



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **CA&R 85/2017**
DATE HEARD: **25 JUNE 2018**
DATE DELIVERED: **29 JUNE 2018**

In the matter between:

BAMBISO, MOOKETSI CHEVRON

Appellant

and

THE STATE

Respondent

Coram: Olivier J et Coetzee AJ

JUDGMENT

Olivier J:

[1.] The appellant, Mr MC Bambiso, was convicted in the Regional Court on two counts of having raped the female complainant¹, by penetrating her vaginally (Count 2) and anally (Count 3) with his penis. It was found that, in terms of section 51(1) of the **Criminal Law Amendment Act**², read with the provisions of Part I of Schedule 2 of that Act, the prescribed sentence of life imprisonment was

¹ In contravention of the provisions of section 3 of the **Criminal Law (Sexual Offences and Related Matters) Amendment Act**, 32 of 2007

² 105 of 1997

applicable on the basis that the complainant had been raped more than once by the appellant and a co-perpetrator, acting “*in the execution or furtherance of a common purpose*”³, and that the complainant was “*a person who (was) mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007*”⁴. After finding that there were no substantial and compelling circumstances which would justify a lesser sentence, the Regional Magistrate imposed sentences of life imprisonment on each of the two counts, but ordered them to be served concurrently⁵. These sentences, having been imposed by a Regional Court, entitle the appellant to appeal against his convictions and sentences⁶.

- [2.] The case for the prosecution was that the complainant had been walking home along a footpath when she was grabbed by the appellant and a co-perpetrator, was forced into bushes and was raped by both, and both vaginally and anally. She reported the rapes and was then medically examined by Dr Haarhoff, who compiled a report (J88) which was handed in as an exhibit.
- [3.] The appellant’s version, as contained in his plea-explanation and in his evidence, was very briefly that a police officer by the name of Burksten⁷ and another person had approached him at a scrapyard where he was going to sell scrap metal. They took him with them, apparently on the false pretence that they would show him where to find more scrap metal. At one point, when the three of them were outside Warrenton and in bushes, he heard a woman crying. Two other men then appeared. They were holding the complainant, whose clothes were soiled and who had blood on her face. Burksten then instructed him to have intercourse with the complainant and, when he refused, forced him to do so by holding a firearm to his head. According to the appellant he only penetrated

³ Paragraph (a)(i) and (ii) of the definition of rape in Part I of Schedule 2

⁴ Paragraph (b)(iii) of the definition of rape in Part I of Schedule 2

⁵ Somewhat superfluously, in view of the provisions of section 39(2)(a)(ii) of the **Correctional Services Act**, 111 of 1998

⁶ See the proviso to section 309(1)(a) of the **Criminal Procedure Act**, 51 of 1977.

⁷ This is the spelling of the name in the transcription of the evidence, although it was spelt “*Braxton*” in the transcription of the judgment.

the complainant vaginally, and never anally. He further testified that, while he was having intercourse with the complainant, the two men who had brought her there, trampled on his back. The appellant went on to testify that, after he had completed the sexual intercourse with the complainant, Burksten examined his penis to confirm that he had ejaculated. He was then tied to a tree, half naked, and the men left with the complainant. When he later heard a vehicle and shouted for help, two young men came to his rescue by untying him, but they then chased him away. The appellant testified that Burksten did this to him because he had once witnessed how Burksten beat a boy to death. He testified, finally, that he had reported the rape incident to a detective by the name of Eksteen.

[4.] That the complainant had not consented to sexual intercourse with the appellant was, at the very least, implicit in his own version.

[5.] As far as the convictions are concerned the issues to be decided in this appeal are:

5.1 whether the finding by the Regional Magistrate that the complainant was a competent witness, was correct;

5.2 whether anal penetration had taken place;

5.3 whether not only the appellant, but also a co-perpetrator, had sexual intercourse with the complainant; and

5.4 whether the appellant had been coerced to have sexual intercourse with the complainant.

COMPETENCY OF COMPLAINANT AS A WITNESS

- [6.] As part of the state case the prosecutor presented the evidence of Dr Piotrowski, a psychiatrist who had evaluated the complainant and who actually knew her as a patient. His evidence, very briefly, was that the complainant was mildly to moderately mentally retarded and that, although an adult, she had the cognitive ability of a child between the ages of approximately 7 and 9 years old.
- [7.] Dr Piotrowski testified that, although the complainant found it difficult to verbalise answers and was shy, susceptible to intimidation and quick to withdraw under such circumstances, she could distinguish between truth and falsehood and *"should be able to tell the story"*.
- [8.] Dr Piotrowski furthermore testified that the complainant sometimes would suffer psychotic episodes, during which she would suffer from hallucinations, but it is clear that Dr Piotrowski was of the view that the complainant was not psychotic at that stage, and also not at the time of the incident, as she had conveyed to him detail about the incident that was consistent with certain objective facts, and in a consistent way.
- [9.] At a later stage of the proceedings, just before the complainant herself testified, the Regional Magistrate questioned her on her ability to distinguish between truth and falsehoods.
- [10.] When regard is had to the heads of argument on behalf of the appellant, the challenge in this regard appears not to be aimed at the finding that the complainant was a competent witness, in the sense envisaged in sections 192 to 194 of the **Criminal Procedure Act**⁸. It has not been argued that the Regional

⁸ "192 Every witness competent and compellable unless expressly excluded

Every person not expressly excluded by this Act from giving evidence shall, subject to the provisions of section 206, be competent and compellable to give evidence in criminal proceedings.

193 Court to decide upon competency of witness

The court in which criminal proceedings are conducted shall decide any question concerning the competency or compellability of any witness to give evidence.

194 Incompetency due to state of mind

No person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled."

Magistrate should, on the evidence of Dr Piotrowski and the answers of the complainant during the questioning, have decided that the complainant was someone who was, because of *“mental illness ... deprived of the proper use of (her) reason”*, as envisaged in section 194 of the **Criminal Procedure Act**.

[11.] What has been submitted, purely on the basis of the exchange between the Regional Magistrate and the complainant prior to her being admonished, was that it could not *“safely be said that the complainant understood what it meant to speak the truth”*. In making this submission the appellant’s legal representative quoted extracts from the Regional Magistrate’s questioning of the complainant. Although some of the answers reflected in these passages were not very convincing, it appears from even these passages that the complainant did at least understand that it would be wrong to tell lies and right to tell the truth.

[12.] The passages quoted should, however, not be viewed in isolation. When regard is had to the whole of the exchange between the Regional Magistrate and the complainant, it appears that she knew:

12.1 that she had been married, what her husband’s name was and that he was the one who divorced her, what her married surname was and what her maiden surname was;

12.2 where she stayed;

12.3 that she had children and what their names were;

12.4 that she was a member of the ZCC Church and that the surname of her pastor was M.; and

12.5 that she suffered from a mental ailment that she took medicine for, which she got at the clinic in Windsorton.

[13.] In my view there is no basis for interfering with the Regional Magistrate's finding that the complainant was a competent witness and was able to distinguish between what was true and what was not true.

CREDIBILITY

[14.] It is trite that a court of appeal should not readily interfere with the factual findings of a trial court⁹. However, it will, and in fact should, be done where such findings are clearly wrong¹⁰; All the more so where such findings are premised on the recorded evidence, rather than on demeanour¹¹.

[15.] The complainant was a single witness as regards the rape incident itself. As a result of the fact that her cognitive functioning was that of a young child, her evidence should also in view of the evidence of Dr Piotrowski have been regarded as that of a child of approximately 8 years old. For both these reasons the evidence of the complainant should have been approached with caution and should only have been accepted as a basis for any finding if "*substantially satisfactory in every material respect, or if there is corroboration*"¹².

[16.] For evidence to serve as corroboration it would have to pertain to the issue/s in dispute¹³.

[17.] In a case such as this "*It is trite that the state must prove its case beyond reasonable doubt and that an accused person is not obliged to give a version of events. However, if and when he does give a version, it must be reasonably possibly true for it to be accepted by the court. The trial court must, of course,*

⁹ Compare **Kebana v S** [2010] 1 All SA 310 (SCA) para [12]

¹⁰ Compare **S v M** 2006 (1) SACR 135 (SCA) para [40]

¹¹ Compare **S v Crossberg** 2008 (2) SACR 317 (SCA) para [149]

¹² **S v Mahlangu and Another** 2011 (2) SACR 164 (SCA) para [21]; See also **S v ML** 2016 (2) SACR 160 (SCA) para [7], where it was held that the evidence of a complainant who was a very young child and a single witness should "*not only be treated with caution, but a degree of corroboration is required to reduce the danger of relying solely upon her evidence to convict ...*"

¹³ Compare **S v Scott-Crossley** 2008 (1) SACR 223 (SCA) para [8]

examine the totality of the particular facts, and any inferences to be drawn, in considering its verdict"¹⁴.

ANAL PENETRATION

- [18.] It appears from the transcribed evidence of the complainant that she made use of gestures, by indicating to her backside, to explain that she had also been penetrated anally.
- [19.] In **Haarhoff and another v S**¹⁵ the Court was concerned with a 24 year old complainant who had the mental capability of a 10 year old child. It was found¹⁶ that the *"childlike manner"* in which that complainant had testified was *"consistent with that of the mind of a 10 year old"*. In my view the complainant's evidence regarding this issue should also be seen in this context.
- [20.] The fact that the ability of the present complainant to *"appreciate the nature and reasonable foreseeable consequences of a sexual act as well as her ability to express her unwillingness to participate in any such act"* was according to Dr Piotrowski diminished, unlike the complainant in the **Haarhoff** matter, is of no consequence. It was never the case of the appellant that the complainant had consented to any form of sexual intercourse with him, be it vaginally or anally.
- [21.] It was submitted on behalf of the appellant that Dr Haarhoff had only found that there was *"a mere possibility"* that the complainant had been penetrated anally, which did not sufficiently corroborate the complainant about anal penetration having taken place.
- [22.] It is clear from the record that Dr Haarhoff had more than once, in response to questions about whether there had been anal penetration, not been prepared to go any further than to say that it was possible. He based this opinion on the presence of an *"abrasion anterior to the opening of the anus which was red and*

¹⁴ **S v Makgatho** 2013 (2) SACR 13 (SCA) para [8]

¹⁵ [2017] 4 All SA 446 (ECG)

¹⁶ **Ibid**, para [32]

swollen". Dr Haarhoff was, however, never asked whether the abrasion could have been caused by something else, and just how strong the "*possibility*" was of it having been caused by anal penetration was never examined. His evidence did not therefore exclude the reasonable possibility that anal penetration had not taken place. This Mr Kgatwe, counsel for the respondent, correctly conceded. He also conceded that the uncorroborated evidence of the complainant was, as will also appear from what follows, insufficient to prove beyond reasonable doubt that there had been anal penetration, let alone by specifically the appellant. It follows that the appeal against the conviction should be upheld.

WAS THERE A CO-PERPETRATOR?

- [23.] There was no independent corroboration for the complainant's evidence that there had been a co-perpetrator with the appellant .

- [24.] Although the complainant remained steadfast in her version that she had been raped by the appellant and a co-perpetrator, there were material inconsistencies in her evidence that were also relevant to this issue.

- [25.] The appellant was convicted on the factual basis that he and his co-perpetrator had taken turns to rape the complainant. In her evidence-in-chief, when the complainant was describing how the appellant had penetrated her anus, she was asked: "*When the Accused before the Court was raping you as you described, what was the other one doing who is not at Court?*". Her answer to this question was "*He was also doing it. He also got on top of me*".

- [26.] When the prosecutor, clearly surprised by this answer, asked "*At the same time?*", the complainant answered "*Yes, when the other one gets off the other one would get on*".

- [27.] In her statement to the police the complainant supplied a version in terms of which the two rapists had penetrated her simultaneously, the one vaginally and

the other anally, and therefore a version that is completely inconsistent with the two rapists having taken turns to rape her. She admitted this inconsistency in cross-examination. Her answers when asked to explain this were far from clear and satisfactory, as appears from the following exchanges between her and the appellant's legal representative:

"So what you told the Police is at some stage these two men had sex – or sorry, these two men had their penis inside you at the same time, one in the anus and one in the vagina. === Yes.

You understand that? So which is different from what you told the Court because you say to the Court the one was having sex and then it was the other one. That's not the same story you told the Police. So please tell us why is there a difference in your story. === It is only now that I remember. I forgot. It's only now that I explain.

...

What is it that you forgot, the story of the Police that that is the real story, or the story that you are telling the Court that that is the real story? What did you forget? === I forgot to tell the Court the manner in which they did it to me.

But you did tell the Court the manner in which they did it to you. So what I want to know, is the story that you were telling the Court is that the true story or is the story that you told the Police is that a true story? === It's today's one."

And later:

"Okay, so now it is the second time you say that to the Police but you didn't say that to the Court today. That's not how you explained it. So which story do you want us to accept, the one you told to the Police or the one here at the Court? === Yes.

Yes to what Mam? Do you want us to accept what you told the Police or do you want us to accept what you told the Court? === Yes.

Do you not understand what I'm trying to ask you? === No.

You don't understand. Okay, so you told the Police one story right, as to what happened to you which I'm saying is not the same story that you are telling – or that you told the Court. Okay, so we are sitting with ... === I'm saying they assisted.

COURT: *They what? === They assisted me.*

They assist? === Assisted me.

...

Who assisted you? === That woman.

Is it the Police lady that took the statement? === Yes.

And when you say assisted, what does that mean? === By writing the statement.

Yes, we know that. She also told us she wrote the statement. Okay. But she didn't tell you what to say in this statement, correct? === No.

Okay, so we know, we've covered that now more than once that this is your story, this is your words. So now what I'm saying is what you told the Police is very different than what you are telling the Court today. So which story do you want us to accept, the one you told the Police or the one that you were telling today? Or do you want us to accept both stories, that is how things happened? === Yes."

- [28.] The complainant also did not initially in her evidence make any mention of an interruption in the attack on her, until she was confronted with the fact that, according to her statement, there had been an interruption of as long as approximately 30 minutes after the initial rapes, when the attackers told her to sleep, before they then each raped her again. It was only when she was in cross-examination confronted with this part of her statement that the complainant said that it was true and that she had forgotten about it until then.

- [29.] In these circumstances the complainant's evidence on the issue of whether she was raped by more than one person should in my view not have been accepted as credible without independent corroboration on this issue, which there was not.
- [30.] It appears from the evidence that Dr Haarhoff had taken a sample, by using a swab, of the white discharge that he had observed in the vagina and that he had suspected to be semen.
- [31.] The prosecutor presented only evidence that the appellant's DNA was found on the complainant's panty, and the report to this effect was also handed in as an exhibit. No evidence was presented as regards the outcome of DNA analysis (if it was in fact done) on the swab sample. If it appeared that the appellant had also been the donor of that sample, it would have meant that no unknown DNA was found, which would arguably have substantiated the appellant's version that the complainant had not been raped by another person during the same incident. Conversely, if the DNA of an unknown donor was found on the swab, it would have gone a long way towards corroborating the complainant's version.
- [32.] In the circumstances I am of the view of that it was not proved, beyond reasonable doubt, that there had been a co-perpetrator who had acted with the appellant in the execution of a common purpose and had also raped the complainant.

WAS THE APPELLANT COERCED?

- [33.] In **S v Van der Linde**¹⁷ it was confirmed, with reference to cases like **S v Trainor**¹⁸, **S v Van der Meyden**¹⁹ and **S v Van Aswegen**²⁰, that *"it is trite that the onus rests upon the State to prove the guilt of the accused beyond reasonable*

¹⁷ 2016 (2) SACR 377 (GJ) para [96]

¹⁸ 2003 (1) SACR 35 (SCA) (Also reported at [2003] 1 All SA 435)

¹⁹ 1999 (1) SACR 447 (W) (Also reported at 1999 (2) SA 79 (W))

²⁰ 2001 (2) SACR 97 (SCA)

doubt, after weighing up all the evidence before Court and in a holistic manner.”²¹.

- [34.] On this issue the complainant’s evidence remained consistent throughout. She persisted in her denial that the appellant had been forced to have intercourse with her, and in her denial of the appellant’s version in this regard, and her evidence in this regard was not in any way shaken in cross-examination.

- [35.] The appellant, on the other hand, was an exceptionally poor witness, especially on this issue, and there is no basis whatsoever for interfering in the Regional Magistrate’s rejection thereof. The appellant’s evidence as regards the alleged coercion was riddled with contradictions, inconsistencies and improbabilities.

- [36.] The appellant’s evidence about witnessing an assault committed by Burksten contradicted his earlier evidence that he had, before the incident, only seen Burksten when he was driving around in police vehicles.

- [37.] In cross-examination the appellant said that he had told Eksteen the name of the person who had held the gun, in other words on his version Burksten. In his evidence-in-chief he testified, however, that he had not known the name of the particular person at the time of the incident.

- [38.] It is also difficult to understand why Burksten would have thought that forcing the appellant to rape the complainant would keep him quiet on the issue of the assault on the boy.

- [39.] If the appellant had in the past often gone to Eksteen with complaints, as he claimed, why had he not told Eksteen about the assault on the boy before, or even after the rape?

²¹ See also **S v Vilakazi** 2016 (2) SACR 365 (SCA) para [17]

- [40.] Sergeant Fourie and Sergeant K Mogwerane, who were both police officers that were stationed in Warrenton, did not know any police officer by the name of Burksten. In fact, Sergeant Fourie had grown up Warrenton.
- [41.] It appears from the record that Eksteen had, at least by the time of the trial, already passed away. No evidence was unfortunately presented as to when he passed away and whether he had still been alive at the time of the incident, and in other words at the time when the appellant claimed to have reported the rape incident to him.
- [42.] In cross-examination the appellant said that he told Eksteen about the rape incident at Eksteen's office, which contradicted his evidence-in-chief that he had told Eksteen about that at the scrapyard.
- [43.] In cross-examination the appellant also testified that Eksteen had then promised to investigate the incident, which contradicted his evidence-in-chief that Eksteen had said "*there is nothing that I have with me that he can use*".
- [44.] Why would the complainant, with the cognitive functioning of a very young child, have wanted to protect people who, on the appellant's version, had been the whole cause of her trauma? Especially the presence of a person with a gun would have made a lasting impression on her.
- [45.] Why would men who had just come to the rescue of the appellant and had found him half naked and tied to a tree, chase him away and not at the very least ask him what had happened?

SENTENCE

- [46.] Even without the co-perpetrator findings the prescribed sentence for the rape in count 2 would have remained life imprisonment, because of the complainant's mental condition. Mr Steynberg, who appeared on behalf of the appellant,

conceded that he could not responsibly argue the appeal against any of the sentences.

[47.] The appellant attacked the complainant in broad daylight. He never showed even a hint of remorse and this, seen with the fact that this rape was preceded by a rape in 2008 and followed by a rape in 2009, militate against any real possibility of rehabilitation. The fact that he was only convicted of those rapes after he had committed the present rape does not mean that those rapes and convictions should be disregarded as aggravating factors²².

[48.] Even if it could be said that the setting aside of the conviction on count 3 and the absence of a co-perpetrator would constitute a substantially different factual matrix than the one upon which the Regional Magistrate had considered sentence, there would still in my view not be a basis upon which the sentence imposed on count 2 could be interfered with. The absence of serious injuries would not in itself justify it.

CONCLUSION

[49.] In the premises the following orders are made:

1. The appeal against the conviction on count 3 is upheld and the conviction and the sentence imposed on count 3 are set aside.
2. The appeal against the conviction and the sentence of life imprisonment on count 2 is dismissed and both the conviction and sentence on count 2 are confirmed.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

²² Compare **S v Ngidi and Others** 1991 (1) SACR 589 (A) at 596 D; **S v S** 1988 (1) SA 120 (A) at 123 G-H

I concur.

W J COETZEE
ACTING JUDGE
NORTHERN CAPE DIVISION

For the appellant:	Mr H STEYNBERG (Legal Aid South Africa, Kimberley)
For the respondent:	ADV K M KGATWE (Office of The Director of Public Prosecutions)