

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: A962/2013

DATE: 10 MARCH 2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

KHANYISO MBETHA

Appellant

V

THE STATE

Respondent

JUDGMENT

THOBANE AJ,

[1] The appellant, who was legally represented throughout the trial proceedings, was on the 1st February 2012 convicted of contravening the provisions of section 3 of the Sexual Offences Act, Act 32 of 1997, in the Regional Court held at Klerksdorp. He was sentenced to 20 years imprisonment.

[2] He appeals against conviction and sentence pursuant to a petition granted on the 15th May 2013.

[3] The grounds of appeal are that the court *a quo* erred in many respects; (i) in accepting the evidence of the complainant whereas there were many contradictions between her testimony and that of two other witnesses, in particular, her testimony that she did not know the appellant whereas two witnesses testified that she knew him. That as a result of this contradiction her evidence can not be true and reliable; (i) her refusal to acknowledge knowing the appellant and that she sat next to him at the tavern, points to her intention to

mislead and that was an indication that the sexual intercourse was consensual; (iii) the explanation by the appellant to the effect that the intercourse was consensual, was reasonably possibly true; (iv) the reason for going to the tavern was a factor that should not have been overlooked in view of the fact that the testimony of the complainant, in that regard, differed to that of the witnesses; (v) the fact that the testimony of the complainant, to the effect that she did not report the rape to her friend N[...], points to her untruthfulness; (vi) the complainant's failure to report the rape to her parents raises questions and that her explanation about such failure was not convincing; (vii) her failure to scream whereas there was a person at the scene of the rape, is a factor that should count in favour of the appellant. Finally, that the magistrate was biased in that he uttered the following words; *"Further more this tendency is I think this is what happened of the young people going to the taverns buy drinks for the girls hoping that after buying these drinks they will get favours. Okay you can do it, but if the lady says no must not think that because you bought liquor I must get something from her"*.

[4] The Notice of Application for leave to Appeal dated the 18th April 2012 indicates that the application for leave is in respect of conviction only. Equally, the grounds of appeal are aimed at attacking the conviction only. Finally, the Heads of Argument filed on behalf of the appellant point to the fact that the appellant is aggrieved at the conviction only, as no points were raised in respect of the sentence. Before us counsel for the appellant indicated that their approach was simply that should appeal succeed then automatically the sentence will be set aside, hence the focus on conviction despite the petition order being in respect of both conviction and sentence.

[5] The appeal is opposed by the state on the following grounds; (i) intercourse is not in dispute as the appellant proffered a defence of consent; (ii) the credibility of witnesses is a matter best left to the trial court; (iii) evidence of a single witness was handled properly by the trial court; (iv) the rape was corroborated by a witness who testified that she was slapped by the appellant when she tried to intervene; (v) there was corroboration of the rape by an independent person i.e. the Doctor that carried out the medico legal examination of the complainant and completed the J88 medical report.

[6] The crisp issue for determination is whether the appellant committed an act of sexual penetration on the complainant by having intercourse with her without her consent. Simply put, whether the appellant raped the complainant.

THE EVIDENCE

[7] A[...] T[...], the complainant, testified that on the 30th January 2010 she went to a tavern together with her friends with the intention of fetching a key from her sister. While walking there, a person approached from the opposite direction and came towards them. They entered the tavern and the same person also entered. On

exiting the premises, later on, that person grabbed her forearm. N[...], her friend, tried to pull her away but was slapped with an open hand. While being held on her arm, she was walked to the appellant's parental home. She tried to break lose but could no succeed. She was pulled inside the house and the door was locked. She was then raped by the appellant. She was given her clothes to wear only for the appellant to again undress her and rape her the second time. She was thereafter allowed to leave.

[8] Boitumelo Seitumeng testified that she went to the tavern and observed that the complainant was seated next to the appellant drinking liquor. Later she observed the appellant exiting the tavern and the complainant also went outside. Soon thereafter she also went out only to see the appellant hitting N[...] with an open hand¹. She went back inside the tavern to call someone so that they could leave.

[9] N[...] M[...] gave evidence that she went to a tavern in the company of friends that included the complainant. She indicated that they had gone to the tavern to drink. At the tavern she had been sitting with some people that included the appellant. She was called to come sit with them as she was seated far from them, which she then did. The complainant went outside the tavern apparently because the appellant had called her. She was called outside to come and see what was happening. She then went outside and saw the appellant holding the complainant restraining her from leaving. He was pulling her forcibly while the complainant was crying. When she tried to intervene, she was slapped by the appellant on her right cheek. She observed the appellant pulling the complainant in the direction of his home while the complainant was trying to resist being pulled. She then left the tavern and went home.

[10] Dr. Mapheka testified that he conducted a medico legal examination of the complainant and thereafter completed the J88 form. He observed the following injuries in the vaginal area; tears, bruises, tears around the hymen and as well as blood stained vaginal discharge. He concluded that indeed the complainant had been raped. He readily conceded that while it was possible to have tearing during consensual intercourse, the injuries that the complainant sustained cumulatively pointed to a sexual assault.

[11] The appellant closed his case without leading any evidence, whereafter the parties addressed the magistrate as to what verdict the trial court should return.

THE LAW

[13] It is settled that a court of appeal will not interfere with a finding of fact and credibility made by the trial court. The reason for this is simply that the trial court sees and hears the witnesses and is steeped in the atmosphere of the trial. It is in a position to take into account a witness' appearance, demeanour and personality. In the absence of factual error or misdirection on the part of the trial court, its finding is presumed to be correct. **Rex v Dhlumayo & Another 1948(2) SA 677(A) 705-6.**

[14] As a consequence of the aforementioned, the ambit for the interference by the appeal court on a finding of fact and credibility is restricted to few instances. It is only allowed in instances where there is a demonstrable and material misdirection by the trial court where the recorded evidence shows that the finding is clearly wrong. Factual errors may be errors where the reasons which the trial judge provides are unsatisfactory or where he/she overlooks facts or improbabilities. Also, where the finding on fact is not dependent on the personal impression made by a witnesses' demeanour, but predominantly upon inferences and other facts, and upon probabilities. The appeal court is also in an equal position to the trial court regarding the facts that are found to be correct by the trial court. **S v Hadebe and Others 1997 (2) SACR 641 (SCA) t 645e- f. S v Bailey 2007 (2) SACR 1 (C)**

[15] When evaluating or assessing evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider. See **S v Van der Meyden 1999 (1) SACR 447 (W) stated at 450:**

“What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored.”

JUDGMENT OF THE MAGISTRATE

[16] [16.1] The magistrate summarized the evidence tendered before him. He noted that the appellant had a Constitutional right to remain silent if he wished to exercise it. He also observed that there was no version to evaluate on the side of the appellant as he had tendered no evidence. He was quick to add that the fact that the appellant chose not to testify did not mean that the evidence of the state was to be accepted as it was, it still had to be evaluated. Finally, the magistrate was alive to the fact that the evidence he was confronted with was that of a single witness and that he needed to approach it with a measure of caution. In this regard he referred to **S v Sauls 1981 (3) SA 172(A)**, and quoted therefrom.

[16.2] He further dealt with the contradictions in the testimony of the complainant in so far as it related to having sat with the appellant inside the tavern. The magistrate found that the complainant was not a truthful witness in that regard in that two witnesses gave a different account. He thereafter looked at **S v Mkohle 1990 (1) SACR 95 (A)**, in an endeavour to adopt an approach to the contradictions that he highlighted on the testimony of the complainant. He further made reference to **R v Abdoorham 1954 (3) SA 163 (NPD)** in explaining his approach towards the unsatisfactoriness of the complainant's testimony.

[16.3] In the end the magistrate considered the totality of the evidence tendered prior to pronouncing his finding. Such exercise included consideration of the fact that the appellant chose not to testify, also the weight that ought to be given to the version that was put to state witnesses.

[16.4] In the end, he found that the guilt of the appellant had been established beyond a reasonable doubt and convicted the appellant.

ANALYSIS

[17] The approach to the evaluation of evidence was authoritatively stated by Navsa JA in **S v Trainor 2003 (1) SACR 35 (SCA) at 41, in paragraph 9** as follows:

“[9] 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 of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety.”

[18] In my view the magistrate's approach to the evaluation of evidence, though at times lacking in detail, was correct. He accounted for all the evidence which was led in the trial, paying particular attention to the complainant's evidence. He applied the cautionary rule to her evidence when such application was warranted.

[19] The complainant related in satisfactory and in my view compelling terms what happened to her. Even though she was a single witness to the actual rape incident, she was corroborated on a material aspect of her evidence, namely that the appellant in the process of taking her to his parental home, slapped N[...] who tried to intervene and also that she did not accompany the appellant to his home voluntarily and without any struggle. In **S v Banana 2000 (2) SACR 1 (ZSC) on page 8C**, which dicta the magistrate correctly relied upon, Gubbay CJ (delivering the judgement of the majority of that court) stated the following:

“ Where the evidence of the single witness is corroborated in any way which tends to indicate that the whole story was not concocted, the caution enjoined may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution.”

[20] I am satisfied that the magistrate satisfactorily dealt with the the contradiction relating to the knowledge of the appellant by the complainant. However there were other contradictions that were raised during the trial

that need to be mentioned as they were not dealt with by the trial court;

[20.1] The complainant testified that the purpose for going to the tavern was to get the house keys from her sister as she did not want to wake up people at her home should she get home late. Her friend Boitumelo however testified that the purpose of going to the tavern was to go and drink. It has been argued that by seeking to conceal the true purpose of going to the tavern, the complainant misled the trial court. I do not agree with this submission. The testimony of the complainant is to the effect that although she went there to get the key, they ended up sitting at the tavern for some thirty minutes and drank liquor². I do not find this to be a deviation from her evidence in chief. The submission therefore that the complainant sought to conceal the fact that they were drinking liquor is not correct.

[20.2] Boitumelo and N[...] both testified that at some point the complainant was seated with the appellant in the tavern. The complainant disputed this. It has been argued on behalf of the appellant that by seeking to conceal the fact that they were seated together at some point, the complainant wanted to mislead the court and hide the fact that the sexual intercourse was consensual. I do not agree with the conclusion. Even if one were to accept that the complainant and the appellant were seated together at the tavern, it does not necessarily imply that the intercourse was consensual as has been argued. It was further argued, that the fact that the complainant and the appellant were at some stage seen talking, meant that the intercourse was consensual. I do not agree with that inference for they could have been discussing anything. They could even have been simply exchanging greetings. The state submitted, with which submission I agree, that it was difficult for people who had been drinking at a tavern to relate similar observations. It was therefore expected that there could be differences in their perceptions of the events on the day.

[20.3] It is clear that the complainant did not leave with the appellant from the tavern free from duress. Firstly, the version of the appellant is that she was grabbed on her arm by the appellant. N[...] tried to intervene by pulling her away from the appellant. She was thereafter slapped on her cheek by the appellant. She further testified that although the appellant did not pull her as they walked away, she tried to break loose from the appellant's grip³. Boitumelo's observation was that she went out and saw the appellant assault N[...] with an open hand⁴. She did not observe the appellant holding the complainant. N[...] testified that when she went outside she observed the appellant holding the complainant and forbidding her to go⁵. She observed that the appellant held the complainant's wrist and was pulling her in a rough manner or by force⁶. At that stage the complainant was crying saying that N[...] should help her. She tried to intervene, as a result, she was slapped on her cheek. She walked away but was able to observe that the appellant was pulling the complainant who was resisting being pulled, in the direction of the appellant's home. I find the corroboration as to the

involuntary departure of the complainant, and the accompanying violence meted out by the appellant, very compelling, and so did the trial court, rightly in my view.

[20.4] Much has been made about the failure of the appellant to report the incident immediately. The first person that the complainant would have been able to report to but did not, was her father who opened the door for her when she reached her home after the rape. Early in her testimony the complainant testified that her parents did not approve of her being away from home at night. That by the way is also the reason why she claimed to have gone to the tavern to look for her sister so as to secure the house keys as she did not want anyone to open the door for her late at night. It is understandable therefore why she would find it difficult to report to her father when she arrived at home at night having been to a tavern. Her failure to report to the first available person, i.e. her father, viewed in this context, is understandable.

[20.5] The submission that the complainant's report to her friend N[...], that the appellant had sex with her and not telling her that she was raped, is pure obfuscation. It is true that the words used by the complainant were to the effect that the appellant had had "sexual intercourse" with her. The recorded evidence however, looked at holistically particularly in the context of the complainant and her friend having parted the night before in the most unusual manner, points to the fact that the appellant and N[...], were in fact referring to rape, for the simple reason that after the complainant had informed N[...] about the "sexual intercourse", she wanted to know if the complainant had told her parents, to which she replied that she had not. This, in my view, does not point to untruthfulness on the part of the complainant, nor does it support the appellant's contention that the intercourse was consensual. One shudders to think that the complainant would have been expected, by her friend, to report "consensual sexual intercourse" to her parents. The explanation given by the complainant for not having reported the rape to her parents i.e. that she was afraid because she had been out at night, without their knowledge, is in my view plausible.

[20.6] It was argued that that the complainant should have screamed when she went into the appellant's home, more so after she knew that there was a person there. I have various problems with this submission. Firstly, the complainant details how events unfolded at the appellant's house. How she was kissed and taken to the bedroom. Her evidence was that she tried to resist by looking away and also by pushing away the complainant using her hand⁷. Her passiveness however is explained by her when she says she was so shocked when the appellant took off her clothes, "she could hardly speak"⁸. Secondly, the recorded evidence shows that the complainant testified that at first she was raped, then the appellant gave her her clothes only to take them off and rape her again⁹. She was thereafter given her clothes. Only then did she start running inside the house. While so running the

appellant's brother, so she testified, emerged from one of the rooms and pushed her towards the appellant. The appellant took her to the bedroom where they sat and she told him that she wanted to go home¹⁰. Given this chronology of events, the interpretation that the appellant's brother emerged between the first and second rape, is clearly wrong. Despite being misled during cross examination by the legal representative on behalf of the appellant, the complainant was able to stand by her story that the complainant's younger brother only came to the picture after the second rape had taken place¹¹. In my view the expectation that the complainant should have screamed in between the first and second rape is premised on the wrong set of facts, being the assumption that the complainant ran after the first incident of rape but before the second. Further more, surely the complainant could not have been expected to seek help from the person that pushed her towards her assailant when she tried to run away.

[20.7] In my view the contradiction that emerged as to whether Boitumelo went with the complainant to the tavern or whether she was already at the tavern when the complainant arrived, was not and still is not material to the issues to be decided. So is the contention that the complainant knew the appellant by name or by sight before the day in question.

[20.8] It has been submitted that the comments by the magistrate, namely;

"Further more this tendency is I think this is what happened of the young people going to the taverns buy drinks for girls hoping that after buying these drinks they will get favours. Okay you can do it, but if the lady says no must not think that because you bought liquor I must get something from her.",

are indicative of bias towards the appellant, and that the appellant was prejudiced thereby thus depriving him of a fair trial as guaranteed in the Constitution. A fair trial is at the centre of our judicial system. For that reason, that a trial was unfair, should not be an easy submission to make. The above statement by the magistrate being a ground of appeal based in bias, should be examined thoroughly to dispel, in my view, the notion that the trial was unfair.

The legal position with regard to the role and importance of a presiding officer is encapsulated in the following *dictum* by Schoeman AJA, quoting extensively from case law, in the SCA judgment of **Leon Smith v The State (595/2012) [2013] ZASCA 38 (28th March 2013)**,

"Unfair trial"

[13] *Even before the present constitutional dispensation, it has been a principle of our law that an*

accused person is entitled to a fair trial and this 'necessarily presupposes that the judicial officer who tries him is fair and unbiased and conducts the trial in accordance with those rules and principles or the procedure which the law requires. '

[14] Every accused has the right to a fair trial in terms of s 35(3) of the Constitution. What exactly that right encompasses has not been circumscribed. In **S v Dzukuda ; S v Tshilo**¹² it was set out as follows.

'It would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof. In what follows, no more is intended to be said about this particular right than is necessary to decide the case at hand. At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution. '

[15] In **S v le Grange**¹³ it was stressed that it is essential that a judicial officer who presides should not ask questions during the trial in a manner that does not subjectively and objectively demonstrate his impartiality:

'It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy it is important that the public should have confidence in the courts. Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. '

And at para 13:

'Where the offending questioning sustains the inference that in fact the presiding judge was not open-minded, impartial or fair during the trial, this court will intervene and grant appropriate relief. ... In such a case the court will declare the proceedings invalid without considering the merits.'

And at para 27:

'In the end the only guarantee of impartiality on the part of the courts is conspicuous impartiality. '

[16] *In S v May*¹⁴ Lewis JA discussed the role of a presiding officer and the effect, if any, of an irregularity:

‘Judicial officers are not umpires. Their role is to ensure that the parties’ cases are presented fully and fairly, and that the truth is established. They are not required to be passive observers of a trial; they are required to ensure fairness and justice, and if that requires intervention then it is fully justifiable. It is only when prejudice is caused to an accused that intervention will become an irregularity.’

[17] *In S v Rail*¹⁵ Trollip AJ A set out the standards expected of a presiding officer when he or she poses questions of witnesses. The most important aspect is that justice must be done. Blit, it must also be seen to be done:

‘He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially

[20.9] I have quoted case law extensively for completeness. Otherwise there is no merit in the submission that the right to a fair trial was violated. The transcribed record does not point to any bias on the part of the presiding officer. The magistrate intervened only where necessary and whenever such intervention was justified. Counsel for the appellant reluctantly agreed that there was no recorded bias but nonetheless argued before us, that the absence of any bias from the recorded evidence is because the magistrate bottled it up only to blurt it out at the end of proceedings during sentencing proceedings. I disagree with such characterization of the magistrates comments, simply because the magistrate was commenting about the state of crime and our society before imposing sentence. Most importantly however, there was no prejudice to the appellant.

[21] Lastly, the rape was independently corroborated by the evidence of Dr. Mapheka. The J88 Medical Report was accepted into evidence without any objection. The injuries depicted therein were consistent with sexual assault. The postulation that anything could have happened to the complainant after she left the appellant's home is just pure speculation.

[22] The defence proffered by the appellant viewed on a conspectus of the evidence of the state as a whole particularly in the face of corroboration of the complainant’s evidence by both N[...] and Boitumelo as to N[...]’s assault, coupled with the findings of the medico-legal examination recorded in the J88, cannot be said to be a reasonably possibly true version. I am accordingly satisfied that the State had proved its case against the appellant beyond reasonable doubt and that he was correctly found guilty of rape.

[23] In the present case, the appellant has failed to advance any cogent reasons for the rejection of the

evidence of the complaint. I am satisfied that the court *a quo* adopted the approach in the Sauls matter. I am further satisfied that the evidence pointed to the guilt of the appellant. In the circumstances appeal must fail.

[24] I would therefore propose the following order:

1. The appeal is dismissed, his conviction is confirmed and his sentence stands.

S. A. THOBANE

ACTING JUDGE OF THE HIGH COURT

I AGREE, AND IT IS SO ORDERED

S. POTTERILL

JUDGE OF THE HIGH COURT

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- 1 Page 151 para 19-20
 - 2 Page 134 para 13 to 19
 - 3 Page 116 para 5
 - 4 Page 151 paara 20
 - 5 Page 160 para 14
 - 6 Page 160 para 23
 - 7 Page 117 para 20-24
 - 8 Page 118 para 9
 - 9 Page 129 para 11-19
 - 10 Page 121 para 11,21; page 122 para 1 & 2
 - 11 Page 129 para 8 to page 130 para 14
 - 12 S v Dzukuda ; S v Tshilo 2000 (2) SACR 443 (CC) para 11.
 - 13 S v Le Grange 2009 (1) SACR 125 (SCA) para 21.
 - 14 S v May 2005 (2) SACR 331 (SCA) paras 28-29
 - 15 S v Rall 1982 (1) SA 828 (A) at 832A-833A