

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal number: A342/2012

In the appeal between:

ANDREW JOHNSON
PETRUS RADEBE

1st Appellant
2nd Appellant

and

THE STATE

Respondent

CORAM: EBRAHIM, J *et* FISCHER, AJ

JUDGMENT: FISCHER, AJ

HEARD ON: 27 MAY 2013

DELIVERED ON: 30 MAY 2013

[1] The appellants Andrew Johnson and Petrus Radebe were, together with their co-accused Lefa Jerry Mphale, charged with two counts of rape, and one count of indecent assault in the Regional Court in Bloemfontein. All the charges arose from the alleged rape and indecent assault of the complainant, Daisy May by the two appellants and their co-accused on the evening of 22 to 23 September 2006. At the time of the alleged rape

and indecent assault the two appellants were 16 and 18 years of age respectively whilst their co-accused was 19 years old. The complainant was approximately 23 years of age at the time of the alleged incidents. At the end of the trial both appellants were convicted on two counts of rape and one count of indecent assault, whilst their co-accused was convicted on one count of rape and one count of indecent assault.

- [2] During argument on appeal Mr Reyneke, on behalf of the appellants, drew the court's attention to the judgment of Zulman JA, in **S v KIMBERLEY AND ANOTHER** 2005 (2) SACR 663 (SCA) which dealt comprehensively with the application of section 52 of the Criminal Law Amendment Act 105 of 1997 and more specifically the meaning of paras (a)(i), (a)(ii) of Part 1 of Schedule 2 of the said Act. Having regard to the approach and interpretation of Zulman JA to the question of the position of an accomplice as opposed to that of a person(s) acting in common purpose, I am respectfully of the opinion that the court *a quo* erred in its interpretation of section 52 and more specifically the application thereof to the case of both appellants and their co-accused in handing down the sentences

it did. However in view of the finding I have arrived at on the merits, I deemed it unnecessary to revisit this aspect of the case especially in view of the fact that the co-accused of the appellants has appealed neither his conviction nor his sentence.

- [3] At the commencement of the trial both appellants pleaded not guilty to the two charges of rape and the one charge of indecent assault and furthermore proceeded to place on record that sexual intercourse with the complainant had been consensual in that she had willingly partaken and acceded thereto.
- [4] The state proceeded to call three witnesses, being the complainant, her elder brother Piet May and Dr Adrie Krieger.
- [5] The complainant Daisy May testified that on the evening in question she accompanied her brothers Karel and Piet May together with the wife of Piet May to a tavern where they proceeded to consume alcohol. She testified that she remained there for approximately two hours until midnight when she requested her sister-in-law to accompany her home. She

confirmed that she was “onder die invloed van alkohol” and that her sister-in-law refused to accompany her home.

[6] According to the complainant she then left the tavern with the intention of returning to her brother Piet May's home where she was staying. On the way home she met a person unknown to her who later turned out to be the first appellant who asked her where alcohol could be bought. Whilst they were standing speaking to each other two other unknown persons, who later turned out to be the second appellant and the co-accused, grabbed her arms whereupon she was taken to a nearby piece of open ground and undressed. The first appellant then had sexual intercourse with her whilst the second appellant and the co-accused stood close by talking to each other. The second appellant then had sexual intercourse with her whereafter the co-accused indecently assaulted her by penetrating her anally with his penis. She was adamant that she never consented to the sexual penetration. The co-accused then departed the scene.

[7] The first and second appellant's then took turns to piggyback

her to the shack of first appellant. In the process they proceeded past several homes as well as several people in the street but she chose to say nothing because she was allegedly scared. The complainant was taken into the shack of the first appellant and made to lie between the appellants whereupon they once again both had sexual intercourse with her in turn without her consent. According to the complainant they thereupon fell asleep and at sunrise the complainant then departed for home, leaving her panty and shoes in the shack. The complainant reported the matter to her brother Piet May who told her to go to bed and that she should later in the morning report the incident to the police. The incident was subsequently reported to the police, the shack pointed out, the complainant's shoes and panty found and the appellants arrested and charged.

- [8] The complainant's brother Piet May confirmed that he had accompanied the complainant together with his wife and brother to the tavern on the night in question. He did however add that he had been consuming alcohol before they all got there. He testified that at some stage during the evening he left

for another “shop” where he consumed approximately two more beers where after he returned to the tavern. Upon his return he established that the complainant had left and sometime thereafter he, accompanied by his wife and brother, went home. For the first time during his testimony reference was made to a seven year old child who at all times was apparently in their company and had remained at the tavern and this notwithstanding the fact that the complainant had earlier left for home. He furthermore confirmed that the complainant although staying with him was only visiting and that when they got home she was not there. According to him the complainant arrived early the following morning claiming that she had been raped by three men. According to him the complainant advised that she did not know the appellants and their co-accused but knew where the rape had taken place. He confirmed that he subsequently gave the complainant money with which to telephonically contact the police.

- [9] Dr Krieger a medical practitioner testified, with reference to the J88 report completed by her pursuant to a medico-legal examination, that the complainant had told her that she had

been raped by three unidentified male persons who had thereafter dragged her over an open piece of ground to a shack where she was once again raped. According to the doctor small tears (skeurtjies) were visible in the perineum as well as around the orifice of the anus which, according to her, corresponded with alleged forced vaginal and anal penetration.

[10] According to the first appellant he went to the tavern on the night in question and found the second appellant and the co-accused in the company of the complainant. They all drank Black Label beer and at some stage the second appellant told him that the complainant was his girl (meisie). According to him the parties continued drinking and dancing in the tavern and that some stage during the evening the complainant winked at him and told him confidentially that she had strong feelings for him. He was hesitant to get involved with the complainant in view of the claim by second appellant that the complainant was in fact his girl to which she responded that the first appellant was not to worry as she would take care of the matter.

[11] Later in the evening the second appellant enquired from the

first appellant as to whether the first appellant would allow him and the complainant to go to the shack of the first appellant to “sleep”, as he put it. The co-accused had in the interim left for home to fetch more money. The appellants never saw the co-accused again that evening and they subsequently left the tavern accompanied by the complainant.

- [12] At some stage on the way back to first appellant’s shack, the complainant advised that she needed snuff and made it very clear that she wanted second appellant to go and fetch and/or buy some and not first appellant. Second appellant had no sooner departed when complainant made advances upon first appellant to sleep with her. According to him they then proceeded to have sexual intercourse in a hurried fashion as he was afraid that second appellant would return and catch them *in flagrante*. They had no sooner completed the sexual act when he heard second appellant approaching singing a song to himself whereupon the complainant responded by urging first applicant to climb off her before second appellant arrived. Second appellant handed the snuff over to complainant whereupon first appellant made a bed on the floor in the

adjoining room. The complainant and second appellant then proceeded to have sexual intercourse on the same bed where first appellant had shortly before done the same thing. According to first appellant they then all fell asleep and the following morning after he had awoken and went outside to relieve himself, the complainant approached and told him that she intended returning to visit him later that same afternoon. The second appellant then accompanied her halfway home. According to first appellant the complainant had left her shoes and snuff at his home so as to provide a reason for returning there later the same day. He was unaware of her panty which was subsequently found by her in a draw in the shack of first appellant upon her return with the police.

- [13] The second appellant confirmed the version of first appellant and added that he was unaware of the fact that there had been sexual intercourse between the complainant and first appellant during his absence. He testified that he was affected by the alcohol he had consumed and was not sure whether his penetration of the complainant had been vaginal, alternatively anal. He was however adamant that whatever had happened

had been consensual.

[14] The general principles according to which this court should consider the facts of a case on appeal are set out in **R v Dhlumayo** 1948 (2) SA 677 (A) at 705 – 706. It is accepted for purposes hereof that the court *a quo* was and always is in a better position than a court of appeal to make reliable findings of fact as the court *a quo* sees and hears the witnesses and furthermore takes into account their appearance, demeanour and personality.

[15] In the absence of what have been identified as demonstrable and material misdirections by the court *a quo*, this court will accept that the findings of the facts of the court *a quo* are correct, unless the recorded evidence clearly shows that the court *a quo* was wrong. See **S v Hadebe and Others** 1998 (1) SACR 422 (SCA) at 426a – b.

[16] It is trite that the state carries the onus of proving its case beyond a reasonable doubt and that caution is to be applied in matters relating to sexual offences as well as when the state

seeks to rely on the evidence of a single witness. See **S v Heslop** 2007 (1) SACR 461 (SCA).

[17] The court *a quo* found the complainant to be a credible witness who came across as an honest person and whose version was corroborated in every material respect especially insofar as it related to the rape as supported by the medical evidence.

[18] The medical evidence consists of the report by Dr Krieger contained in the J88 as well as her testimony in the court *a quo*. This evidence does not unequivocally support a finding or inference of non-consensual sex given not only the limited nature and extent of the vaginal and anal injuries but more importantly the concessions made by Dr Krieger that, given the circumstances, her observations and findings were also reconcilable with consensual sexual penetration. Of further material importance in this regard is that Dr Krieger could find no visible physical evidence to support the claim by the complainant that she had been dragged naked over rough terrain after the first alleged rape.

[19] Furthermore the typed record does not in my respectful

submission support the impression the court a quo had of the complainant especially if regard be had to the following facts:

- (1) The complainant testified that her brother Piet May had the key to the home where she was sleeping but notwithstanding decided to depart for home without telling her brother or for that matter first obtaining the key; (2) The complainant testified that she was piggybacked in turn by both appellants on the way to the shack of the first appellant whereas she told Dr Krieger that she had been dragged across rough terrain; (3) On the way to the shack of first appellant complainant confirmed that they had passed several homes and pedestrians along the way but that she did not see fit to call out for help; (4) The alleged rapes took place shortly after midnight but complainant remained in the company of the appellants until sunrise before leaving for home; (5) The complainant was never locked in the shack and at no stage prevented by either of the appellants from leaving. No attempt was made to escape what, if her version is to be believed, must have been a traumatic experience; (6) The doctor confirmed that, given the circumstances in which first

appellant had allegedly had sexual intercourse with the complainant “behind the back” of second appellant, the absence of lubrication was to be expected which could in turn have given rise to and explained the presence of small tears. (7)The complainant must have known that her brother Piet May would not have been impressed with her behaviour. Not only did the complainant testify that she was scared of him having stayed out all night but her brother confirmed this adding that;

“... hy (sic) was seker bang vir my want hy (sic) weet ek raas hom (sic) altyd as hy (sic) sulke goed maak.”

[20] Brand, AJA (as he was then) made the following apposite comment in **S v Shackell** 2001 (2) SACR 185 (SCA):

“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.”

[21] An intervention by this court is in my opinion more acceptable and legally sound where the findings of fact do not as such depend on the personal impressions made by a witness's demeanour together with the probabilities. See **Minister of Safety and Security and Others v Craig and Others NNO** 2011 (1) SACR 469 (SCA) at para [58].

[22] What is quite apparent from a reading of the judgment of the court *a quo* is that the court gave very little if any attention to the question as to whether or not the appellant's version was reasonably possibly true or, to put it differently that their version was so improbable that it could not reasonably possibly be true.

[23] On the facts I am of the view that the version of the appellants is reasonably possibly true. Three young men and a young woman found themselves at a tavern consuming alcohol, advances were made and a decision taken to enjoy sexual intercourse involving a scheme whereby second appellant was

obliged to leave the scene thereby facilitating sexual intercourse between first appellant and the complainant. The purchasing of the snuff and the fact that it was left behind in the shack, on its own lends strong support to the version of the appellants. But that version is fortified by the objective facts as detailed by the complainant herself. In leaving her panty and shoes at the shack of first applicant strong support is to be found for the inference that the complainant did this so as to provide her elder brother with an explanation for staying out all night, namely that she had to leave the scene in haste because of the rape, in the process leaving some of her belongings behind. Further strengthening the appellant's version are the numerous contradictions I have listed in the complainant's evidence.

[24] In the circumstances I respectfully conclude that the court *a quo* misdirected itself in regard to the facts and the inferences to be drawn therefrom and consequently erred in not finding that the version of the appellants was reasonably possibly true.

ORDER

[25] In the result the following is ordered:

25.1 The appeals against the convictions of rape and indecent assault are upheld.

25.2 The convictions and accompanying sentences in respect of both appellants are accordingly set aside.

25.3 Both appellants are acquitted on both counts of rape and the single count of indecent assault.

P.U. FISCHER, AJ

I concur.

S. EBRAHIM, J

On behalf of the applicant: Mr. D. Reyneke
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. L. Zweni
Instructed by:
The Director: Public Prosecutions
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