

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A607/2017
DPP REF. NO: PA 122/2017

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

29 MARCH 2021
DATE

PD. PHAHLANE
SIGNATURE

In the matter between:

BARENG TREVOR SPHANDA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

PHAHLANE, AJ

- [1] The appellant was arraigned before the Regional Court, Pretoria for contravening the provisions of sections 3 of the Criminal Law Amendment (Sexual Offences and Related Matters) Act 32 of 2007. He pleaded not guilty and was convicted of rape on 13 April 2015 and sentenced to 15 years imprisonment on 3 June 2015. His application for leave to appeal against conviction and sentence was refused by the trial court and he was granted leave to appeal against conviction when he petitioned the Judge President of the Gauteng Division on 17 October 2017. Subsequent thereto, his appeal was enrolled for hearing, but the matter was however removed from the roll due to the record being incomplete. The appeal lapsed, and the appellant now applies for condonation for the late filing of his application for appeal and for the appeal to be reinstated, and stated that there are prospects of success on the merits of the appeal. A detailed account for the causes of the delay is stated in his founding affidavit in support of the application.
- [2] Advocate Mashudu on behalf of the respondent indicated that the application for condonation and reinstatement of the appeal are not opposed and that in the interest of justice, the respondent accepts the explanation as set out in the appellant's affidavit in support of his application. The court was also satisfied with the explanation and reasons advanced and consequently, the condonation was granted, and the appeal was reinstated.
- [3] The offence for which the appellant was convicted for, occurred on 7 February 2011 where it was alleged that the appellant had unlawfully and intentionally committed an act of sexual penetration with a female person, Palesa Mabusela, who was thirteen (13) years old at the time, by inserting his penis into her vagina without her consent. The conviction of the appellant was based on the testimony of the complainant who was a single witness. She testified that while sleeping with her siblings at her parental home, she heard a knock on the door around 20:00. She dressed up and went to enquirer who it was, and the appellant responded by identifying himself with his name. She opened the door for the appellant who said he was there to buy cigarettes. She explained that her family sold cigarettes and chips in the premises. She went to her parent's bedroom to

collect the cigarettes and change for R20 which she received from the appellant. While still in the bedroom, the appellant entered the bedroom and undresses her and raped her by inserting his penis into her vagina. She testified that she could not scream because the appellant closed her mouth with his hand. The incident lasted for an hour and she did not feel any pain and did not experience any bleeding during the incident. She did not tell her mother about the incident because the appellant warned her not to tell anyone. A few days later she started experiencing pain in her vagina and decided to tell her younger sister about the pain in her vagina, and she in turn told her mother. When her mother questioned her about the incident, she still did not disclose what had happened. Her mother sought the assistance of a neighbour, Ms Christina Mahlangu, and she then disclosed to the Ms Mahlangu what happened, and she was thereafter taken to the hospital and was examined.

[4] Ms Mahlangu testified that she was summoned by the complainant's mother and upon her arrival, she found the complainant crying. She said the complainant's mother wanted the complainant to tell her that she has been raped. The complainant was crying and when she asked why she was crying, the complainant told her that she had been crying because her mother had assaulted her. The complainant never told her about the rape, but she learned about the alleged rape from the complainant's mother.

[5] Doctor Sebopa who examined the complainant testified that the complainant had no vaginal injuries save for the fact that her clitoris was swollen and tender. There was no scarring or bleeding of the posterior fourchette and there were no bumps or clefts observed on the hymen. There were no injuries on the vagina suggesting forced penetration. The doctor conceded that one would have expected to find injuries to the vagina where penetration was forceful and the penetration was by an adult male person with a penis, more particularly with a child who was of the same age as the complainant. She however noted that there was a discharge, which according to her opinion, was suggestive of sexual activity and that it was sexually transmitted because it was foul smelling and yellowish in colour. Under

cross-examination, Dr Sebopa testified that in order to contract the sexually transmitted infection and to have a particular discharge present, there need not be any penetration of the penis to the vagina and that the touching of the penis to the vagina can cause same. When confronted about the possibility of other causes of infections other than those sexually transmitted or contracted during sexual contact, she admitted that there might be other causes such as when the child had a thrush which is infected or that because of the pH balance in the vagina, the thrush becomes infected. She confirmed that the colour of the discharge is not necessarily indicative of the fact that it was sexually transmitted infection.

- [6] The appellant also testified and admitted going to the complainant's house to buy cigarette but denied entering the house and raping her. He testified that he stood at the door and that it took him only one minute because he was with his sister who was at the time waiting for him at the gate of the complainant's home. From the complainant's home, they went to the spaza shop and thereafter they went home and he went to sleep. His sister Ms Msibi corroborated his evidence and stated that when the appellant went to buy cigarette at the complainant's home, he spent only two minutes because she was waiting for him at the gate and they thereafter went to the spaza to buy the things she needed and went home afterwards.
- [7] The trial court held that although the complainant was a single witness, she was a good witness who did not fabricate or contradict her evidence. The court further held that even though the doctor made some concessions under cross-examinations and her evidence was inconclusive, her conclusion however remained intact because her findings were that the swelling of the clitoris was due to forced penetration by a blunt object.
- [8] As a court of appeal, this court must determine as regards the conviction, what the evidence of the state witnesses was, as understood within the totality of the

evidence led, including evidence led on the part of the accused or defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the said facts in coming to its decision.

[9] In order to succeed on appeal, the appellant must convince this court on adequate grounds that the trial court was wrong in accepting the evidence of the State and rejecting his version as not being reasonable possibly true.

[10] It is trite law that a court of appeal will not interfere with the trial court's decision regarding a conviction unless it finds that the trial court misdirected itself as regards its findings or the law¹. This court has to determine, as a court of appeal, whether the appellant was correctly convicted in respect of the rape conviction. Credibility findings and findings of fact of the trial court cannot be disturbed unless the recorded evidence shows them to be clearly wrong.

[11] In **S v Francis**² it was held that:

"The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings, bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional circumstances that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony."

¹ See: R v Dhlumayo & Another 1948 (2) SA 677 (A).

² 1991 (1) SACR 198 (A) at 198j-199a.

[12] In **S v Hadebe and Others**³ the Supreme Court of Appeal held that:

“In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong”.

[13] This position was reaffirmed by the Supreme Court of Appeal in **S v Monyane and Others**⁴ where the court stated that:

“This court’s power to interfere on appeal with the findings of fact of a trial court are limited...In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong”.

[14] On appeal, the findings of the trial court were attacked. Mr Viviers submitted that the trial court misdirected itself in assessing and evaluating the evidence. The basis for his submission was premised on the fact the trial court having correctly pointed out that the complainant was a single witness, it did not consider her evidence which was contradicted by the evidence of other state witnesses. Counsel insisted that the contradictions in the complainant’s evidence had a material impact on her credibility and reliability as a single witness, and also with regards to the sequence of events that transpired in the bedroom, and the fact that Ms Mahlangu indicated that the complainant never reported to her that she was raped because she only learnt about the rape from the complainant’s mother. Mr Viviers further argued that the trial court misdirected itself by holding that the evidence of Ms Mahlangu did not add value to the State’s case and that her evidence was highly unlikely.

³ 1997 (2) SACR 641 (SCA) at 645e-f; See also: S v Pakane and Others 2008 (1) SACR 543 (SCA) at para 15

⁴ 2008 (1) SACR 543 (SCA) at para 15.

[15] The Learned Magistrate indicated in her judgment that the evidence of Ms Mahlangu did not assist the court because she disputed the first report about the incident that was made to her as indicated by the complainant. The court held that the evidence of this witness was highly unlikely because she did not agree with, and corroborate the evidence of the complainant.

[16] I do not agree with the finding of the trial court in this respect. The complainant testified that she was crying and threatened with a beating by her mother if she does not tell the truth and that Ms Mahlangu was roped in to have a conversation with her and she thereafter confided in Ms Mahlangu. This evidence was not supported by Ms Mahlangu who testified that the complainant's mother wanted the complainant to tell her that she has been raped. In this regard, the evidence begs clarity as to whether Ms Mahlangu was the first report, and whether the evidence of the complainant that she reported the rape after getting a hiding from her mother should not have been treated with caution.

[17] In my view, the trial court should have properly evaluated the evidence of the complainant and taken due regard to the probabilities and improbabilities inherent in the evidence of the complainant, and investigated whether such evidence was substantially satisfactory, rather than dismissing the evidence of Ms Mahlangu as being 'highly unlikely' and not of any assistance to the court, bearing in mind that Ms Mahlangu was a State witness.

[18] I am of the view that the trial court misdirected itself in its finding of facts by disregarding the evidence of Ms Mahlangu on the basis that it did not corroborate the evidence of the complainant.

[19] On the other hand, the court should have been cautious or applied caution in dealing with the evidence of the complainant. Although the cautionary rule as previously applied in the evidence of complainants in sexual cases was

abolished by the Supreme Court of Appeal in **S v Jackson**⁵, coupled with the provisions of section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 which provides that a court may not treat the evidence of a complainant in a sexual offence with caution on account of the nature of the offence, I am of the view that the trial court should have applied caution when considering (a) the evidence of the complainant as a single witness, (b) the evidence Ms Mahlangu who contradicted the complainant; (c) the evidence of the appellant as he denied the offence; (d) and the evidence of the doctor who ultimately conceded that there might not have been sexual penetration on the complainant.

[20] The cautionary rule relating to the evidence of children entails that the presiding officer should fully appreciate the dangers of accepting the evidence of children. In terms of the cautionary rule, the court should not easily convict unless the evidence of the child has been treated with due caution. Where the child witness is also the sole witness, the evidence should be regarded with more caution. In dealing with the evidence of children, our courts have developed a cautionary rule which should be applied to such evidence. Consequently, the court will seek corroboration, even though corroboration of a child's evidence is not required by law. Where the child's evidence is not corroborated, it must be scrutinised with great care and accepted with great caution. The rationale for this approach was followed in **R v Manda**⁶ where the court emphasised that the dangers inherent in relying on the uncorroborated evidence of a young child should not be underrated. The court explained that the danger involved in the evidence of children can be attributed (among other factors) to their "imaginativeness and suggestibility", that require their evidence to be scrutinised with care.

[21] Having said that, advocate Mashudu on behalf of the respondent submitted that contradictions *per se*, do not lead to the rejection of state witnesses' evidence and further that the contradictions in this case were not fatal to the State's case.

⁵ 1998 (1) SACR 470 (A).

⁶ 1951 (3) SA 158 (A) at 163 E-F.

Counsel argued that even though there are contradictions regarding the person who the matter was first reported to, and the extended period of an hour which, according to the doctor is unlikely as the complainant would have sustained serious injuries as opposed to the injuries she observed during her examination on the complainant, those contradictions were not fatal. Counsel however admitted that the complainant might have exaggerated on the period of time when she was raped, but that she did not make any mistakes about the identity of the appellant as he was known to her and was a friend to the complainant's father, and further that they stayed in the same premises together. On the same token, counsel conceded that if one looks at the evidence of the complainant that she was forcefully penetrated for an hour and compare it with the evidence of the doctor that one would have expected serious injuries, the State should have submitted that this aspect on its own should have raised a concern to the court.

[22] It is on this basis that Mr Viviers submitted that there was no proper assessment and evaluation of the evidence because of the inherent contradictions and improbabilities, and the fact that there were no reasons advanced by the trial court to reject the evidence of the appellant as improbable.

[23] It is common cause that the complainant *in casu* was a single witness on the essential aspect of the charge of rape. The legal position was aptly stated by Makgoka J in the matter of **Mayisela v S**⁷ as follows:

"[7] The issue in this appeal is whether or not there was penetration — a key consideration which has a bearing on the conviction. This aspect is dependent on the evidence of the complainant who was a single witness".

[24] Section 208 of the Criminal Procedure Act states clearly that 'an accused person may be convicted of any offence on the single evidence of any competent

⁷ (A827/2011) [2013] ZAGPPHC 91; 2013 (2) SACR 129 (GNP) (28 March 2013).

witness'. However, there are guidelines and principles which must be adhered to by the court if a conviction on the evidence of a single witness should follow.

[25] In **S v Webber**⁸ the court held that:

"A conviction is possible on the evidence of a single witness. Such witness must be credible, and the evidence should be approached with caution. Due consideration should be given to factors which affirm, and factors which detract from the credibility of the witness. The probative value of the evidence of a single witness should also not be equated with that of several witnesses".

[26] In **S v Sauls and Others**⁹ the court held that:

"There is no rule of 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 has been told". (See also: S v Webber 1971 (3) SA 754 (A) at 758; R v Mokoena 1956 (3) SA 81 (A) at 85)

[27] The court can based its findings on the evidence of a single witness where such evidence is substantially satisfactory and there is corroboration which in many respects, should consist of independent evidence¹⁰. In this regard, the evidence of Dr Sebopa under cross-examination made it clear that, safe for the presence of the discharge, there were no injuries to the vagina that would suggest penetration, given the fact that a child of the age of the complainant, when penetrated by an adult person with a penis, one would have expected to find

⁸ 1971 (3) SA 574 (A).

⁹ 1991 (3) SA 172 (A).

¹⁰ See S v Gentle (317/2003) [2005] ZASCA 26 (29 March 2005).

injuries to the vagina especially where penetration was forceful or there was dry penetration.

[28] The doctor conceded that having initially testified that the complainant had a discharge which was sexually transmitted because of the yellowish colour and foul smell, in order to contract sexually transmitted infection and to have that particular discharge present, there need not be any penetration of the penis to the vagina because mere touching of the penis to the vagina can cause the same effect. She further conceded that having a discharge is not necessarily indicative of the fact that it was a sexually transmitted infection. According to her, the swelling of the clitoris might have been caused by scratching as a result of having a discharge.

[29] It had appeared that the doctor took the sample of the discharge to the laboratory for testing but there was no indication of the sample being recorded on the J88 and the doctor was also not in possession of the results thereof. When asked about the doctor who initially examined the complainant, she indicated that she was not aware that the complainant was attended by another medical practitioner and stated that the previous medical practitioner should have completed the J88 form. The evidence of the doctor therefore shows that she based her findings on the foul smell in the discharge.

[30] Based on the above, it is clear that there was no conclusive medical evidence on which the doctor could base her conclusions or findings. Furthermore, the evidence of the doctor did not corroborate the evidence of the complainant on equally important aspects of the complainant's evidence, in view of the medical report and the evidence of the doctor.

[31] It must be emphasised immediately that by corroboration is meant for other evidence which supports the evidence of the complainant, and which rendered

the evidence of the appellant less probable. This means that doctor Sebopa's evidence did not corroborate the evidence of the allegation of rape, more particularly because she confirmed under cross-examination that had there been forceful penetration which lasted for an hour, there would have been healing scars, but there was none. This, accompanied by the fact that her finding was only based on the foul smell in the discharge.

[32] Nonetheless, the trial court held that the evidence of doctor Sebopa was that the swelling on the clitoris and hymen area was caused by forced penetration by a blunt object. On the contrary, this was not the doctor's evidence. It is on this basis that advocate Mashudu conceded that the concessions made by the doctor regarding her conclusions should have raised a red flag which should have prompted the trial court to ask clarifying questions on critical issues to establish the truth, and that was not done.

[33] To secure a conviction in a criminal trial, the State must prove all the elements of the crime beyond a reasonable doubt. With regards to the question whether trial court was correct in finding that the State proved its case against the appellant, the evidence of the State has to be measured against the evidence or version of the appellant as to whether his version could be said to have been reasonably possibly be true. Of course, this cannot be done in isolation, but the court has to consider the totality of the evidence before it, in order to come to a just decision.

[34] When evaluating or assessing evidence, it is imperative to evaluate all the evidence and not be selective in determining what evidence to consider.

[35] In **S v Chabalala**¹¹ the Supreme Court of Appeal amplified as follows, the 'holistic' approach required by a trial court in examining the evidence on the question of the guilt or innocence of an accused:

¹¹ 2003 (1) SACR 134 (SCA) at para 15

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weights so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt".

[36] As already indicated, the appellant denied raping the complainant. His counsel submitted that the trial court erred in convicting the appellant when there was no evidence upon which to convict. The basis for his submission was premised on the fact that the doctor conceded that there was no evidence of sexual penetration and that her findings were only based on foul smell from a discharge.

[37] I am inclined to agree with Mr Viviers because in rejecting the evidence of the appellant and the defence witness, the trial court held that the evidence of Ms Msibi is rejected because she has a reason to favour the appellant because it is her brother and would not want something bad happening to him.

[38] This is by no means a reason to reject a witness' evidence. It is important to note that the trial court indicated in the judgment that the appellant never contradicted himself during his evidence in chief or his cross-examination, and there was also no criticism by the trial court against the content of the evidence of the defence witness. This conclusion finds reference to a principle in our law that, there is no onus on the accused to prove his innocence as stated by the court in **S v Letsoko**¹² that:

"It is settled law that there is no onus on the accused to prove his innocence, and the question remains whether the state proved the offence charged beyond reasonable doubt".

¹² 1964 (4) SA 768 (A).

[39] As indicated *supra* that in criminal proceedings the State bears the onus to prove the accused's guilt beyond a reasonable doubt, the accused's version cannot be rejected solely on the basis that it is improbable. It is only when the trial court has made a finding on credible evidence that the accused's explanation is false beyond a reasonable doubt¹³. The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. It is trite that in an appeal the accused's conviction can only be sustained after consideration of all the evidence and the accused's version of events.

[40] In **S v V**¹⁴ Zulman JA said the following:

"It is trite that there is no obligation upon an accused person, where the State bears the onus, to convince the court. If his version is reasonably possibly true, he is entitled to his acquittal although his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably true but one subjectively believes him is not the test."

[41] In determining whether the accused's version is reasonably possibly true, the Supreme Court of Appeal in **S v Trainor**¹⁵ stated that:

"A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must be of necessity, be evaluated, as must corroborative

¹³ **S v V** 2000 (1) SACR 453 (SCA) at 455B

¹⁴ 2000 (1) SACR 453 (SCA) at 455 a-b, para 3.

¹⁵ 2003 (1) SACR 35 (SCA) at para 9

evidence, if any. Evidence of course, must be evaluated against the onus of any particular issue or in respect of the case in its entirety”.

[42] *In casu*, this principle was never followed by the trial court. The presumption of innocence is an established principle of the South African law which places the burden of proof squarely on the prosecution. It requires that the prosecution bear the burden of proving all the elements of a criminal charge.

[43] In **S v Sithole**¹⁶ the court stated that:

“There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond a reasonable doubt. The corollary is that the accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true”.

[44] On a conspectus of the evidence on record and the arguments and submissions made before this court, I am of the view that the appellant should have been given the benefit of doubt and acquitted by the trial court, bearing in mind the concessions made by the doctor. These concessions were also made by the trial court in its judgment as well as the respondent during the appeal proceedings - that the appellant should have been given the benefit of doubt. In the circumstances, it cannot be said that the State succeeded in proving its case or the guilt of the appellant beyond a reasonable doubt.

[45] In **S v Van der Meyden**¹⁷ Nugent J stated that:

“What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or acquit) must account for all the evidence”.

¹⁶ 1999(1) SACR 585 (W)

¹⁷ 1999 (1) SACR 447 (W); See also: Rex v De Villiers 1944 AD 493 at 508-9.

[46] The trial court in electing to disregard the evidence of the defence without having due regard to the principles on the question of fact and law, is an indication that the trial court misdirected itself in its findings.

[47] Having given proper and due consideration to all the circumstances, this court finds that the trial court misdirected itself in convicting the appellant for the offence of rape. We are of the view, the state has not succeeded in proving its case beyond reasonable doubt, especially in the light of the improbabilities inherent in the circumstances of this case. Accordingly, we are of the view that the state did not discharge the onus of proving beyond reasonable doubt that the appellant raped the complainant.

[48] In the circumstances, the appeal should succeed and the conviction accordingly be set aside.

[49] I propose the following order:

1. The appeal is upheld.
2. The conviction and sentence are set aside.



PD PHAHLANE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree, and it is also so ordered.



DS FOURIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA
26/3/21

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