cranberry. They also had a meal together. They left O'Hagans restaurant between 22h00 and 23h00 and proceeded to the first appellant's house. At the first appellant's house, she and the appellants consumed two glasses of shooters each and she also had a glass of wine while they consumed some beers. After she took a sip of the wine, the first appellant grabbed the glass of wine from her hand and spilled it in the sink.

[7] She became angry and decided to leave the place. She left the house and proceeded to the vehicle. The second appellant followed her and the first appellant also followed. She entered the motor vehicle after the second appellant had unlocked it and occupied the front passenger seat. The second appellant took the driver's seat while the first appellant sat at the back. She only remembered getting into the vehicle and vehicle reversing as the two appellants told her that they were taking her home.

[8] When she left the first appellant's house she could appreciate what was going on around her until she fell asleep in the vehicle. When she woke up, she found herself in the first appellant's bedroom and the second appellant was on top of her busy sexually penetrating her. The second appellant was not dressed. Her dress was pulled up and her panty was taken off on one leg. The second appellant's penis was inside her vagina. She pushed him and also screamed. The second appellant jumped off her and went to lie on the floor. Surprisingly the first appellant was lying on the same bed next to her. He was also not dressed.

[9] She asked the first appellant as to what was happening and how could he let the second appellant penetrate her sexually while he was looking. The first appellant said she did not see properly and alleged that it was him who had been having sexual intercourse with her and not the second appellant. She told the first

appellant that she saw the second appellant properly as the bedroom light was on.

[10] She stood up and told the first appellant that she did not like what they both did to her. Her dress was pulled up and her panty was only taken off on one leg. She left the first appellant's bedroom and told the appellants that she was going to the police station to press charges of rape against them. They tried to stop her.

[11] She assured them that she was not going to the police station, she only wanted her phone. The second appellant said her phone was in the car in the garage. She went to the car, took her phone and shoes and proceeded to Ikageng police station where she reported the matter.

[12] On her way to the police station she phoned the first appellant telling him that she was scared. She also asked him why did they do that to her while she was her boyfriend. The first appellant just said that if she said she was going to the police station, then she can go.

[13] She also phoned her friend, Ms X and reported the rape to her.

[14] Even on her arrival at the police station, she phoned the first appellant telling him that she was laying a charge of rape.

[15] After reporting the matter, she was taken to a doctor. She did not sustain any injuries during the rape incident. She only had old injuries on her legs.

[16] The appellants were arrested the same morning in her presence.

[17] She did not remember giving consent to the first appellant to have sexual intercourse with her on the night of the incident. She also did not remember having sexual intercourse with him.

[18] She vehemently denied having consented to the sexual intercourse with the second appellant.

[19] Under cross-examination she testified that she was under the influence of alcohol and persisted with her denial that she consented to the sexual intercourse with the second appellant at the time. She maintained that she would not have sexual intercourse with someone who is her boyfriend's cousin. She testified that she did not see the first appellant having sexual intercourse with her.

She laid a charge of rape against the first appellant because he was watching when the second appellant was raping her. She denied that while she was with the two appellants at O'Hagan after drinking the vodka and the cranberry, she said she wanted something stronger and ordered a stroh rum shooter. She did not recall drinking the stroh rum shooter. She also denied that when O'Hagan closed, she wanted to go to Bourbon Street. She denied putting her hand on the second appellant's leg or flirting with him. She was adamant that at some stage she told the first appellant that she did not like the way the second appellant was touching her that night before they consumed liquor.

[20] She also denied going to the bedroom with the first appellant from the kitchen after he took a glass of wine out of her hand and spilled it in the sink.

[21] She denied the second appellant's version that at some stage she was with him on the corridor next to the toilet where she took him by his hand and started caressing and kissing him. She maintained that the last thing she remembered was that she was in the motor vehicle and it was reversing. She testified that if whatever happened did take place, the appellants made her do it without her being aware.

[22] She denied the second appellant's version that she put her arms around him, walked him into the bedroom where the first appellant was sleeping and showed him a condom, that he put the condom on and had sex with her and that the first appellant was surprised by her actions.

[23] She denied asking the second appellant to give her money and also screaming at him on the corridor after they had sexual intercourse thereby waking the first appellant up.

[24] She stuck to her version and denied both appellants' versions.

[25] Ms X corroborated the evidence of Ms I that she called her in the early hours of 9 October 2015 and reported that the two appellants raped her. She testified that after speaking to her that day, she spoke to her again on Saturday where she tried to explain what happened. She told her to stop as she was becoming emotional.

[26] Under cross-examination she testified that she met with the complainant at her house on Saturday. When she arrived at her house, the complainant was

crying. She asked her what was wrong. She told her that the two appellants raped her. She admitted that she previously had a love relationship with the first appellant but it was a long time ago.

[27] Constable Rampore's evidence was briefly as follows: She worked in the charge office at Ikageng police station at the time of the incident. The complainant arrived at the police station in the early hours of 9 October 2015 after 03h00. She was crying and holding her shoes in her hands. She reported that she was raped by her boyfriend and her boyfriend's cousin. She was also smelling of alcohol. She appeared to have been under the influence of alcohol. She corroborated the complainant's evidence that she was with the two appellants at O'Hagan restaurant and then they proceeded to the first appellant's house where they had some drinks. The last thing she remembered was that they were leaving, heading towards the garage. She told her that she does not know if she entered the motor vehicle or not. Suddenly she was lying on the bed and the second appellant was on top of her, having sexual intercourse with her. She screamed and the second appellant jumped off her and went to sleep on the floor. The first appellant told her that he was the person who was having sexual intercourse with her.

[28] She also corroborated the complainant's evidence that when she was at the police station, she called the first appellant although she did not know the content of their conversation.

[29] She opened a case and because the complainant was under the influence of alcohol at the time, she made the A1 statement.

[30] The complainant mentioned to her that she was wearing a g-string panty at the time of the incident but the under part of it was removed. The top part of the g-string panty was on her waist, and her vagina was wet.

[31] Under cross-examination she testified that she did not take the complainant's statement at the time because she was not in her sound and sober senses. The complainant further told her that she thought they both raped her because the first appellant told her that they usually sleep with girls when they are drunk. She did not tell her what the first appellant did to her.

[32] Upon questioning by the court she testified that although the complainant

was drunk, she understood her questions and she was able to respond even though she was crying.

[33] The J88 medical report of the complainant together with a section 212(4) statement from the Forensic Science Laboratory in Pretoria were handed in by agreement. In the section 212(4) statement it was reported that no DNA was obtained from the exhibits marked " *Ibiditse* " and no further DNA analysis would be carried out in the case. That concluded the State case.

[34] The first appellant also testified. His evidence was as follows: He corroborated the complainant's evidence that she was his girlfriend for \pm 4 months at the time of the incident. On 8 October 2015 he phoned her and later went to fetch her accompanied by his cousin , the second appellant and they went to O'Hagan where they had drinks. At some stage while they were at O'Hagan, the complainant asked for a strong drink. That was when she ordered a straw rum which she mixed with cranberry. They also ordered food and the complainant did not eat. They also drank shooters. Subsequently they were told that the restaurant was closing. The complainant said they should go to a pub. He refused and said there was liquor at his house. They drove to his house where they continued drinking. The complainant drank a wine while they were drinking Castle Light beers.

[35] The complainant started smoking. While she was about to finish the last glass of wine in the bottle, he took it and poured it in the sink. He told her that he was going to bed. They both went to bed. He waited under the blankets and passed out. As he was sleeping he heard a commotion on the corridor. It was the complainant and his cousin, the second appellant. He asked them what was happening. None of them responded. He took his car keys and gave them to the second appellant. He told him to leave. After the second appellant had left, he remained with the complainant. She reported to him that the second appellant had raped her in his bedroom. It was dark in the bedroom and he did not see and hear anything. The complainant subsequently phoned her friend, Lindiwe. She thereafter left the house and told him that she was going to the police station.

[36] When she was at the police station, she called him again and said the police said she should come and make a statement later after four hours

because she was drunk. He told her that she saw him giving the second appellant his car keys, she should request the police to take her home. About 35 minutes later she arrived at his house with the police. The police said they were looking for the second appellant.

[37] He disputed the complainant's version that when they left O'Hagan restaurant she wanted to go home. He also denied her version that at some stage when they were at his house, she left the house to the motor vehicle as she wanted to go home. The complainant never told him in front of the second appellant that he raped her. He never raped the complainant on the night of 8 October 2015 and neither did he have sexual intercourse with her.

[38] Under cross-examination he testified that when they left the O'Hagan restaurant to his house, he was drunk that he could not drive his own vehicle. The complainant was also very drunk. He denied the complainant's version that after her wine was poured in the sink, she wanted to leave, she walked to the bakkie and both the appellants followed her and the three of them got into the vehicle. He also denied that the vehicle reversed and after that she could not remember what happened until in the morning when she woke up and found the second appellant on top of her. His evidence was that after he poured her glass of wine in the sink, he told her that he wanted to sleep. The complainant followed him to the bedroom and they left the second appellant in the kitchen.

[39] He and the complainant went under the blankets and fell asleep. He was awoken by the commotion between the second appellant and the complainant on the corridor. He did not hear their conversation. He was still drunk at the time.

[40] He tried to speak to the complainant not go to the police station at that time of the night but she refused. He could not accompany her to the police station because he was drunk and the complainant was aggressive and busy making noise. He thought if she leaves, she would come back. There is a pub on his street, he thought the complainant would go there and come back. Later on the complainant came back to his house with the police whom he took to the second appellant's residence where he and the second appellant were duly arrested.

[41] He denied that the complainant called him while she was on her way to

the police station. He denied ever seeing the second appellant on top of the complainant, she pushing him off her and asking him what was happening. He admitted that he slept naked that night. He denied telling the complainant that she did not see properly, it was him who was on top of her.

[42] He testified that prior to them going to bed at his house, there were no problems between him and the complainant and the complainant did not also have problems with the second appellant. He admitted that the complainant was angry when she left his house to the police station alone in the early hours of the morning and that something must have made her angry.

[43] The second appellant testified in his own defence and corroborated the evidence of the complainant and the first appellant that he was together with them on the night of 8 October 2015 from the time the first appellant went to fetch the complainant at her homestead, at O'Hagan restaurant and at the first appellant's house where they had drinks. He testified that the complainant was sitting between him and the first appellant. She touched him and the two were holding hands at O'Hagan restaurant.

[44] He corroborated the first appellant's evidence that they did not go to Bourbon Street as the first appellant said there was liquor at his house. At the first appellant's house while they were busy drinking, the first appellant took a glass of wine from the complainant's hand and told her that they should go to bed. The complainant and the first appellant went to bed and left him in the kitchen. 15 minutes later as he was preparing to go to bed, he went to the toilet. While he was inside the toilet, he suddenly saw the complainant entering the toilet. When he turned, she held him. They started kissing. They moved towards the bedroom. They entered the first appellant's bedroom. The complainant pulled a drawer where she took out a condom and gave it to him. He told him to use it. He eventually had sexual intercourse with her. When they were done, they all dressed up. When he left the bedroom, the complainant asked him to give him money. He told her he did not have money. They started fighting over the money. At that time they were in the corridor in the house. The first appellant woke up and came to them. He gave him his car keys so that he could leave. They did not want to show the neighbours who had a funeral, that there was a fight in the

house.

[45] He went home and the police came to his house between 04h00 and 05h00. He was surprised when they accused him of raping the complainant. When asked how he had sex with his cousin's girlfriend while he was also sleeping on the same bed, he testified that he was surprised in the manner in which the complainant approached him. He testified that that could have been influenced by alcohol because he would not have done that if he was sober. It was put to him that the complainant said he had sex with her without her consent. He testified that there was never any conversation between them. The complainant held him in the toilet and in the bedroom.

[46] Under cross-examination he testified that from the toilet, the complainant pulled him into the bedroom where the first appellant was sleeping. He could not say anything because the complainant overpowered his feelings in the manner in which she was acting. He could have refused but she was persuading him to have sex with her. When he had sex with her, the complainant was fine and not too drunk because she was even talking to him, telling him she was enjoying. He was also not too drunk because he managed to drive the car.

[47] He denied that there was a stage where the complainant asked to go home when they were at the first appellant's home. He also denied her version that at some stage they went to the motor vehicle with the intention of taking her home: He maintained that the complainant consented to the sexual intercourse with him.

[48] He further denied the complainant's version that he pushed him off her while he was busy having sexual intercourse with her.

[49] He could not explain why the complainant who according to him consented to having sex with him would risk having sex with him on the same bed where her boyfriend, the first appellant, was sleeping and why would she ask for money from him while the first appellant was there who could have given her money if she really wanted it.

[50] Section 208 of Act 51 of 1977 (*"the Criminal Procedure Act"*) provides that an accused person may be convicted of any offence on the single evidence of a single competent witness. It is however, a well-established judicial principle that

the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which might militate against his or her credibility (*S v Stevens* 2005 (1) All SA (1) SCA).

[51] The correct approach to the application of the so-called "*cautionary rule*" was set out by Diemont JA in *S v Sauls and Another* 1981 (3) SA 172 (A) at 180E-G where he said the following:

"There is no rule or thumb test or formula to apply when it comes to a consideration of the credibility of a single witness ... The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth had been told. The cautionary rule referred to by De Villiers JP in R v Mokoena 1932 OPD 79 at 80, may be a guide to a right decision but it does not mean the 'appeal must succeed if any criticism, however slender, of the witnesses' evidence, were well founded ... ' It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[52] The first appellant testified that after the second appellant had left his house, the complainant told him that the second appellant raped her. While the two appellants were both still at the first appellant's house, the complainant testified that she told them that she was going to the police station immediately after she realised that the second appellant was busy having sexual intercourse with her in the presence of the first appellant and after she asked the first appellant as to why he allowed such a thing to happen. She indeed left the first appellant's house in the early hours of the morning of 9 October 2015 to the police station and pressed charges of rape against them. On her way to the police station and at the police station she phoned the first appellant asking him how he could allow such a thing to happen while he was her boyfriend. She was clear in her evidence that this angered her. She also phoned Ms X and reported

the rape to her. This conduct of the complainant is not consistent with the conduct of somebody who had consented to the sexual intercourse with someone. She was adamant in her evidence that she would not have consented to have sexual intercourse with her boyfriend's cousin. What makes her version probable is that the sexual intercourse took place in the same bedroom, on the same bed, where her boyfriend was lying at the time.

[53] She testified that even though she consumed alcohol on the night in question, she could appreciate what was happening around her from O'Hagan restaurant to her boyfriend's house until the two appellants went with her to the motor vehicle after she asked them to take her home. This evidence was strengthened by the fact that her shoes and her phone were found in the motor vehicle. How could they have gone to the motor vehicle if she did not go to the motor vehicle when she thought she was being taken home? If she did not go to the motor vehicle as she testified but remained at the first appellant's house, her shoes and cellular phone would have been found in the house. The only reasonable inference to be drawn under the circumstances is that her shoes and cellular phone were left in the motor vehicle at the time she was inside with the appellants when she thought she was being taken home.

[54] The evidence of the complainant as a single witness about the rape finds corroboration in the first appellant's evidence that she told him that the second appellant raped her, the report that she voluntarily made to her friend, Ms X at her first available opportunity and what she reported to Constable Rampore. There was a repeated consistency of her reports about the rape to various people and the court. The court *a quo* correctly found her to have been a good and credible witness whose evidence could be relied upon. It also correctly found the evidence of Ms X and Constable Rampore to have been credible and reliable.

[55] As against the evidence of the above state witnesses, the trial court correctly found the evidence of the two appellants to be contradictory and not probable. The second appellant testified that when he had sexual intercourse with the complainant, she was fine and not drunk as she was able to tell him that she was enjoying. At the same time he testified that the complainant asked them to buy her something strong to drink at O'Hagan and they bought it for her. She

was already drunk when they left O'Hagan restaurant. He further testified that while they were at the first appellant's house, as the complainant was busy smoking and upon realising that she was too drunk, the first appellant took a glass of wine from her hand and spilled it into the sink. The complainant cannot be drunk and drunk at the same time. Whenever it suited him the complainant was not drunk, she appreciated what was going on around her.

[56] He also testified that the complainant started flirting with him at O'Hagan in the presence of the first appellant suggesting that she was already drunk while they were there. The complainant testified that she complained to the first appellant that she did not like the way the second appellant was touching her while they were at O'Hagan. This evidence was not challenged but instead when the second appellant testified, it was the complainant who was flirting with him.

[57] Even if the complainant could have pushed the second appellant into the first appellant's bedroom and had sexual intercourse with him as he testified, it is not probable that that could have happened in the same room and bed where the first appellant was also lying and that it could have taken place in his presence. It is also not probable that the first appellant could not hear the conversation and movements of the second appellant and the complainant when they were having sexual intercourse on the same bed.

[58] What was also strange in the appellants' version was that when the complainant realised that the second appellant was busy having sexual intercourse with her, when she screamed and pushed him away from her asking the first appellant what was happening, the first appellant told her that she did not look properly and that it was not the second appellant who had been on top of her, but him.

[59] According to the first appellant's version, immediately he got under the blankets, he got a blackout. He does not know what happened until he heard the noise between the second appellant and the complainant on the corridor which woke him up. He hears there was an argument between the two of them, he confronts them about it, they do not respond. Strange enough he gives the second appellant his car keys and ordered him to leave without resolving the dispute between him and the complainant. After the second appellant had left,

the complainant tells him about the rape, he does nothing and does not say anything. In fact according to his version he saw nothing. The magistrate, in my view, correctly rejected this evidence as not being reasonably possibly true.

[60] It is my further view the trial court also correctly found that the complainant could not consent to the sexual intercourse with the second appellant, given her state of sobriety at the time and rejected his version. Counsel for the defence submitted that the trial court accepted the second appellant's version that the complainant consented to the sexual intercourse but qualified the definition of consent in that it found that she could not give valid consent to the intercourse. This argument is, in my view, misplaced and without merit. There is nowhere in the trial court's judgment where it had accepted the second appellant's version that the complainant consented to the sexual intercourse. The trial court found that there could not have been a valid consent to the sexual intercourse between the complainant and the second appellant given her state of sobriety at the time.

[61] The court *a quo* dealt with the definition of an accomplice and correctly held that the first appellant was guilty as an accomplice to the rape of the complainant by the second appellant. Counsel for the defence argued that the trial court erred in convicting the first appellant as an accomplice because whatever the complainant alleged regarding the first appellant's conduct, only happened after the alleged rape by the second appellant had already taken place.

[62] At page 142 of the record lines 12 to 20 the trial court said the following:

" Accused 1 covered for accused 2 by saying that he was the one who penetrated the complainant. He was not surprised by what was happening. He was well aware of the fact that the complainant was drunk before they went to sleep. He in a way was also aware of accused 2's intentions. Based on this afore-mentioned conduct he associated himself with the act of accused 2 to penetrate the complainant."

[63] When one looks at the totality of the evidence, the first appellant was indeed aware of the actions of the second appellant. According to the

complainant he was looking and watching at what the second appellant was doing while he was on top of her. He did nothing to stop him until she woke up and was able to see what was happening. When she asked what was happening, despite the fact that the complainant clearly saw that it was the second appellant on top of her, he denied it and said it was him, she did not see properly. From his own version when he realised that the second appellant and the complainant had an argument, he did nothing. He did not care about the complainant. He also did not have any reason not to accompany her to the police station while it was not safe for her to walk alone at night.

[64] In convicting the first appellant as an accomplice to the rape of the complainant, the court *a quo* took into consideration the totality of the evidence. In my view it correctly rejected the evidence of the appellants as not reasonably possibly true. I cannot therefore find any misdirection on the court *a quo*'s finding. The two appellants were correctly convicted.

[65] Consequently the appeal against the convictions of the first and second appellants is dismissed.

M J TEFFO

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I agree:

N DAVIS

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES

For the appellants

Instructed by

For the respondent

Instructed by

Date heard

Date handed down

P M Ramoshaba

P M Mositsa Inc

Mr Wilsenach

The Director of Public Prosecutions

26 January 2018

6 March 2018