

THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

CASE NO. A 217/13

In the matter between:

LEKGOTLA MOEKETSI

APPELLANT

versus

THE STATE

RESPONDENT

CORAM: DAFFUE, J *et* NAIDOO, AJ

JUDGMENT BY: NAIDOO, AJ

HEARD ON: 25 NOVEMBER 2013

DELIVERED ON: 28 NOVEMBER 2013

NAIDOO AJ

[1] The appellant was convicted and sentenced in the
Regional Court, Welkom as follows:

Count 1- Rape, 10 years' imprisonment

Count 2 – Sexual Assault, four years' imprisonment

Count 3 – Sexual Assault, four years' imprisonment.

The sentences in respect of counts 2 and 3 were ordered to run concurrently.

The appellant was legally represented during the trial in the Regional Court, and with the leave of the trial court, appeals against his convictions and sentences. Mr JD Reyneke appears on behalf of the appellant in this court and Mr DJ Pretorius on behalf of the State.

- [2] The complainants in count 1, S[...] M[...] (S[...]), count 2, Si[...] M[...] (Si[...]) and count 3, L[...] M[...] (L[...]) were walking home at approximately 18h30 on the evening of 12 October 2008, when they were accosted by the appellant who said he was going to punish them for walking in the street at night. He grabbed hold of S[...] and L[...] by their T-shirts, while at the same time he produced a knife and threatened them with it. Si[...] ran away but was called back, under threat that her two friends would be stabbed. S[...] was eighteen while Si[...] and L[...] were seventeen at the time of the incident. The appellant took the girls to a veld and asked

them to undress. He raped S[...] in the presence of the other two girls and told L[...] she was next. He asked her to undress, and she removed her trousers and underwear and sat there as instructed. He repeatedly threatened them with the knife. Two men then approached and asked what was happening. The girls told them they were being raped, and they, as well as the appellant, were taken to the hostel where the appellant was arrested. S[...] was taken to a doctor where she was examined and a medical report (the J88) was compiled.

- [3] The appellant's version is that he proposed love to S[...] and she said that he should not waste her time, saying she needs money. He gave her R150.00 and then she walked to the veld and her friends (L[...] and Si[...]) followed them. At the veld, he had (consensual) sexual intercourse with S[...]. At that time L[...] offered herself to him and said she was next. Two men then came and asked what was happening. He told them to go away as they were disturbing him, and that these were his

girlfriends. He and the girls were then taken to the hostel where the police were called and he was arrested.

- [4] S[...] as well as the other two complainants testified that S[...] was crying. At some stage L[...] was also crying. One of the two men who rescued the girls, Bongani Petrus Nkomo (Nkomo), testified and confirmed that he and his friend discovered the girls with the appellant in the veld, at which time the appellant was on top of S[...]. He stopped the appellant and the three girls and appellant were taken back to the hostel where he lives. His version is that the girls were completely naked, whereas Si[...]’s and L[...]’s evidence was that they was partially naked, having only removed their trousers. Nkomo testified that the girls were crying, and S[...] cried after she was rescued.
- [5] There were discrepancies in the evidence of the state witnesses regarding the manner in which the appellant held S[...] and L[...] when he marched them to the veld, S[...] having said that she was grabbed by her T-shirt while L[...] was grabbed by the waist of her

trousers. Si[...] and L[...] testified that the accused grabbed L[...] and S[...] by the trousers.

- [6] It is a common occurrence that different witnesses observe the same scene differently and would thus include in their testimony aspects of the same events not mentioned by other witnesses, or give an explanation that could differ from other witnesses. The state of mind of the witnesses, and such aspects as lighting or visibility, also influence the power of a witness' observations. All three complainants testified that the appellant threatened them with a knife. It is common cause that Nkomo recovered a knife at the scene, although the appellant denied that he was in possession of a knife. The appellant's version is largely the same as the version of the State, except that the appellant alleges that S[...] consented to having sexual intercourse with him and that L[...] offered herself to him. He also agreed that he did not know Si[...] and L[...] before this day in question. According to the appellant, he knew S[...]’s brother and also had seen her before. This was not put to her when she testified.

[7] The three complainant's were afraid and emotional. The incident occurred at night, and it appeared that they were still far from their homes. The obvious question that arises when considering the circumstances of this matter is why the complainants did not run away, as they had the opportunity to do so. This was put to Si[...] as well as L[...] and they said that they were threatened with the knife and therefore remained. They were told that S[...] would be stabbed if they ran away. This version is also consistent with Nkomo finding them in an emotional state. If they were with the appellant of their own accord, it makes no sense that they would be in the emotional state of mind that he found them in. It must also be borne in mind that the complainants were young at the time of the incident, and clearly very intimidated by the threats with the knife, preventing them from acting logically and running away.

[8] There were indeed a number of other contradictions, which were pointed out by Mr Reyneke in his Heads of

Argument and during argument in court, for example, S[...] said that the knife was recovered on the person of the accused, while Si[...] said that Nkomo went back to the veld to retrieve it. Nkomo confirmed Si[...]’s evidence in this regard. Mr Reyneke argued that the numerous contradictions weakened the State’s case considerably. His contention is that the State failed to prove the guilt of the appellant beyond reasonable doubt. It is true that there is no onus on the appellant to prove his innocence and that his version need only be reasonably possibly true. Mr Pretorius, for the State, conceded the contradictions pointed out by Mr Reyneke, but argued that in assessing the evidence, there is a golden thread that runs through which points to the guilt of the appellant.

- [9] When one examines the evidence of the appellant, it emerges for the first time during his evidence in chief that he actually handed R150.00 to S[...] after which she led the way to the veld and had consensual sex with him. This was never put to S[...] in cross examination. Mr Pretorius argued that if indeed, S[...]

did consent to have sexual intercourse with him, it is so against ordinary human conduct that she would take her two friends along, undress in their presence and then allow them to watch while she and the appellant executed the carnal act, that this version should be found to be improbable. I agree. A further observation regarding the improbability of this version is that the appellant alleges that he paid for S[...]’s services, yet when they were approached by Nkomo and his friend Para, the appellant referred to S[...] as his girlfriend. In addition, I also find it improbable that L[...] would go along without any prompting from or arrangement with the appellant, undress and offer herself to the appellant, a person she had only just encountered.

The evidence of Nkomo, who is a completely independent witness who did not know any of the parties, cannot be disregarded. His evidence is clear that when the girls were asked by Para what was happening, they responded that they were being raped. He found them to be emotional, and they were crying. S[...] started crying shortly thereafter. This in all probability prompted his intervention in this incident.

The state that Nkomo found the three complainants in is not consistent with the version of the appellant and I find that Nkomo's evidence corroborates the version of the three complainants.

[10] The trial court clearly took all of the above factors into consideration in convicting the appellant. I am unable to find any misdirection on the part of the trial magistrate with regard to the convictions in this matter. In this regard, Mr Pretorius referred us, in his Heads of Argument to two cases, **J v S [1998] 2 All SA 267 (SCA)** and **S v Francis 1991(1) SACR 198 (A) at 204 c-e**. In **J v S**, the court said at page 271 c :

"In the absence of an irregularity or misdirection, a court of appeal is bound by the credibility findings of the trial court, unless it is convinced that such findings are clearly incorrect."

In Francis case, the court commented as follows:

"Bearing in mind that the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial Court's evaluation of oral testimony" I agree.

[11] With regard to the sentences imposed, Mr Reyneke conceded that the minimum sentence prescribed for the charge of rape in count 1 is applicable and that he is unable to argue on the whole, taking into account that the sentences in respect of counts 2 and 3 were ordered to run concurrently, that the sentences in this matter are inappropriate or too high.

[12] In the circumstances, I propose that the following order be made:

(1) The appeal against the convictions and sentences is dismissed;

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NAIDOO, AJ

I agree, and it is so ordered

DAFFUE, J

**Counsel for Appellant:
Instructed by:**

Mr. JD Reyneke
**Bloemfontein Justice
Centre**

**Counsel for the Respondent:
Instructed by:**

Mr DJ Pretorius
The State