THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

JUDGMENT

Case No 510/10

In the matter between:

THOKOZANE PHILANE SINDANE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Sindane v The State* (510/10) [2010] ZASCA 157 (1 December 2010)

Coram: PONNAN, MHLANTLA et TSHIQI JJA

Heard: 22 November 2010

Delivered: 1 December 2010

Summary: Rape ─ appeal against conviction ─ assessment of evidence totality of evidence to be considered ─ whether all elements of offence proved.

ORDER

On appeal from: KwaZulu-Natal High Court (Pietermaritzburg) (K Pillay and Van Zyl JJ sitting as court of appeal):
The appeal against conviction is dismissed.

JUDGMENT

MHLANTLA JA (PONNAN JA and TSHIQI JA concurring):

[1] Does 'rape' mean rape is evidently what we are called upon to decide in this case? The suggestion on behalf of the appellant being that when the complainant repeatedly used that word during the course of her evidence she had no real appreciation of its meaning or import. That question arises against the following backdrop.

[2] The appellant, Thokazane Sindane, an educator, was charged in the Regional Court, Pietermaritzburg with rape involving his 19 year old domestic worker. The charge against him was based upon an occurrence at his home on Sunday, 24 July 2005. On 17 April 2007, the appellant was convicted of rape and sentenced to ten years' imprisonment. An appeal against his conviction was dismissed by the KwaZulu-Natal High Court (Pietermaritzburg), (K Pillay J, Van Zyl J concurring). His appeal is before us with the leave of that court.

[3] The complainant testified that on the day in question, she had gone to church and on her return, found no-one at home. The appellant arrived and let her in. She prepared food for him and thereafter carried on with her other household duties. She was busy ironing when the appellant approached her. He reminded her that in the past he had told her that he loved her and reiterated those feelings for her. She ignored him and carried on with her work.

[4] She testified that the appellant then started fondling her but she pushed his hands away. He grabbed her from behind and threw her onto the bed. He lifted her skirt, pulled her panty aside and raped her. She cried and protested but no one heard her because the television set had been switched on and the volume was high.

[5] After the incident, the complainant left the house. She attempted to call her mother in order to report the incident but could not get through to her. She waited for the appellant's wife and on her return made a report to her about having been raped by the appellant. The appellant was confronted by his wife about the allegation. Mrs Sindane berated him. She was upset and broke down crying, which attracted the attention of their neighbours.

[6] The complainant testified that she had never had sex before and that she was a virgin when the appellant raped her. She was taken to a doctor for treatment by Mrs Sindane, who by that stage was hysterical, and two of her neighbours. She was advised by them to lie to the doctor about the true identity of her rapists. The advice having been that if she had told the doctor that the perpetrators were unknown she would qualify for anti-retroviral treatment. According to the complainant, Mrs Sindane

thereafter convened a meeting with her (Mrs Sindane's) relatives to discuss what course to follow. She and certain other relatives later accompanied the complainant to her mother where they reported the incident.

[7] During cross-examination she admitted that the appellant had stated that he wanted sex and was adamant that the appellant had raped her. She denied that she had falsely implicated him to secure financial assistance for herself in the event that she fell pregnant.

[8] The complainant was thereafter examined by a district surgeon, Dr Abdul Akoo, two days later. Dr Akoo testified that the gynaecological examination of the complainant was quite difficult because she was very anxious. She would not allow him to insert his fingers into her vagina because it was very sore and tender. He recorded in the J88 form that her vagina was very tender, there was a slight vaginal discharge and her hymen had a bruise. Dr Akoo concluded that he could not exclude forced penetration, albeit that he was not 100 per cent certain. During cross-examination he stated that if any forced vaginal penetration had occurred, then the injuries sustained by the complainant would be consistent with those sustained by a virgin 48 hours prior to his examination of her. According to him, the tissue in her vaginal area, which has a good supply of blood, heals quite fast. That, so he testified, may explain the absence of tears 48 hours later.

[9] The appellant denied any involvement in the commission of the offence. He testified that he had found the complainant outside the house crying. She did not tell him what was troubling her despite his repeated enquiries. He informed his wife, when she returned from church, about

the complainant's distraught state. The former went to speak to the complainant and thereafter told him that the complainant had reported to her that she had been raped by unknown boys. His wife subsequently took the complainant to the doctor. When they returned, his wife confronted him with the allegation that he had raped the complainant. He denied the allegation contending that the complainant had falsely implicated him as she knew that he would be able to cover her medical expenses if she became pregnant. He testified that he then decided to 'stay away from this matter and to involve [himself] not in this matter'.

[10] The trial court cautioned itself that the complainant was a single witness and was mindful of the approach to be adopted when evaluating her evidence. The court accepted the complainant's testimony and concluded that she had no reason to falsely implicate the appellant. It rejected the appellant's version because it was 'so unlikely that it just cannot be true'. The trial court accordingly convicted the appellant as charged.

[11] The appellant appealed to the high court. In that court, various arguments were advanced on his behalf, on appeal, but the question of whether the complainant understood the full import of the word 'rape' when she used it in her evidence was never raised. The court below held that the magistrate had properly evaluated the evidence and that there was no basis for interfering with its finding. It thus dismissed the appeal.

[12] This issue was raised for the first time in the high court during the application for leave to appeal to this court. The high court appeared to have been persuaded that it had some merit and accordingly granted leave to appeal to this court.

[13] The common law crime of rape is defined as the unlawful and intentional sexual intercourse by a male person with a female without her consent.[1] The slightest penetration is sufficient. Before us, the thrust of the argument on behalf of the appellant was that the complainant did not quite comprehend what the word 'rape' meant especially since she had never had sexual intercourse before the incident. Counsel contended that it was incumbent upon the State to have adduced evidence to prove that she fully comprehended what the word meant. Absent such elaboration, so the contention went, an essential element of the offence, namely penetration, had not been proved.

[14] That submission cannot prevail. It is necessary to refer to the evidence in this regard. The record discloses the following twelve references to the word 'rape' during the complainant's testimony:

'Prosecutor: How do you know him?

Complainant: I know him because he is the one who raped me. I was employed by him.

. . .

Q: Yes?

A: The accused grabbed me from behind because I was facing the bed and he pushed me onto the bed. He then raped me.

. . .

Q: With your clothes on?

A: As a matter of fact I was dressed in a skirt and panties, a long skirt which eventually got torn during the struggle between myself and him. He then pulled the panty to the side, he then raped me. . . . Two of the neighbours came and they enquired what had happened and the accused's wife then explained that her husband, one Thokozane, had raped me.

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[1] C R Snyman *Criminal Law* 4 ed (2002) p 445.

. . .

Q: What did you tell the doctor then?

A: I said to the doctor that I had been raped coming from church by unknown males.

. . .

Q: You were a virgin when the accused raped you?

A: Yes.'

[15] During cross-examination, the appellant's counsel used the word 'rape' repeatedly. The complainant under cross examination was adamant that the appellant had raped her. She replied as follows to questions put to her:

'Q: But on the day in question he reminded you that he wants sex, is it?

A: Yes, that is what he said.

. . .

Q: Before you arrived at accused home, after the church, had you been raped by any boys?

A: No

. . .

Q: Why did you agree to say that you had been raped by unknown persons?

A: I agreed because I did not want any serious infection.

. . .

Q: Then how did he rape you with his pants on.

A: I do not know when he took off his pants but when he grabbed me he had his pants on.

. . .

Q: Accused denies that he ever raped you.

A: He did rape me.

. . .

Q: Accused also puts it to you that you mentioned him as the person who raped you for convenience so that you can be treated in case you have contracted a disease?

A: I was raped by him.

. . .

Q: Accused says what you told the doctor about the person who raped you was correct.

A: I was raped by him and he was intoxicated on the day in question.'

[16] A perusal of the record clearly shows that the complainant, who was 21 years old when she testified, repeatedly stated that she was raped. There is nothing on the record to suggest that she did not understand what the word 'rape' meant. The issue of penetration or what she understood by the word rape was never canvassed during her evidence. There is not a shred of evidence that suggests that the complainant did not appreciate or understand the import of the word when she used it. In my view, on the totality of the evidence, there can be no doubt that she fully comprehended what rape entailed. By the end of her evidence it became common cause that she had been raped. The only issue before the trial court was the identity of the perpetrator. The appellant's defence in the trial court, consistent with what the doctor had been informed on the evening of the incident, was that some unknown males were the perpetrators.

[17] Moreover, as an educator the appellant was not an unsophisticated person. If indeed the contact between him and the appellant had fallen short of penetration one would have expected him to have raised that in his defence. I accept that there is no onus on him, however one would have expected a person of his standing to take issue with the allegation and dispute that penetration had taken place. He instead chose initially to become aloof and at a very late stage, after he had already had two bites at the cherry this technical defence was opportunistically raised on his behalf.

[18] To all of that must be added the conduct of the appellant's wife. She became very upset when she heard the allegations. She scolded the appellant. She cried and broke down. She made a noise which attracted the attention of her two neighbours. She ensured that the complainant was taken to a doctor. She even reported the matter to her relatives. It is clear that the appellant's wife was left in no doubt that something untoward had happened in the house.

[19] Counsel for the appellant contended that the medical evidence was neutral. There is no merit in that submission. It is prudent to consider the J88 form in greater detail. Dr Akoo noted that the hymen was bruised and that the vagina was very tender and sore and there was a vaginal discharge. It is common cause that the complainant had not been sexually active prior to the incident. Those observations are all consistent with some kind of trauma to the complainant's vaginal area. It follows that the medical evidence, far from being neutral, in fact corroborated the complainant's evidence that a sexual assault had occurred. There is nothing to gainsay her evidence that the trauma was caused by the rape.

[20] In those circumstances, I am satisfied that the State proved all of the elements of the offence and established the guilt of the appellant beyond reasonable doubt. The appellant's version was correctly rejected as not being reasonably possibly true. There is therefore no basis to disturb the trial court's finding of guilt.

[21] For these reasons the appeal against conviction is dismissed.

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N Z MHLANTLA

JUDGE OF APPEAL

APPEARANCES:

APPELLANT:	L Barnard Instructed by Ngubane Wills Inc Pietermaritzburg; Naude Attorneys, Bloemfontein
RESPONDENT:	R Blumrick The Director of Public Prosecutions, Pietermaritzburg; The Director of Public Prosecutions, Bloemfontein