



IN THE NORTH WEST HIGH COURT, MAFIKENG

CA 33/12

In the matter between:

GERT NEELS FOURIE

Appellant

and

THE STATE

Respondent

CRIMINAL APPEAL

HENDRICKS J; KGOELE J

DATE OF HEARING : 28 FEBRUARY 2013

DATE OF JUDGMENT : 28 FEBRUARY 2013

COUNSEL FOR THE APPELLANT : ADV NKHAHLE

COUNSEL FOR THE RESPONDENT : ADV JACOBS

EX TEMPORE JUDGMENT

HENDRICKS J

[A] Introduction

- [1] The Appellant was arraigned in the Regional Court, Lichtenburg on a charge of rape. It was alleged that he unlawfully and intentionally committed an act of sexual penetration with a 25 year old female by inserting his penis into her vagina without consent. He was convicted on 12 May 2011 and sentenced to life imprisonment.
- [2] On the 24th November 2011 the Appellant filed a notice of appeal with the Clerk of that Court against the sentence only. However in the heads of argument filed on behalf of the Appellant with the Registrar of this Court on 08 February 2013, an attack is launched also against the conviction. This prompted counsel for the Respondent, quite correctly in my view, to raise *in limine* the fact that the conviction is not covered by the said notice of appeal. However, in the interest of justice, we deemed it necessary to exercise our inherent power of review in terms of Section 22 of the Supreme Court Act 59 of 1959 and allowed counsel to address us also on the merits of the appeal. This however should be seen as an exception rather than the rule. It need to be stressed that the Rules of Court should not be willy-nilly disregarded but be adhere to.

[B] The Facts:-

- [3] The facts of this case, as testified to by the State witnesses, can be succinctly summarized as follows:-

The complainant, a 25 year old female at that time, was at a shebeen in the company of her friend on the 1st April 2010. She stumbled across the Appellant who is her uncle. They conversed and he bought some of the liquor that the complainant and her friend consumed. At some stage, the Appellant called the complainant outside the shebeen in order to talk to her because he wanted to propose love to the complainant's friend. They went outside.

Outside the shebeen, the Appellant grabbed hold of the complainant's hand and walked with her towards his house. Along the way, he produced a knife which he held against her neck and threatened to stab her with it if she dare raise an alarm.

Upon arrival at his house, he opened and took her into his bedroom where he ordered her to undress. She refused and he undressed her and himself and had sexual intercourse with her, without her consent. Thereafter, he gave her a tissue to wipe herself. They dressed up and went back to the tavern together.

- [4] On the way back to the tavern, the Appellant offered her a cigarette which she accepted and smoked. Upon their arrival at the tavern she found her boyfriend and introduced him to the

Appellant, her uncle. She did not report the incident to her boyfriend or her friend. They spend some time together at the shebeen and they parted ways with the Appellant. The following day, the Appellant paid a visit to complainant's parental place where food was even offered to him. Nothing was said about the alleged rape incident. Thereafter, he had visited a couple of times and the complainant remained tight-lipped. Four days after the alleged incident, on the 5th April 2010, the complainant had consensual sexual intercourse with her boyfriend. Still no report was made about the alleged rape incident.

[5] On the 6th April 2010 she ultimately reported the incident to her father who in turn informed her mother. Criminal charges were preferred against the Appellant on the 10th April 2010. The complainant consulted a medical doctor on the 12th April 2010, eleven (11) days after the incident and after she had consensual intercourse with her boyfriend in the interim.

[6] It was contended on behalf of the Appellant that doubt exists whether the complainant was indeed raped and the Appellant should be given the benefit of the doubt. The complainant was a single witness with regard to the rape. Her conduct needs to be carefully scrutinized.

[7] First of all, the Appellant was no stranger to her – in fact he is a relative, an uncle to her. She had as casual chat with the Appellant at the shebeen. She even asked for money from him and he even bought liquor for her and her friend. The mood amongst them must have been very friendly and cordial. The

Appellant wanted to make advances towards the friend of the complainant, but all of a sudden pounds upon the complainant and forced her at knife-point to accompany him to his house.

[8] After the sexual encounter he even gave her a tissue to wipe herself which she left in his bedroom. Evidence which she could have taken along to prove that he had sexual intercourse with her. If that is not enough, she accompanied him back to the shebeen and accepted the cigarette he offered her and thereby proverbially smoked the piece pipe. No animosity whatsoever was displayed by her.

[9] Back at the shebeen, after she met her boyfriend, she introduced him to the Appellant, her uncle. This was the ideal opportunity for her to make a report to someone that she trusted and with whom she was in love with. She failed to seize the opportunity. To add to that, they spend time together at the shebeen. She did not even report the incident to her friend.

[10] In the days that followed, she had on numerous occasions failed to report the incident to anybody, even though the Appellant on occasions showed up at her place. She even went to the extent of having consensual intercourse with her boyfriend four days after the incident and again failed to seize the opportunity to inform him what ordeal befell her.

[11] Out of the blue, the next day, she made a report to her father and she was very emotional about it. Mind you, she is not a small child. She is the mother of two children. Not only was she all of a

sudden overcome by emotions when she made the report to her father but even during the trial, was she so emotional that she cried and the Regional Magistrate had to ask her mother to sit next to her whilst she testified in order to comfort and morally support her. Strange behaviour indeed from what her reactions was after the ordeal with the Appellant on 1st April 2010. She was even not emotional when she asked money from the Appellant after the sexual intercourse – what she called rape.

[12] Taking into consideration the conduct of the complainant after the alleged incident, it is very much doubtful whether she was indeed raped as she alleged. The benefit of the doubt should be given to the Appellant and the conviction as well as the sentence should therefore be set aside.

[C] Order:-

[i] The appeal is upheld.

[ii] The conviction and sentence is set aside.

R D HENDRICKS
JUDGE OF THE HIGH COURT

I agree.

A M KGOELE
JUDGE OF THE HIGH COURT