



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

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

Saakno / Case number: **CA & R 29 / 2016**
Datum aangehoor / Date heard: **31 / 10 / 2016**
Datum beskikbaar / Date available: **25 / 11 / 2016**

In the matter between:

LUCAS MONNAPULE MANONG

Appellant

and

THE STATE

Respondent

Coram: Williams, J *et* Erasmus, AJ

JUDGMENT ON APPEAL

ERASMUS, AJ

- [1] The appellant, a 24 year old male, was convicted in the Regional Court Kimberley on three counts of rape (counts 1, 2 and 4), i.e. a contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007 and the further charges

of assault and assault with intent to cause grievous bodily harm (counts 3 and 5). He was acquitted on count 6. The appellant was sentenced to an effective period of 30 years imprisonment. The appeal was directed at the convictions only, having been granted leave to appeal by the court *a quo*.

- [2] In respect of counts 1, 2 and 3 it was alleged that the crimes had been committed on 29 and 30 November 2009 respectively. In respect of count 4 and 5 it was alleged that the crimes had been committed on 7 August 2010.
- [3] Adv. Van Zyl Nel, on behalf of the appellant, conceded (and correctly so in our view) that the court *a quo* had not misdirected himself in respect of the convictions on counts 4 and 5 pertaining to the events of 7 August 2010. The complainant's evidence in respect of these crimes was corroborated in all material aspects by three other witnesses.
- [5] It is common cause that the appellant and the complainant had been involved in a long term relationship and that a daughter had been born therefrom. The complainant had ended the relationship

earlier during the week preceding the events of 29 and 30 November 2009. The appellant wanted to reconcile and had approached the complainant with a view to rekindle their relationship. Whether she had indeed agreed to such reconciliation remained at the core of the matter before us.

- [6] According to the complainant she had refused to reconcile but agreed to be friends with the appellant for the sake of their child. On 29 November 2009 they had agreed to have a cold drink together and had played a game of pool. Having informed him later that evening that she no longer loved him, the appellant began to swear at her, made threats towards her and slapped her. They eventually ended up at the appellant's residence. He insisted that she and the child sleep over and she only agreed because she was fearful of him. The appellant then had sexual intercourse with her against her will; once during the evening of 29 November and again the following morning. All three of them went to her parental home. Here she washed the child before the appellant took the child to the crèche. When she complained to her brother in law about the appellant's abusive behaviour, he suggested she report it to the police and having told the police that the appellant had raped her he was subsequently arrested. She underwent a medical examination. The nurse who had conducted the

examination noted a tear at the 6 o' clock position on the posterior fourchette and concluded that the injury corresponded with forceful vaginal penetration.

- [7] The appellant's version was that the complainant had agreed to the reconciliation and that they had had consensual sexual intercourse during the evening of 29 November 2009. He had insisted on having sexual intercourse as he wanted to be sure that the complainant had been sincere in agreeing to reconcile. She consented to sleep at his residence and voluntarily spent the night. He denied either assaulting or threatening her.
- [8] The learned Regional Magistrate, Mr. Hole, found that the complainant's supposed agreement to reconcile and consent to sexual intercourse was as a result of the appellant's intimidation. The complainant neither intended to reconcile nor consent to sexual intercourse. The appellant, on his version, had doubted the sincerity of the complainant and he wanted to have intercourse with her as proof or assurance of her sincerity. The learned Regional Magistrate further found that the appellant, who had created a situation of fear and terror, could not later claim the benefit of having been led to believe that consent was present.

[9] In respect of the convictions which relate to the incidents of 29 and 30 November 2009, Mr. Nel submitted that the convictions and sentences stand to be set aside as the court *a quo* had misdirected himself in that he:

9.1 failed to take into account that the complainant was a single witness whose evidence warranted a cautionary approach;

9.2 failed to identify and critically evaluate the numerous improbabilities inherent to her version and that this resulted in an unqualified acceptance of her improbable and uncorroborated evidence; and

9.3 found that the appellant's inability to provide a reason why the complainant would falsely incriminate him, strengthened her version and negated his.

[10] Adv. Mxabo, on behalf of the respondent, agreed with the concessions of Mr. Nel in respect of counts 4 and 5. He however submitted that the appeal against the convictions on count 1, 2 and 3 should be dismissed. He

submitted that the sexual intercourse could not have been consensual as the complainant had been intimidated and threatened because the appellant had had some doubt as to whether the complainant had been sincere and therefore insisted on having sexual intercourse with her. Mr. Mxabo also submitted that the injury which the complainant had sustained during the intercourse corroborated her version of non-consensual intercourse.

[11] It is trite that a Court of Appeal will not lightly interfere with the factual findings of the trial Court and that it will only do so if it is convinced that the findings were wrong.¹ In ***S v Monyane and Others***² Ponnann JA stated:

'This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. 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 (S v Hadebe and Others [1997 \(2\) SACR 641 \(SCA\)](#) at 645e – f)...

¹ *R v Dhlumayo and Another* 1948(2) SA 677 (A) op 705 -706

² 2008 (1) SACR 543 (SCA) para 15; See also *S v Mlumbi en 'n Ander* 1991 (1) SACR 235 (A); *S v Hadebe and Others* 1998 (1) SACR 422 (SCA); *S v Kekana* 2013 (1) SACR 101 (SCA)

[12] When considering the evaluation of the evidence by the trial Court, it should be kept in mind that there is no *onus* on an accused to convince the Court that his version is true. It is not a prerequisite for an acquittal that a court should believe the innocent account given by him; it is sufficient if his version might be substantially true. He is not required to prove his innocence.³ In **S v V**⁴ Zulman JA remarked as follows:

“...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 even though 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 any 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 possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true....”

[13] We agree with the submission of Mr. Nel that the complainant's uncorroborated evidence was inconsistent with the probabilities and not materially satisfactory.

13.1 From the evidence it appears that the complainant had neither sought assistance from other people, nor attempted to leave his company at any stage

³ *R v Difford* 1937 AD 370 at 272; *S v Pistorius* 2014 (2) SACR 314 SCA at 319 (h) to (i)

⁴ 2000 (1) SACR 453 (SCA) at para [3]

during her interaction with the appellant on 29 November 2009. It would have been expected of her to seek help or to leave his company given the fact that the appellant had become abusive while they were playing pool and this abusive conduct and threats had escalated thereafter. As pointed out by Mr. Nel, she had opportunity to do so.

13.2 The complainant had accompanied him to his bedroom and did not, after the first sexual encounter leave the appellant while he was asleep. She had remained in his presence until the next morning, when they had left his residence together.

13.3 The complainant and appellant proceeded to her parental home together. She did not report the incident to her parents. She also did not report the alleged rape to her brother in law. No evidence of any emotional distress had been adduced.

[14] Although we are mindful of the advantages which the trial Court had had in observing the complainant and appellant, the learned Regional Magistrate's reasons for rejecting the appellant's version and accepting the

evidence of the complainant in this matter are unsatisfactory. We have already referred to the improbabilities in the version of the complainant. The version of the appellant is not inherently improbable. The complainant's concession that the appellant would not have known that she had not consented to the sexual intercourse, should have been considered in the context of all the evidence and the probabilities. It appears from the judgment of the Court *a quo* as if this concession by the complainant, was not attributed sufficient weight during the evaluation of the evidence.

[15] We are satisfied that the Court *a quo* was wrong in finding that the appellant's version in respect of the charges pertaining to 29 and 30 November 2009 was not reasonably possibly true. The appeal in respect of counts 1, 2 and 3 should therefor succeed.

[16] It has already been conceded that the appeal against the convictions on counts 4 and 5 should be dismissed.

We therefor make the following order:

1. THE APPEAL AGAINST THE CONVICTIONS ON COUNTS 1, 2 AND 3 SUCCEEDS AND THE CONVICTIONS AND SENTENCES IN RESPECT THEREOF ARE SET ASIDE.
2. THE APPEAL AGAINST THE CONVICTIONS ON COUNTS 4 AND 5 IS DISMISSED.

SL ERASMUS
ACTING JUDGE

I agree.

CC WILLIAMS
JUDGE

<u>On behalf of Appellant:</u>	Adv. v.Z Nel (oio Legal Aid SA)
<u>On behalf of Respondent:</u>	Adv. Mxabu (oio The NDPP)