

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A20/2011

In the appeal between:-

JABULANI NKOMO

First Appellant

LAWRENCE MASOABI

Second Appellant

TIMOTHY MOKHOEBI

Third Appellant

and

THE STATE

Respondent

CORAM:

C.J. MUSI, J *et* DAFFUE, J

HEARD ON:

23 APRIL 2012

JUDGMENT BY:

DAFFUE, J

DELIVERED ON:

3 MAY 2012

INTRODUCTION

[1] On 15 September 2009 the three appellants were convicted in the Regional Court, Sasolburg on one count of rape. On 28 September 2009 they were each sentenced to 18 (eighteen) years' imprisonment, such sentences to run concurrently with their remaining periods of incarceration.

- [2] Upon dismissal by the court *a quo* of their application for leave to appeal against their convictions and sentences, appellants applied for leave to appeal to this court. On 18 August 2010 Van der Merwe and Mocumie JJ granted leave to appeal against the convictions and sentences.

ISSUES ON APPEAL

- [3] It was submitted on behalf of appellants that the court *a quo* erred in accepting the evidence of the complainant – a single witness – to be credible and reliable, notwithstanding several contradictions and the absence of objective facts to substantiate his claim of being raped. It was further submitted that the court *a quo* was also wrong not to accept that complainant had a reason to falsely incriminate appellants in the light of the evidence which was common cause. Although the sentence was attacked in the heads of argument prepared by Mr. Reyneke on behalf of appellants, Mr. Pretorius who argued the matter before us conceded that the sentence was appropriate. Mr. Mthethwa, on behalf of the State, supported the judgment of the court *a quo*.

SUMMARY OF THE EVIDENCE

[4] On or about 5 October 2008 the complainant, Jabulani Jack Maduna, a sentenced inmate, shared a cell in the Groenpunt Correctional Centre, Sasolburg, with the three appellants and twelve others.

[5] The complainant testified that he had been awakened by first appellant around twelve o' clock the Friday night/early Saturday morning. He was taken to the only toilet in their cell. The second and third appellants accompanied them on the instructions of first appellant. It is common cause that the lights in the cells were normally put off at ten o' clock at night, but that the light in the toilet was never switched off. The toilet, which is located within the cell, does not have a door. The complainant and the three appellants were members of the Rough (RAF?) 3 gang. Inside the toilet second and third appellants grabbed him by the arms and caused him to bend forward whilst first appellant undressed him by pulling down his pants. First appellant put on a condom and penetrated his anus with his penis and continued to have sexual intercourse until he ejaculated. Thereafter the first appellant left and third appellant had

sexual intercourse with him in exactly the same manner. Lastly, second appellant did the same. Thereafter they instructed him to go into the shower to wash. On the Monday morning complainant reported the incident to Mr. Ramotse, an employee of the Department of Correctional Services and the Unit Supervisor.

[6] In cross-examination complainant admitted that he had an altercation with a person known as 619. This occurred prior to the alleged rape and this person hit him with his fists. It was put to him that he requested the others in his cell and appellants in particular to assist him in his fight against 619, but that they declined to do so. The complainant denied this. He furthermore admitted in cross-examination that he had a fight with second appellant prior to the rape incident. He mentioned in cross-examination that an eyewitness, one Carbo, could testify about the rape on him, but when he reported the matter to Mr. Ramotse he informed him that he was not sure whether anybody had witnessed this.

[7] After the incident he noticed that he was bleeding from his anus. However the J88 medical report which was completed

after an examination on Monday 7 October 2008, does not bear any proof of injuries at all. Furthermore it was not noted that the complainant was in pain as he had allegedly informed the doctor.

- [8] Discrepancies between the complainant's statement and his *viva voce* evidence were put to him in cross-examination. He denied ever informing the police that he was told by first appellant that before he could be given his present gang number, he had to have sex with him. According to him the police lied about this. In his statement he mentioned that second appellant was the second person who had raped him, whilst he testified that was incorrect as second appellant was the last person to rape him. According to his statement he immediately showered after the rape "as the smell of condoms was very bad". In the statement there was no reference to the fact that he was forced to shower, but he maintained this in his *viva voce* evidence.

- [9] According to Mr. Ramotse complainant informed him that he did not want to report the matter earlier to the other warders as he did not trust them and preferred to wait until Monday

when Mr. Ramotse came on duty. Complainant's version was that he did not report the matter earlier because he was threatened not to do so and also because he was ashamed about what happened to him. Later on and because he was emotionally hurt he decided to report the matter.

[10] According to Mr. Ramotse complainant reported to him that he had to be taught about the rules of the air force, but before then he had to sleep with appellants. This is in line with the complainant's statement wherein he indicated that first appellant had told him that before he could give him his prison gang number complainant must first have sex with him. In his evidence he did not testify that he had been informed that sex with him had to take place first before first appellant could teach him about the Rough (RAF?) 3 gang.

[11] Mr. Ramotse testified about complainant's hospitalisation for a month and a week after the alleged rape incident, that complainant behaved abnormally afterwards and that he informed him that he was thinking of committing suicide. He even arranged with a nursing sister to provide "physiological" (sic) treatment to complainant. According to this witness

complainant also suffered from epilepsy after the incident. The complainant did not mention anything about his medical condition or hospitalisation after the incident, save for the allegation that he suffered pain which was not recorded by the doctor who completed the J88 medical report.

[12] Appellants denied the allegations levelled against them. According to them they were fast asleep when the alleged incident would have occurred. They called two witnesses, firstly Mr. Ngalo who was detained in the same cell and who held the position of assistant monitor. His bed was the closest to the toilet. He confirmed the two incidents between complainant and the person called 619 and complainant and second appellant. He testified that if complainant was indeed raped, the cell members would have heard it as he expected complainant to scream. He was neither a member of the Rough (RAF?) 3 gang, nor any other gang.

[13] The next witness on behalf of the defence was Mr. Sizane Nthutang, a cellmate of all the others. In his *viva voce* evidence he testified that he noticed second and third appellants in the toilet between eight and nine o'clock on the

Saturday night. He denied having entered the toilet at the stage when the three appellants and complainant were present and when the alleged rape occurred the Friday night as testified to by complainant. According to him complainant wanted him to testify on his behalf that he was indeed raped. He mentioned that he had been bribed by the complainant who gave him two Dawn products, two phone cards and a roll-on. He was confronted with his statement made to detective L.J. Hendrikse. Mr. Hendrikse testified about the statement which was accepted as part of the evidential material. The statement was taken down in Afrikaans whilst, according to Mr. Hendrikse, the consultation was in English. On Mr. Hendrikse's version he read the statement back to the witness by simultaneously translating it into English. According to the version set out in the statement, Mr. Nthutang went to the toilet Sunday morning at three o' clock where he found second and third appellants with one Jack Mabaso (apparently a reference to complainant). The name Jack Jabulani also appears on the statement as being one of the persons present in the toilet, but this name was deleted by Mr. Hendrikse at the request of the witness prior to the statement being signed.

LEGAL PRINCIPLES

[14] In assessing the evidence a court must in the ultimate analysis look at the evidence holistically in order to determine whether the guilt of the accused is proved beyond reasonable doubt. This does not mean that the breaking down of the evidence in its component parts is not a useful aid to a proper evaluation and understanding thereof. There is no substitute for a detailed and critical examination of each and every component in a body of evidence, but once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood from the trees. See **S v SHILAKWE** 2012 (1) SACR 16 (SCA) at [11] and **S v HADEBE AND OTHERS** 1998 (1) SACR 422 (SCA) at 426 f – h.

[15] It is acceptable in evaluating the evidence in its totality to consider the inherent improbabilities. Heher AJA (as he then was) dealt with this aspect as follows:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent

strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.”

See **S v CHABALALA** 2003 (1) SACR 134 (SCA) at [15].

[16] An accused may be convicted of any offence on the single evidence of any competent witness. See section 208 of the Criminal Procedure Act, 51 of 1977.

[17] The danger of relying exclusively on the evidence of a single witness has evoked a judicial practice that such evidence be treated with the utmost care. De Villiers JP opined 80 years ago pertaining to the predecessor of section 208 that the section should only be relied on when the evidence of a single witness is clear and satisfactory in every material aspect. See **R v MOKOENA** 1932 OPD 79 at 80. The rule was put in perspective in several judgments of the former Appeal Court and there is no doubt that the exercise of caution should not be allowed to displace the exercise of common sense. See **S v ARTMAN AND ANOTHER** 1968

(3) SA 339 (A) at 341.

[18] Although contradictions and omissions in the evidence of a single witness may not be material on their own, they may tend, collectively, to have a negative impact on the credibility of the witness. See **S v JANSE VAN RENSBURG** 2009 (2) SACR 216 (C) at [12]. A court is allowed to compare the nature and quality of the complainant's evidence with that of the accused. See **MAAKE v DPP** [2011] 1 ALL SA 460 (SCA) at [6] and [8] and **S v CHABALALA**, *loc cit*, at [15].

[19] The cautionary rule applied in sexual cases has been dealt with comprehensively after the adoption of our Constitution. See **S v JACKSON** 1998 (1) SACR 470 (A) in which judgment it was emphasised that judges were not required to conform to any formula, and courts of appeal should be slow to interfere with the exercise of the discretion by a trial judge (or magistrate) who had the advantage of being able to assess the evidence in question.

[20] In the case of differences between the *viva voce* evidence of a witness and his or her statement, it remains the duty of the

trial court to consider these differences, which may even be material, and its final task is to weigh up the previous statement against the *viva voce* evidence, to consider all the evidence and to decide whether the evidence is reliable or not and whether the truth has been told, despite any shortcomings. See **S v MAFALADISO EN ANDERE** 2003 (1) SACR 583 (SCA) at 593 b - 594 h.

THE COURT A QUO'S APPROACH

[21] Although the court *a quo* indicated that the evidence of the complainant had to be approached with caution, it nevertheless found as follows:

“I must say that the evidence of the complainant there is nothing wrong that I picked up.” (*sic*)

“That is, even during cross-examination, there is nothing that the court picked up as being strange in the evidence. There were no contradictions picked up by the court regarding the incident.”

[22] The court *a quo* went on to say that there were inconsistencies and only four were quoted, i.e.

- a) who undressed complainant;
- b) what time the incident occurred;

- c) that complainant did not testify that he had become epileptic after the incident; and
- d) whether or not complainant was threatened with assault or that he would be killed if he reported the incident.

[23] The court *a quo* also mentioned that complainant was not certain whether anyone witnessed the incident. Mr. Ramotse was also not informed that the complainant bled.

[24] The court *a quo* referred to the evidence of Mr. Nthutang who testified that second and third appellants were seen at the toilet between eight and nine o' clock the Saturday night and before the lights (excluding the toilet light) were switched off. It then came to the following conclusion:

“Their (the appellants’) bare denial is refuted by the evidence of the witness (Nthutang) who places the accused number 2 and 3 at the scene.”

[25] The court *a quo* found that the evidence by Mr. Ramotse pertaining to the complainant’s condition after the alleged

rape was indicative of trauma.

EVALUATION OF THE COURT A QUO'S APPROACH

[26] The court *a quo* did not consider the evidence holistically in order to determine whether the guilt of the appellants was proved beyond reasonable doubt. It is apparent that the court *a quo* considered the version of the state witnesses in isolation and accepted the reliability and correctness thereof notwithstanding contradictions and improbabilities and without seriously considering the merits and demerits in the version of the defence. In doing so, it paid lip service to the cautionary rule applicable to single witnesses. Insufficient weight was afforded to the fact that the evidence of complainant as a single witness was not supported by the medical report or any other objective fact, that there were material discrepancies between his *viva voce* evidence and his statement and between his evidence and that of Mr Ramotse.

[27] The court *a quo* incorrectly mentioned that complainant was not certain whether anyone witnessed the incident. This is not correct as complainant positively testified that one Cargo

(Mr. Nthutang it turned out to be) “saw that these people were busy raping me.....” However Mr. Ramotse recalled that complainant indicated that he was not sure whether anyone witnessed the rape. Although the court warned itself to apply safeguards, none were shown to be applied. It came to an inaccurate conclusion pertaining to the evidence of Mr. Nthutang in that it was never complainant’s case that he was raped on the Saturday night between eight and nine o’clock when the lights in the cell were still on. On his version he was raped the previous night at about midnight. No medical evidence was tendered pertaining to complainant’s condition after he was examined for purposes of the J88 medical report. No nexus between the alleged rape and his epilepsy has been proven, but a causal link appears to be highly improbable. It is not necessary to speculate, but it is also possible that complainant was not prepared to remain in the cell any further after the two incidents described by most of the witnesses and that he invented a strategy and created an opportunity to arrange his relocation.

[28] It might be blamed to a slip of the tongue by the court *a quo*,

but the fact remains that the following was stated when the application for discharge in terms of section 174 was considered:

“It is the feeling of this court that the State has proved its case beyond a reasonable doubt. In other words at this stage there is a *prima facie* case against you.” (emphasis added)

[29] It totally disregarded complainant’s alleged motive for falsely incriminating appellants, notwithstanding acceptable evidence which lent support to their version. The version of Mr. Nthutang was attacked when appellants’ denial was considered and in this regard the court *a quo* merely mentioned – incorrectly may I add – that

“they (the appellants) could not advance a tangible reason why they would say complainant was falsely incriminating them amongst the 16 cell members.”

[30] In conclusion various contradictions and improbabilities were disregarded by the court *a quo* not the least being the absence of objective facts to substantiate the allegation that complainant was raped. I am of the view that sufficient doubt

has been cast upon the State's version. The court *a quo* came to a wrong conclusion in accepting the evidence of the State and rejecting the version of appellants as not reasonably possibly true.

[31] Consequently the convictions and sentences should be set aside.

ORDER

[32] In the premises I would

1. uphold the appeal; and
2. set aside the convictions and sentences of all three appellants.

J.P. DAFFUE, J

I concur and it is so ordered.

C.J. MUSI, J

On behalf of appellants: Mr. K. Pretorius
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv. S. Mthethwa
Instructed by:
Office of the Director of Public
Prosecutions
BLOEMFONTEIN

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