

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. : A165/2012

In the matter between:-

GERHARDUS IGNATIUS POTGIETER

Applicant

and

THE STATE

Respondent

CORAM: RAMPAL, J et MOLOI, J et MOTLOUNG, AJ

ENROLLED FOR: 17 MARCH 2014

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 20 MARCH 2014

- [1] This is an application for leave to appeal. The applicant, Mr G.I. Potgieter, was tried in the Bloemfontein Regional Court on a charge of rape. He was convicted. Following his conviction he was sentenced to 8 (eight) years imprisonment.
- [2] Disenchanted by his conviction and sentence, the applicant appealed against both. The appellate *coram* which heard his appeal consisted of Phalatsi AJ, Moloi J and Rampai AJP. On this occasion the *coram* is differently constituted. Motlounge AJ

has stepped into the shoes of Phalatsi AJ who is no longer acting.

- [3] The matter was enrolled for argument on Monday 17 March 2014. Since the date turned out to be unsuitable to Moloi J, I consulted the two counsels, Ms Bezuidenhout and Mr Mohlala. They both agreed to dispense with their rights to present oral argument. They acceded to my proposal that the application be adjudicated on the strength of the written heads of argument instead of been postponed to a date on which Moloi J would be available. Moloi J is doing circuit duty at Parys.
- [4] The grounds on which the applicant seeks leave to appeal, are embodied in a four page typed document. Of those fifteen grounds concerned the conviction and two the sentence component of the judgment. To reproduce them here will unduly burden the judgment. I shall do my utmost to condense them without doing violence to the essence of their materiality.
- [5] As regards the conviction, those grounds may be fairly paraphrased as follows:
- That the court *a quo* erred in that it did not impartially adjudicate the matter, but instead adopted a selective critical approach to the analysis of the evidence to the detriment of the applicant;
 - That the court *a quo* erred in finding that the version of the applicant was not only improbable, but beyond a reasonable doubt, false;

- That the court *a quo* erred in underplaying the material discrepancies in the evidence tendered on behalf of the prosecution and the serious shortcomings of the trial judgment;
- That the court *a quo* erred in disregarding the inconsistencies in the complainant's evidence concerning the number of fingers the applicant had allegedly inserted in her vagina;
- That the court *a quo* erred in rejecting the evidence of Ms Michelle Potgieter, which was corroborated by that of Ms Joyce Mphalo and in preferring the contrary and untrue evidence of the complainant.

[6] The requisite test in an application for leave to appeal is trite. We are called upon to determine whether the applicant has a reasonable prospect of success on appeal – **S v Sikosana** 1980 (4) SA 559 (A) at 562A; **S v Magadla** 2010 (2) SACR 316 (ECM) at par [5] and the authorities there cited.

[7] The test applicable to the determination of guilt or innocence in a criminal trial was elucidated in **S v Van der Meyden** 1996 (1) SACR 447 (W) at 449i – 450c by Nugent J, as he then was:

“The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. 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.”

- [8] In **S v Shackell** 2001 (2) SACR 185 (SCA) at 194g – i Brand AJA, as he then was, said the following about the criminal test and the probabilities in particular:

“It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.”

- [9] I have read and considered the grounds of misdirection on which the applicant relies for his quest to go on further appeal. Having meticulously done so, I am persuaded that he has a reasonable prospect of success on appeal.

- [10] It may well be that we, sitting as we were as the court of first appellate instance, did not heed the judicial injunction of evaluating the evidence before us in the context of the entire

body of the evidence. Perhaps we ignored or overlooked the significance of the evidence concerning the details of the employment. The gist of all the alleged misdirections levelled at our judgment, suggests that we did not adopt the holistic approach in evaluating the evidence presented to us. See **S v Hadebe and Others** 1998 (1) SACR 422 (SCA) at 426f – h.

- [11] Moreover, another misdirection, among others, which the applicant complained of, was that we failed to assign appropriate weight to all the various pieces of the entire evidence against the backdrop of the inherent probabilities and improbabilities – **S v Sithole and Others** 1999 (1) SACR 585 (W). Was the version of the applicant so improbable that it could not have been reasonably true? I feel somewhat unease about our finding to that effect.
- [12] The applicant also contended that the trial judgment had serious shortcomings. His argument was that the trial court did not properly and cumulatively consider every fragment of the evidence in order to properly determine whether or not his guilt, as an accused, had been established beyond a reasonable doubt. It was then argued that we glossed over such shortcomings and thereby committed a misdirection. On the strength of that contention, the applicant's counsel submitted that a reasonable possibility existed that the applicant might not be guilty.
- [13] I am persuaded that, perhaps, we misdirected ourselves, as alleged. It must be borne in mind that we were here grappling

with *terra nova* – finger rape. I would, therefore, grant the applicant leave to appeal against his conviction.

- [14] As regards sentence, the applicant relied on two grounds in support of his application for leave to appeal. Those grounds were listed in paragraph 2 of his notice of application. The paragraph reads:

“2.

It will be respectfully submitted that trial court erred in sentencing the applicant to a sentence which is inappropriate to the offence, the offender as well as the interest of society. It will further be submitted that interference on appeal is justified on the following grounds:

- 2.1 By finding the existence of substantial and compelling circumstances, the court *a quo* improperly used its discretion not to approach sentencing from the perspective of using a ‘clean slate’, especially since there are no analogical case law on sentencing of rape instances where a finger was used as the ‘object’ of penetration;
- 2.2 The court *a quo* did not give due regard to the moral blameworthiness of the applicant as is evident from the manner in which the rape occurred.”

- [15] The applicant’s chief contention in connection with the sentence was that the trial court, as well as we, as the court of first appellate instance, failed to appreciate that the moral blameworthiness of a finger rapist has to be distinguished from and treated as comparatively less than that of a conventional penis rapist.

- [16] Section 3 of the Sexual Offences and Related Matters Amendment Act 32 of 2007 created *terra nova* in our criminal law. We were not referred to any precedent and we were not aware of any relating to the contravention of this specific statutory provision.
- [17] We attempted to deal with this aspect at paragraphs [66] – [67] of the appeal judgment. It is so that in the case of a fingeral rape, a victim is not exposed to health risks, such as sexually transmittable diseases or HIV/AIDS as in the case of penal rape.
- [18] Whether that distinction justifies a sentencing differentiation is a debatable issue. Obviously the lawmaker does not think so. Similarly we did not think so, but it is reasonably possible that another reasonable court might come to a different conclusion. In the circumstances I am inclined to grant the applicant leave to appeal against the sentence imposed on him as well, which sentence we upheld on appeal.
- [19] Accordingly I propose the following order:
- 19.1 The application succeeds *in toto*.
 - 19.2 The applicant is granted leave to appeal to the Supreme Court of Appeal against his conviction and sentence.

M. H. RAMPAL, J

I concur.

K.J. MOLOI, J

I concur.

S.E. MOTLOUNG, AJ

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