

REPUBLIC OF SOUTH AFRICA



**GAUTENG DIVISION
PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

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

[Signature] *[Signature]*

7/8/2015

CASE NO: A 193/2014

In the matter between:

TEBOGO DAVID TSOTETSI

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

MAKUME J sitting with MALULEKE AJ

- [1] The Appellant was convicted on a charge of rape on the 26th March 2008 and sentenced to 10 years imprisonment. Leave to appeal against

conviction and sentence was granted by the trial court bail was extended pending the outcome of this appeal.

- [2] It is not disputed that the complainant was sexually molested on the 14 January 2007 whilst alone in her home at about 19h30. The medico- legal examination report conducted on the 24th January 2007 is of no assistance for purposes of this judgment. What is in dispute is who raped the complainant. The Appellant denies that it was him.
- [3] The Appellant's *alibi* evidence was rejected by the *court a quo* and correctly saw in view of serious contradictions which have a bearing on the case. However this necessarily does not mean that he may be the person who raped the complainant. There is a duty on the state to prove beyond reasonable doubt that the Appellant is the person who on that evening of the 14th January 2007 entered the home of the complainant and raped her.
- [4] The trial court in dealing with the credibility of the Appellant's *alibi* evidence summarized it as follows:

"Initially it was put to the complainant in cross examination that on the day in question the accused had been at work. In cross examination he stated that he had been on leave from the 7th until 22nd January at Frankfort where his sister stays. He admitted and then denied that he had left on the 7th January. He was again asked whether he was sure that when he had left for Frankfort which he replied that on the 7th yet the time sheet admitted by the court as

evidence shows that only from the 25 January was the accused on leave and that in fact on 14 and 15 January 2007 had been a weekend. Now that must obviously raise a question mark as regard the credibility of the accused and that the inference to be drawn is that the accused was attempting to create an alibi for himself by placing him somewhere else other than at the scene where the crime was committed”.

- [5] That approach is clearly wrong and the courts have warned on several occasions against such an approach. The rejection of the Appellant’s evidence does not necessarily mean that the complainant’s version should be accepted. There still lies an onus on the state to prove beyond reasonable doubt that the complainant’s evidence on identity is unassailable. In the matter of **S v M 2006 (1) SACR 135 SCA** at paragraph 64 Streicher JA cited the decision of **S v Mntweni 1985 (1) SA 590 at 593 (1)** to 594 (1) and said the following:

“By die beoordeling van hierdie vraag is die feit dat die appellant leuenagtige getuienis gegee het ‘n faktor ten gunste van die Staatsaak. Hierdie Hof het egter al herhaaldelik gewaarsku dat daarteen gewaak moet word om nie oormartige gewig aan hierdie faktor te gee nie. Die korrekte benadering is soos volg uiteengesit deur Smalberger Wn AR in S v Mntweni 1985 (1) SA 590 (1) op 5931 – 594D:

(64) “ Terwyl die leuenagtige getuienis of ontkenning van ‘n beskuldigde van belang is wanneer dit by die aflei van gevolgtrekkings en die bepaling van skuld kom, moet daar teen gewaak word om oormartige gewig daaraan te verleen. Veral moet

daar gewaak word teen 'n afleiding dat, omdat 'n beskuldigde 'n leuenaar is, hy daarom waarskynlik skuldig is. Leuenagtige getuienis of 'n valse verklaring regverdig nie altyd die uiterste afleiding nie. Die gewig wat daaraan verleen word, moet met die omstandighede van elke geval verband hou."

- [6] The evidence of the complainant seen together with her conduct after the incident raises serious concerns which has nothing to do with her credibility. She testified that on the 14th January 2007 she was alone in the home having a bath when she heard a knock at the door. At first she thought it was her younger brother Sipho. It was in the evening at around 19h20. The only light that was in the room was a paraffin light which was only enough to illuminate the whole room.
- [7] When she heard the knock on her bedroom door she told the person to come in thinking that it was her brother. She had covered her body with a towel. She then says that a person whom she was seeing for the first time entered and pushed her against the wardrobe, she grabbed a mirror and tried to use it to protect herself, and could not succeed. This person whom she says was the Appellant grabbed her she was tripped and when she fell down the Appellant took off his trouser and raped her. She tried to scream but Appellant covered her mouth with his hand.
- [8] She testified further that the Appellant did his thing very fast then stood up cleaned himself and got out of the room whilst she was still lying on

the floor. The Appellant wore nothing on his head. She saw his face as she concentrated on him during the ordeal.

[9] She went to sleep crying and when her younger brother came she did not tell him what had happened to her. The Appellant was wearing a brown trouser and a cream white T- shirt. The next morning when she was on her way to school she saw the Appellant seated at the shops and when the Appellant saw her he ducked and walked away. He was wearing a short trouser and the same T shirt.

[10] When she arrived at school she spoke to her school teacher. In her discussion she did not say to the school teacher Miss Mofokeng that she had been raped instead she posed a question to the teacher as to where a person who has been raped must go.

[11] Ms Busisiwe Mirriam Mofokeng testified that she is the Deputy Principal at the school where the complainant is a scholar. She also holds a position in the Child Care Unit. All learners who have problems come to her. She is like a mother to all learners at her school. She knows the complainant Lillian Mngomezulu very well. She and her younger brother are orphans and are being assisted with food by an organisation called Katlego Home Based Care Group. The complainant herself also sells ice pops from her home to make money.

- [12] The complainant came to her on the 18 January 2007 and not on the 15th January 2007 and asked her what a person who has been raped should do. She then asked the complainant who has been raped, the complainant did not tell her. She then told her that such a person must go to the Police Station to report. Four days later on the 22 January 2007 the complainant only then told her that she is the person that was raped. She then accompanied the complainant to the Police Station where they both made statements. The complainant told her that she had seen her attacker at the shops.
- [13] On the 24 January 2007 the complainant was examined by a medical practitioner who found that the hymen was not intact and that there was no visible bruises or tear marks.
- [14] Inspector Solomon Masinga testified that he was the investigating officer in the matter and confirmed that the Appellant was arrested on the 22nd September 2007. The prosecutor asked him why it took so long to arrest the Appellant Masinga replied that it is because the complainant told him that she does not know the accused and further that she does not know where he stays. The complainant told him that if it can happen that she sees the person she will be able to identify him.
- [15] Masinga testified that on a Saturday morning the complainant reported to him that she saw the person who raped her and that person is seated at the shops. He was wearing a brownish trouser and a white T-shirt and was listening to the radio with earphones. Masinga then went alone to the

shops at Bodile Store as directed by the complainant he did not find that person he then walked further and at a nearby corner next to Bodile Store he found a person standing who fitted a description given by the complainant. He says that he called the person and asked his name and then informed him that he is a suspect in a rape case. He took the Appellant to the complainant and the complainant confirmed that it is the person who raped her. The Appellant was then placed under arrest after his rights had been explained. He says that the Appellant denied having done anything to the complainant. He told Masinga that He does not know the complainant.

[16] Under cross examination Masinga said that he arrested a person wearing a T shirt which was yellowish and whitish in colour. It must be remembered that in his evidence in chief he said that the complainant said the Appellant was at the shops wearing a whitish colour T shirt. Nothing was said about the yellowish colour. The complainant herself had under cross examination told the court that on the day of the arrest the Appellant was wearing a yellowish T shirt. The question that comes to thefore is did Masinga arrest the correct person according to the description given to him. In my view there is doubt that he arrested the person befitting the described clothes.

[17] The general rule on caution regarding evidence of a single witness in sexual offences espoused in the matter of **S v Jackson 1998 (1) SACR 470 A** has over the years developed into totality abolishing the notion of exercising caution. In short it will not totally be difficult for a court to insists on caution and at the same time observe the limits of Section 60 of

the Criminal Law (Sexual Offence and Related Matters) Amendment Act
32 of 2007

- [18] In **S v Van der Ross 2002 (2) SACR 362 (C)** the court after warning that **S v Jackson** does not allow a trial court to convict in an indiscriminate and reckless manner where the charge is of a sexual nature pointed out that the demise of the general, immutable cautionary rule in that case did not mean that caution should not be exercised if the evidence in a particular case called for such an approach.
- [19] In **S v Jones 2004 (1) SACR 420 (C)** Van Reenen J found that the complainant was a single witness and because there were unusual features in her evidence which in the court's view cried out for the exercise of caution.
- [20] There is in my view unacceptable explanation in the evidence of the complainant which places doubt on whether she was able to properly identify her attacker. It cannot be denied that what happened to her was traumatic; the incident took place quickly in a room illuminated by paraffin light. She was seeing the person this for the first time and could only describe him by his clothing.
- [21] Section 58 and 59 of the Criminal Law (Sexual Offence and Related Matter Amendment Act 32 of 2007) protects evidence of late reporting by victims in sexual offences. However in this matter I find it strange is that

the complainant says she did not deem it necessary to report to her younger brother and worse still to her neighbours she is contradicted by her teacher as to when she made the report, she says it was the following day the 18 January 2007 four days after the incident.

[22] Perhaps what counts heavily against the evidence presented by the state is the time it took to arrest the Appellant. There is no evidence that he was evading arrest. The state has not presented any acceptable evidence what was happening between 22 January 2007 and the 22 September 2007 and when Inspector Msimang arrested the Appellant the description of that person he arrested was not at the place described. Secondly that person was wearing different colour material that person was wearing a whitish/yellow T shirt not a yellow T shirt.

[23] The Witness Ms Mofokeng says to the court that the complainant told her that her attacker was tall and had a scar, that description was not given to the Police. The learned Magistrate recalled the complainant and questioned her about the scar the complainant was adamant and said her attacker did not have a scar and when the Magistrate repeated the question she then answered that she cannot remember that the person had a scar or not.

[24] Our Courts have over here a long period repeatedly warned about the dangers of fallibility of human observation. It it said that an average witness ability to recognise faces is poor. On a question of identity the

confidence and sincerity of the witness are not enough as William J A said in **S v Mehlape 1963 (2) SA 29 A** as follows:

“The often patent honesty, sincerely and conviction of an identifying witness remain however ever a snare to the Judicial Officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence”.

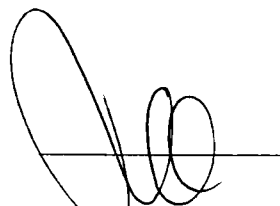
[25] I have no doubt that the complainant in her mind is convinced that it was the Appellant who attacked and raped her. The Appellant denies this. The possibility that she may be mistaken looms large in my mind and this entitles the Appellant to the benefit of the doubt. In my view the state has not proven beyond reasonable doubt that it was the Appellant that the complainant saw on that fateful night.

[26] I accordingly make the following order:

(i) The Appeal is upheld

(ii) The conviction and sentence passed on the 26th March 2008 is set aside and substituted with an order of: NOT GUILTY AND DISCHARGED.

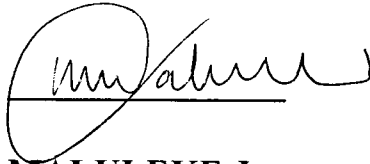
Dated at Pretoria on the 7th day of August 2015.

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MAKUME A.M.

(JUDGE OF THE HIGH COURT)

I agree

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MALULEKE J.

(ACTING JUDGE OF THE HIGH COURT)