

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: 430/2002

In the appeal between:

LINGI IRVIN MATSHELANE

Appellant

and

THE STATE

Respondent

CORAM: **CILLIé, J, MUSI *et* VAN DER MERWE, JJ**

HEARD ON: **2 FEBRUARY 2004**

JUDGMENT BY: **MUSI, J**

DELIVERED ON: **12 FEBRUARY 2004**

[1] I have had the benefit of reading the judgment of my brother Cillié, J, with whom Van der Merwe, J concurred. I agree that the appeal should succeed. But I do so for different reasons. It must have been apparent during the hearing of the appeal that I was somewhat on a different wavelength from the majority and it is only proper that I state the reasons for my decision.

- [2] The issue of whether this is an appeal from the judgment of the Regional Court or that of Rampai, J is indeed an interesting one. Section 52(3)(b) of the Criminal Law Amendment Act makes it clear that the High Court

“shall, after considering the record of the proceedings in the Regional Court, sentence the accused, and the judgment of the Regional Court shall stand for this purpose and be sufficient for the High Court to pass sentence as contemplated in section 51.”

It is only if the High Court is in doubt whether the proceedings are in accordance with justice that it may not summarily proceed to sentence, in which event it must take certain steps. In terms of sub-section (e) it is only after it has obtained and considered the statement referred to in sub-section (b) that the High Court would be called upon to confirm the conviction. The sentiment expressed by Cillié, J that it may not be necessary for the High Court to formally confirm the proceedings in a case like this appears to be correct. Be that as it may, the issue was not fully canvassed and it is unnecessary to say anything further about it save to note that it is unavoidable that extensive reference will be made to the judgment

of the Regional Court even though we proceeded on the basis that it is the judgment of Rampai, J against which it is appealed.

- [3] In my view, the findings of the Regional Court that the complainant was an impressive and credible witness cannot be faulted. It is trite law that a Court of Appeal will only interfere with the credibility findings of a trial court if it is convinced that they are clearly wrong. The reasons for this are obvious and well-known and I need not elaborate. I draw attention to the following observations at p.74 line 15 – 25 of the record:

“Francina Mohokare het ‘n baie goeie indruk op my gemaak. Ek het ‘n aantekening gemaak ‘n baie goeie getuie, doodnormale vrou. Hierdie standpunt is gedeel deur, dat sy ‘n goeie getuie is, deur beide mnr. Loubser, die staatsaanklaer, sowel as ook mnr. Potgieter.

Ek het die id e gekry dat sy op ‘n chronologiese wyse aan my die getuienis gelewer het soos wat die gebeure volgens haar plaasgevind het. Sy probeer nie weghardloop vir die feit dat sy laatnag alreeds ‘n paar drankies agter die blad gehad het nie. Ek kry die id e dat sy gepoog het om aan die hof te verduidelik wat gebeur het.”

Then further at p.75 line 20 – 28:

“Sy getuig dat sy beskuldigde nie ken nie. Hy bevestig dit, die aand die eerste keer dat hulle mekaar ontmoet het, die eerste keer gemeenskap gehou.

Dit bring my by 'n baie belangrike aspek. Hier was duidelik geen motief aan haar kant hoekom sy beskuldigde wil valslik inkrimineer nie.

'n Verdere aspek wat ons moet verreken is die feit dat sy 'n veertigjarige vrou is, al die mans ter sprake is 25 jaar oud. Die klaagster maak 'n goeie indruk op my."

[4] In my view these observations are supported by the evidence on record. The complainant related a straightforward, chronological and logical sequence of events and gave details of how she left the tavern and what happened inside the appellant's dark house up to the following morning. Her conduct shortly after parting with the appellant is consistent with that of a rape victim. Nor are there any inherent improbabilities in her version of what happened inside the appellant's house.

[5] There were indeed discrepancies in the evidence of the report that the complainant made to a friend, Sanna, but these relate to Sanna's own evidence and were not cleared with the complainant. For example, it is Sanna's own observation that the complainant was full of dust and grass, something that the complainant never

said and which she could have explained if it had been broached with her. It must be remembered that the evidence of a complainant in sexual offences is admitted not for the purpose of corroboration, but rather to show consistency. (See **R v M 1959 (1) SA 352 (A)**). The second purpose is to negative consent and rebut any suspicion of fabrication. (See **S v BANANA 2000 (3) SACR 885 (ZSC)**). In my view the report made to Sanna served the purposes for which it was admitted.

- [6] With respect, the suspicion that the complainant may have been drunk and therefore voluntarily accompanied the appellant is not supported by the evidence. If the complainant was that drunk she certainly would not have been able to give such a detailed logical sequence of events. In my view, the appeal must succeed not because the appellant's version was reasonably possibly true. I am of the view that the Magistrate was correct in rejecting his version. However, in the view that I take of the matter it is unnecessary to get into details in this regard.

- [7] The difficulty in this case is that the complainant was a single

witness and though a credible witness, I do not agree with the court *a quo* that her evidence was satisfactory in all material respects and I do not think that the test as initially laid down in **R v MOKOENA 1932 (OPD) 79** has been fully met. There are unsatisfactory aspects in the complainant's evidence. Firstly, why visit a shebeen to which she had never been before alone at that time of night? Why an appointment with a boyfriend at 10 o'clock at night at a strange place? And strangely, the boyfriend does not turn up and nothing is heard of him thereafter. If he did turn up later what did he do to find out what had happened to his girlfriend? Why not call him to confirm the appointment? Does he in fact exist? And if not, why will the complainant fabricate an appointment? These are the questions that the State evidence should have answered. Then there is her reluctance to make a full disclosure of what had happened to Sanna. These questions generate a feeling of discomfort and doubt whether the full truth has been told. Surely the State could have done more to ensure some corroboration for the complainant and clear the doubts.

[8] The real issue, in my view, is sufficiency of evidence and the

cardinal question is whether the evidence on record was sufficient to found a conviction. There is doubt in this regard and the appellant should have been given the benefit thereof. Put otherwise, the State has not succeeded in proving its case beyond a reasonable doubt. On that basis the appeal should succeed.

H.M. MUSI, J

On behalf of Appellant:

Adv. E. Marais
Bloemfontein

On behalf of Respondent:

Adv. A. Bester
instructed by:
Director: Public Prosecutions

/scd