

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: A202/2009

In the appeal between:

THAPELO EDWARD MOKHOELE

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAI J *et* VAN ZYL J

JUDGEMENT:

RAMPAI J

HEARD ON:

9 MAY 2011

DELIVERED ON:

9 JUNE 2011

[1] This is an appeal against the conviction. The appellant was tried in the Bloemfontein Regional Court. On 14th July 2009 he pleaded not guilty to the charge of rape. Notwithstanding his plea, he was found guilty on 27th July 2009. The next day he was sentenced to 15 years imprisonment. He now comes on appeal with the leave of the court *a quo* granted on 28th July 2009.

[2] The grounds of the appeal were that the court *a quo* erred by

finding: that the complainant was a credible witness; that the contradictions in the prosecution case were immaterial; that the complainant was raped notwithstanding the absence of medical evidence and that the circumstantial evidence indicated that the appellant raped the complainant.

- [3] The version of the prosecution was narrated by three witnesses, namely:

Ms N Y Sello – the complainant;

Mr N L Slater – the complainant's boyfriend;

Ms S M Mofama – the boyfriend's mother.

In addition to the oral evidence, documentary evidence by Sr Seekoei was received as evidence and formally admitted as per exhibit A.

- [4] Briefly stated the evidence of the complainant was that the appellant raped her in the vicinity of Roodewal Farm in the district of Bloemfontein on Sunday 8 March 2009. She escaped after the second incident and ran away from the second scene to the parental home of her boyfriend. She did not tell him that the appellant had raped her. However, she told her boyfriend's mother accordingly the next

morning. The boyfriend and his mother contradicted her. Both of them said she did not tell them that the appellant had raped her.

- [5] The version of the defence was narrated by two witnesses, namely:

Mr Thapelo Edward Mokhoele, the appellant and

Mr Soga Siyabonga Ramokolota, the appellant's friend.

- [6] The evidence of the appellant was that he did not rape the victim. Shortly after their companion, Mr Ramkolota, had gone his own way, he and the victim walked straight to his parental home where he lent a white t-shirt to her because she told him she was feeling cold. From there the victim walked alone to her boyfriend's home. He remained behind and slept. He was taken aback to hear about the complainant's accusation from the police the next day.

- [7] The court *a quo* was impressed by the complainant. It described her as a credible and honest witness. Notwithstanding certain discrepancies in her evidence such as her state of intoxication, her conduct on the scene, the

contradictions by her witness and the absence of genital injuries, the court accepted her evidence as a credible and reliable account of what truly happened to her on the day in question.

[8] The court *a quo* was unimpressed by the appellant:

“Beskuldigde se weergawe het nie ‘n goeie indruk op my gemaak nie om redes wat ook sal volg ten tye van die bespreking van die geskilpunte.”

The court *a quo* finally rejected the version of the appellant as false wherever it differed from that of the complainant.

[9] Mr Reyneke, counsel for the appellant, submitted that the court *a quo* erred in making all the findings which I previously outlined and finally reaching the aforesaid conclusion. Accordingly, counsel urged us to interfere with those findings and the ultimate conclusion on the grounds that the court *a quo* had misdirected itself in a number of material respects.

[10] Mr Bontes, counsel for the respondent differed. He submitted that the court *a quo* had committed no misdirection or irregularity to warrant our interference. Counsel argued that the findings under attack were supported by evidence and correctly made by the court *a quo*. Therefore he urged us to dismiss the appeal against the conviction of the appellant.

[11] Sitting, as we are, in an appellate mode, our powers to interfere with the findings of fact by the trial court are limited. The acceptance of the complaints' evidence by the trial court is presumed to be correct unless it is vitiated by material misdirection. The appellant had to convince us on adequate grounds that the regional magistrate was wrong in accepting the complainant's evidence and rejecting his. A mere doubt, however reasonable, will not suffice to justify our interference with the findings made by the trial court. **S v FRANCIS** 1991 (1) SACR 198 (AD) at 204c – e.

[12] Mr Reyneke analysed the complainant's evidence in considerable detail. In the process, he brought to light some minute details, which he contended were inconsistencies,

contradictions and improbabilities, which adversely reflected on the finding that she was a credible witness.

[13] I do not intend to deal with all the points of critique levelled against the complainant's evidence. It will do to deal only with a few of them. During cross-examination it emerged that the complainant lost consciousness during the first incident as a result of her strangling by the appellant. The criticism was that her indirect evidence was inconsistent with her direct evidence. It was then further contended that since she was wearing a tight-fitting pair of jeans which was merely lowered to the level just above her knees, coupled with the fact that she had fainted, cast serious doubt as to whether penetration actually took place.

[14] In my view nothing significant turns on the point, inconsistent though it was. Her evidence was clear. She stated that the appellant had already penetrated her at the time she fainted. She did not faint before she was penetrated. She was fully conscious when she was undressed, when her assailant unzipped and inserted his penis into her vagina. She fainted during and not before she was actually penetrated. The

court *a quo* commented as follows about the first sexual intercourse.

“Sy is egter baie pertinent wanneer sy sê dat daar weliswaar ten tye van die eerste geleentheid penetrasie was, relatief kort van aard.”

On appeal I cannot held such a fining to be wrong. No doubt can ever justify interfering with that finding.

[15] Mr Reyneke devoted a great deal of his argument attempting to convince us, that the absence of genital injuries was inconsistent with the alleged forceful penetration and the alleged pain experienced by the complainant. This critique also concerns the first sexual incident.

[16] When the complainant was confronted by the suggestion that the absence of genital injuries militated against her claim that she was raped, she gave an answer. Her answer was that the first sexual incident endured for a relatively short time and that she momentarily experienced pain. Since she did no endure pain over a sustained period of time

but fleetingly experienced an episode of pain, it came as no surprise to her when the nurse found no fresh tears, bruises or lacerations in or around her vagina. The argument that the attacker's force, vaguely described and the complainant's fleeting pain of unspecified intensity, suggested that the complainant should necessarily have sustained genital injuries failed to persuade me.

- [17] Quite often the absence of genital injuries (or the presence thereof) may be attributed to the anatomical structures of the victim's sex organ or the rapist sex organ or both. This much Mr Reyneke conceded. In this instance, no convincing contention was advanced why the anatomical considerations should be discounted as one of probable explanations for the apparent lack of genital injuries. The mere fact that the complainant had suffered no visible or microscopic genital injuries was neither here nor there. The fact of the matter was that the forensic nurse noted visible neck injuries and detected a whitish discharge in her vagina. Those two undisputed aspects of the forensic nurse's documentary evidence strongly corroborated the complainant's evidence that she was recently under attack and that a bodily fluid,

which resembled sperms, was freshly deposited in her vagina.

[18] The ex-boyfriend and his mother deliberately attempted to destroy the respondent's case by purposefully contradicting the complainant's evidence. The court *a quo* was mindful and alert to their cunning scheme to rescue the appellant. In my view the court *a quo* correctly found that the ex-boyfriend, just like his mother, had a clear motive to protect the appellant by cynically sacrificing the truth, and that at the expense of the complainant. About her, the two witnesses clearly could not care less. Notwithstanding their conspiracy to make common cause or side with the appellant against the complainant the court *a quo* found important safeguards, in their otherwise hostile evidence, which materially corroborated the evidence of the complainant as a single witness.

[19] It was also contended that certain inconsistencies between the complainant's police statement and her court testimony cumulatively considered with the points of critique already alluded to, portrayed the complainant as an untruthful

witness. The court *a quo* found her to be an honest witness who gave a credible account. In **S v OOSTHUIZEN** 1982 (3) SA 571 (T) at 576G – H, Nicholas J held that it was not every error made by a witness which unfavourably affects his or her credibility. In this case the complainant was adamant that her testimony was correct and that her police statement was incorrectly written in certain respects. She was in fact saying that the inconsistencies or contradictions relied upon were not of her own making. In my view her court testimony had to be preferred to the police statement wherever the latter deflects from the former.

[20] I am not persuaded that the court *a quo* was wrong. The evidence of a single witness does not have to be perfect before a court can accept it. All that is required by law is that the court must be humanly convinced that the truth has been told – nothing more and nothing less. **S v GUESS** 1976 (4) SA 715 (AD) and see also **S v SAULS** 1981 (3) SA 172 (AD).

[21] The court *a quo* rejected the version of the appellant. It was contended that the respondent had not proved that the

appellant's version was beyond reasonable doubt false. The court a *quo*, in my respectful view, correctly concluded the matter. Sound reasons were given for its rejection of the appellant's version. I wish to add two more reasons.

[22] Firstly, the appellant was afraid to walk alone that evening. She approached the appellant and asked him if she could walk with him back to the farm where they lived. Apparently, their respective homes were some distance apart. If they first went to his home, as he claimed they did, he would probably have escorted her from there to her home because he knew she was afraid to walk alone. He claimed he lent her a white t-shirt because she was feeling cold. This also shows that he knew the victim still had a long distance to cover to get home otherwise it would not have been necessary to lent her the t-shirt. Therefore, it seems to me, unlikely that he would simply have given her a shirt and let her walk further alone, afraid though he knew she was.

[23] Secondly, the appellant claimed, that from him she went straight to her boyfriend wearing his white t-shirt. However, her boyfriend did not see the white t-shirt. Her boyfriend's

evidence was that she was dressed in dark cloths when she arrived. This evidence tended to show that the appellant's version that she went with him to his parental home, put on a white t-shirt and left him behind there was palpably false. The appellant and the victim did not amicably part ways as the appellant wanted the court to believe.

[24] Thirdly, the appellant complainant did not plan to spend that particular night with her boyfriend. From the tavern she made it clear to the appellant that she wanted to go back to her parental home. Her boyfriend was not expecting her. This makes a mockery of the appellant's insinuation that she falsely incriminated him because she was worried about arriving home very late and intoxicated. It is ridiculous, to say the least, to suggest that she would have contrived such a serious accusation against an innocent man merely because she was afraid of her boyfriend. If fear of her boyfriend was such a big factor she could simply have passed his home and walked straight to her parental home as she had originally planned. After all her boyfriend was not even expecting her that night. The fact that she ended up spending the night at her boyfriend's place where she

tearfully arrived strengthened the probability that she ran there as the nearest place of refuge. She realised the appellant made it unsafe for her to proceed to her parental home.

[25] Fourthly, the regional magistrate dismissed, as false, his claim that the complainant incriminated him because he once had a serious relationship with her but ultimately breached the promise to marry her. Before us, Mr Reyneke, frankly conceded that the court *a quo* was correct to dismiss the claim that there ever existed an intimate relationship or engagement between the appellant and the complainant. In the circumstances of this case the concession was correctly made.

[26] The court *a quo* was also correct to find that the evidence of the appellant's friend did not add anything significant to the enquiry. Instead it implicitly cast some doubt about the appellant's alleged relationship with the complainant.

[27] Mr Reyneke also raised certain points of criticism against the judgment. Indeed the complainant did see and talk to her

boyfriend the next morning. Indeed the complainant did not show her neck injuries to the boyfriend's mother the next morning. Indeed, there was no evidence to suggest that the complainant and her boyfriend had slept in separate bedrooms.

[28] The contrary findings of the court *a quo* on those specific points were factually incorrect. Those incorrect findings were errors. However, not every error by a trial court adversely affects its ultimate conclusion as regards the substantive merits of the case. The three errors did not concern crucial aspect of the case.

[29] What was significant was that the complainant ended up spending the night at a place where she did not intend sleeping as a result of the appellant's criminal aggression. Whether she saw her boyfriend or not the next morning was unimportant. What was important was that she did not have sexual intercourse with her boyfriend in his house during that particular night of her forced visit. Whether they slept in the same or separate bedrooms was immaterial. What was relevant was that the next morning her boyfriend's mother

could see that the complainant was emotionally unwell; that she had visible fresh scratches on her hands and that she blamed the appellant for her physical and emotional conditions.

[30] It would seem that the complainant was unaware of her hand injuries until she met the boyfriend's mother. Similarly, it would also seem that she was unaware of her neck injuries until she met the forensic nurse. The independent observation of her injuries by third parties strengthened her version and significantly enhanced her credibility.

[31] There remains one more aspect about which I want to comment before my conclusion. I have done so in the recent past. Mr Reyneke referred once again to the case of **S v KUBEKA** 1982 (1) SA 534 (W) at 537F – G where Slomowitz AJ said the following about the version of the accused:

“Whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him. It is not enough that he contradicts other acceptable

evidence. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the state.”

Now **S v KUBEKA** *supra* as well as **S v MUNYAI** 1986 (4) SA 712 (V) at 715G have long since been overruled. See **S v VAN ASWEGEN** 2001 (2) SACR 97 (SCA) 100 par [7] and [8] per Cameron JA.

[32] Now my final comments. I have given anxious consideration not only to each individual point of critique raised against the evidence of the complainant but also to the cumulative impact of all such points as wells. I am of the view, and it is a very firm view, that the evidence of that single witness was not shown to be substantially flawed. There were no material contradictions, inconsistencies or improbabilities in her evidence to render her veracity suspect. She has not been shown to have been a deliberately untruthful witness. On the facts the conclusion of the court a *quo* regarding the substantive merits of this case, is one which I, on appeal, cannot hold to be wrong.

[33] Accordingly, I make the following order:

32.1 The appeal against the conviction fails.

32.2 The conviction is confirmed.

32.3 The sentence stands.

M. H. RAMPAL, J

I concur.

C. VAN ZYL, J

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On behalf of respondent:

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