

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

CASE NO: A45/2022

Reportable: NO
Of Interest to other Judges: NO
Circulate to Magistrates: NO

In the matter between:

THABISO MARTIENS MOTLOUNG

APPELLANT

and

THE STATE

RESPONDENT

HEARD ON: 15 AUGUST 2022

CORAM: MHLAMBI, J et OPPERMAN, J

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for hand-down are deemed to be at 09h30 on 22 August 2022

[1] The appellant was convicted on two (2) counts of rape and sentenced to life imprisonment. Having successfully petitioned this court, he now appeals against both the conviction and sentence.

[2] The broad grounds of appeal are that the court *a quo* erred in the following respects:

2.1 Finding that the state proved its case beyond a reasonable doubt;

2.2 finding that the complainant and the state witnesses were credible and that there were no material contradictions in their testimony;

2.3 rejecting the appellant's version as not being reasonably possibly true.

[3] In its heads of argument, the respondent supported both the conviction and sentence. However, during the oral address, the state conceded that it could no longer support the conviction as it was flawed and the state had failed to prove the appellant's guilt beyond reasonable doubt.

[4] In his plea explanation, the appellant conceded that the complainant spent the night with him and they had sexual intercourse more than once. He gave her his phone to call her friends and inform them that she would not be going to her home that night.¹ The complainant confirmed in her testimony that the appellant gave her his cell phone but that he had told her to inform Dieketseng to tell the complaint's parents that she, the complainant, was at Medupi's place.

¹ Page 4 of the transcribed record.

[5] The common course facts are that on the evening of 9 January 2016, the complainant and Dieketseng walked together when the appellant appeared and he, together with the complainant, went to his shack where they had carnal relations until the following morning when the complainant's relatives arrived at the appellant's house looking for her. The appellant's mother found her in the appellant's shack that very morning and ordered her to leave. She left and went to Nkunkunyane's house where she made known for the first time that she was raped. The appellant knew for the first time of the rape two (2) weeks thereafter. The real issue is whether the complainant consented to the sexual act with the appellant or, as the state puts it, whether the trial court erred in finding that the complainant was a credible witness.

[6] The court *a quo* found that the state had proven its case beyond reasonable doubt and that the complainant was forcefully taken to the appellant's shack where he had carnal relations with her against her will.

[7] The complainant testified that at 18h45 on the day in question, she and Dieketseng Masilo were on their way to deliver a chain or piece of jewellery at Makhoro's place. As they passed the shop next to the appellant's place, he called her and asked for her cell phone number. She went to him as he stood by the gate of his home and gave him a false cell phone number whereafter he called her to a passage next to the shop and asked her to accompany him to his home. When she refused, he pulled out a knife and threatened to stab her if she did not comply. She left with him to his shack which was in his parents' yard where they had carnal relations against her will.

[8] Inside the shack, the appellant gave her his phone to phone Dieketseng and tell her that, in the event that the complainant's people enquired about the complainant's whereabouts, she should inform them that the complainant was at Medupi's place. Dieketseng responded and said that she would come and look for her. She was coerced to say this to Dieketseng as the appellant had a panga next to him. She never told the appellant's mother, who chased her away from the shack the following morning, how she got there and that the appellant had raped her.

[9] On the contrary, the second state witness, Dieketseng Masilo, testified that, as she walked with the complainant the appellant was standing at Mapuleng's shop. The appellant called the complainant who went to him while she kept on walking. After a time, the complainant joined her and they continued walking. They met with a friend, Thato, and all three of them walked together. They could not find the person to whom the chain was to be delivered. On their way back, they saw the appellant standing in his yard. As they passed his house, he went to the complainant and both of them walked away from Dieketseng and Thato, and entered a passage while Dieketseng and Thato entered the passage which led to the industrial area. The latter did not take a long time in the passage and when they reached its other side, they did not see the complainant and the appellant. The two continued their search for the owner of the chain but decided to go home as it was late.

[10] On being asked whether the complainant had entered the passage with the appellant of her own free will, Dieketseng stated that the complainant walked normally as the appellant held her by the hand. On being asked why did she not ask the complainant whether she was fine, she retorted that *"Initially she was standing with him at the shop"*, and they did not suspect anything.

[11] When she was about to reach her home, she was called by the complainant who told her that she was at Medupi's place, which was a shop in the neighbourhood. The complainant called and phoned her many times and every time the complainant told her that she was at Medupi's place and that she, Dieketseng, should go and look for her. Dieketseng could not find her on the two occasions she went there and, on the third attempt, decided to go home as it was late at night. The complainant's grandmother arrived at her home that evening and asked her about the complainant's whereabouts whereupon she informed her of the last time she saw her. The complainant's grandmother showed her an SMS message that the complainant sent to her using the appellant's phone.² The SMS stated that the complainant was at the industrial site and someone threatened her with a panga or

² Page 79 of the transcribed record.

knife.³ They then decided to go to sleep and thought that the complainant would come back the following day.⁴

[12] The following morning, Dieketseng informed Moleboheng and the complainant's grandmother, JZ T[....], that the complainant was in the company of Kevy's brother as she recognised him. This information she had given to the complainant's grandmother the previous night.⁵ She, the grandmother and the relatives then proceeded to the appellant's house where they met him standing outside. Thato confirmed that the appellant was the person who left with the complainant the previous day.

[13] The complainant's aunt, K[....] T[....], testified that she received a message from her mother, JZ T[....], on her phone on 9 January 2016 at 22h40, that the complainant was locked up. Her mother was informed by Dieketseng that the complainant left the previous night with Kevy's brother. The following day they proceeded to the appellant's house where, with the assistance of Thato, it was established that he was indeed Kevy's brother. The appellant acknowledged and told the complainant's relatives that the complainant left his place in the morning and went to one of her relatives. This was a confirmation of the complainant's version on this point, namely, that she told the appellant that, on leaving his shack, she would go to Nkunkunyane's house.

[14] The complainant's grandmother, Mrs. JZ T[....], testified that on 9 January 2016, as she tried to call the complainant's phone, she received an SMS message on her phone from the complainant that she was locked up. She informed the complainant's aunt, K[....] T[....], who phoned the cell number that forwarded the SMS message. K[....] then advised that she could hear dogs barking and the complainant said that she must call again as she, the complainant, was in danger and the place where she was, was dangerous.⁶

³ Line 1 to 5 on page 80 of the transcribed record.

⁴ Line 9 to 10 on page 80 of the transcribed record.

⁵ Line 16 on page 81 of the transcribed record.

⁶ Page 116 line 22 to 25 of the transcribed record.

[15] She, JZ T[....], went alone to Dieketseng Masilo and was informed by the latter that a gentleman had called the complainant and held her hand whilst she, Dieketseng, kept on saying to the complainant that they should go.⁷ The gentleman left with the complainant. She, Dieketseng, was scared to come to her (Mrs JZ T[....]) place and tell her that a certain gentleman had taken the complainant.

[16] In cross-examination, she conceded that the complainant did not call for help or asked for someone to be sent to find her as she was held without consent.⁸ As they did not know where to look for her, they decided to go to sleep. They did not seek the assistance of community members. The night was “*a very busy night, it was an up and down movement as many young men were now coming out of initiation.*”⁹

[17] The next day they went to the appellant’s house where they threatened the appellant that the complainant’s father was a very harsh man and, if needs be, he would shoot someone. Eventually the appellant informed them that the complainant spent the night at his place and left in the morning. She confirmed that the complainant told her that the appellant left her in the shack with his cell phone which she used to send them a message. The complainant had therefore the means to call for help but did not do so; instead, she admonished them not to phone back or call again as the place was dangerous.¹⁰

[18] The court *a quo* found that even though the state called five witnesses in support of its case, it relied on the single evidence of the complainant. However, it found that all five state witnesses were credible, honest and reliable. There was “*credibility in the complainant’s testimony as part of her evidence was corroborated by her friend Dieketseng.*”¹¹ The court found that even though there were discrepancies or contradictions in the state’s case, they did not negate the credibility of the state’s case as a whole.

⁷ Page 118 of the transcribed record.

⁸ Line 20 to 24 on page 132 of the transcribed record.

⁹ Line 2-5 on page 134 of the transcribed record.

¹⁰ Page 139 lines 10 to 20 of the transcribed record.

¹¹ Line 15 to 17 on page 236 of the transcribed record.

[19] The evidence on record shows that the complainant was not allowed to leave her home at night and that was the reason that triggered her grandmother to make inquiries about her whereabouts. On this day, the complainant left her home in the morning, went to watch young men at the initiation school, and later in the day she was also seen in the company of two gentlemen before she returned to the place where the initiates were before meeting the appellant. She gave the impression that she was forcefully taken away by the appellant whereas the testimony of Dieketseng contradicts this assertion. She created the impression that she made a telephone call to Dieketseng under duress. Dieketseng on the other hand testified that she made many calls to her saying that she was at Medupi's place. It would seem that the complainant made more calls as the witnesses testified that she informed them that she was either at Medupi's place or the industrial area or at a dangerous place and that her aunt should not call her again. From the evidence of the witnesses, it is evident that she had access to the appellant's cell phone to make several phone calls. Despite having access to his phone, she failed to ask for help. It is also remarkable that she did not inform the appellant's mother of the reason for her being in the appellant's shack and that he had raped her. It is also evident that she was on good speaking terms with the appellant as she informed him that she would be going to one of the relatives when she left his shack. And indeed she did so. It is ironic that despite the fact that she was aware that her grandmother and her relatives had gone to the appellant's house that morning looking for her, she chose not to go to them on leaving the shack, but to a more distant relative.

[20] Dieketseng knew where the appellant lived and that he was the last person seen with the complainant on the day in question. She knew, and conceded in cross-examination, that Botshabelo was a violent place at night and that serious harm could befall the complainant, yet she neither summoned help nor directed that the appellant's house be visited by either the police, community members or the complainant's relatives.

[21] The trial court found that: *"The accused person wanted to create an impression that this offence is an afterthought as he only learned of the rape charge against him two weeks after the incident took place. Based on this evidence it cannot be said that the complainant walked voluntarily with the accused to his home and*

that she consented to sexual intercourse. It is wrong to assume that she consented to sexual intercourse, only because she did not loudly proclaim her opposition or did not physically offer resistance. She was scared as she was threatened with a knife and a panga. She submitted to sexual intercourse and submission cannot be equated to consent. She lied to Dieketseng as the accused person forced her to lie regarding her whereabouts. She managed also to send the message to the grandmother as an indication that she was there against her will or wish.” The court then rejected the version of the appellant as false.

[22] There is no obligation upon an accused person to convince the court where the state bears the onus. His version need only be reasonably possibly true to be entitled to an acquittal even though his explanation is improbable. The court is not entitled to convict unless it is satisfied that, not only is the explanation improbable, but that beyond a reasonable doubt, it is false.¹² In *State v Mattioda*¹³ the following was stated:

“The proper approach in a criminal case is to consider the totality of the evidence, that is to say, to examine the nature of the state case, the nature of the defence case, the probabilities emerging from the case as a whole, the credibility of all the witnesses in the case, including the defence witnesses, and then to ask oneself at the end of all this, whether the guilt of the accused has been established beyond a reasonable doubt.”

[23] It is therefore evident that the court *a quo* misdirected itself in rejecting the appellant’s version as false and failed to consider whether it was reasonably possibly true, especially in the light of the yawning gaps in the state’s case. The accused is, in the circumstances, entitled to an acquittal and the appeal against conviction should succeed. The sentence, it follows, should fall away.

[24] I, therefore, make the following order:

Order:

¹² *State v V* 2000 (1) SACR 453 (SCA).

¹³ 1973 (1) PH H 24 (N) 49.

1. The appeal succeeds.
2. Both the conviction and sentence are set aside.

MHLAMBI, J

I concur

OPPERMAN, J

On behalf of appellant:

Instructed by:

Mr. P. van Der Merwe

Legal Aid South Africa

4th Floor Fedsure Life Building

49 Charlotte Maxeke Street

Bloemfontein

On behalf of respondent:

Instructed by:

Advocate M. Lencoe

The Office of the Director of Public Prosecutions

BLOEMFONTEIN