

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

Case No: CA&R102/23

In the matter between:

KHOLO MAZOSIWE

Appellant

and

THE STATE

JUDGMENT

ZILWA AJ

[1] The Appellant was arraigned in the Regional Court in Kingwilliamstown on charges of Rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act¹ and he was sentenced to 5 years direct imprisonment. He was also declared unfit to possess a firearm in terms of s 103 (1) of Firearms Control Act².

[2] This appeal comes before us with leave granted by the Court *a quo* in respect of both convictions and sentence. The Appellant is currently on bail pending this appeal.

[3] A brief *exposé* of the facts as narrated by the complainant is that:

¹ 32 of 2007

² 60 of 2000

- 3.1 The complainant ('Ms ATS') and the Appellant ('Mr Mazosiwe') were not strangers to each other. In fact, they were friends and in a common circle of friends most of the time. They would at times socialize and, it would seem, they got along very well.
- 3.2 Some days prior to 24 January 2019 the complainant and her cousin ('Ms SJ') ended up in the company of the Appellant. There was an arrangement that after the complainant had written her learner driver's license, on 24 January 2019, the three of them would meet.
- 3.3 It is common cause that on this day they indeed met and the three of them celebrated the complainant's passing of her learners driver's license at the King's Club situated in Kingwilliamstown. They indulged in tots of tequila which were on special on the day. They left the King Club and proceeded to McDonald's food outlet.
- 3.4 Ms SJ was thereafter dropped off at the homestead of the complainant. This was done at the latter's request when she registered her wish to spend a night at the Appellant's place as the latter's parents were away for a week.
- 3.5 The Appellant and the complainant proceeded to the former's homestead. Some passion and romantic chemistry developed between them and that ultimately resulted in the two of them engaging in consensual sexual intercourse which included oral sex. During the course and in the middle of sexual intercourse, the complainant decided to discontinue the sexual act because it crossed her mind that they are friends and that they are not supposed to have engaged in sexual intercourse. She told him to get off her as she is no longer willing to continue with the sexual act.
- 3.6 The Appellant adhered to her request and got off her. He laid next to her and at that time no one uttered a word. After approximately 20 to

30 seconds after having stopped briefly, the latter continued and violently violated her.

3.7 It is this continuation of sexual penetration that is in dispute that prompted the complainant to lay a charge of rape against the Appellant, as this continued sexual penetration took place against her will, so she contended.

[4] On the other hand, the Appellant's sequence of events is somewhat different. It can be summarized as follows:

4.1 The first consensual sexual act was stopped by fatigue which was caused by their intoxication and the fact that it was hot. After they had mutually stopped, he proceeded to the kitchen to get some water and brought some for the complainant.

4.2 The complainant was still lying in bed naked when he came back, and they continued to sit on the bed and had a conversation for a brief moment. There were no signs that the complainant was upset. After their conversation, they started kissing and he continued to finger the complainant before engaging in sex for the second time.

4.3 While busy with the sexual act, the complainant tapped him on his shoulder and verbally asked him to stop. He immediately got off and shortly thereafter, the complainant asked him to take her home. The Appellant complied. He took the car keys and drove the complainant home.

[5] The Appellant's grounds of appeal are that:

5.1 The Presiding Magistrate erred in finding the State's case to have been proved beyond reasonable doubt in that:

- a) he erred in finding that all the elements of the offence had been proved beyond reasonable doubt;
- b) he erred in holding that the Appellant's version was so inherently improbable that it stands to be rejected out of hand as false beyond a reasonable doubt.

5.2 The Presiding Magistrate erred, in the light of the common cause facts, in not finding that there was an interruption and not a cessation and that sexual petting and intercourse resumed.

5.3 The Presiding Magistrate erred in not finding that the rape cannot be sustained absent a finding that:

5.3.1 the State proved its case beyond a reasonable doubt;

5.3.2 the complainant had withdrawn her consent when sexual intercourse resumed; and

5.3.3 the Appellant was aware (i.e., had knowledge) that the complainant had changed her mind.

5.4 The Presiding Magistrate misdirected himself in having regard to the *dicta* of the SCA in *Venter v S* 2021 ZASCA 21 (18 March 2021) and cases there cited that "*rape is one of the most invasive and horrendous criminal acts*" as informing his decision on the guilt of the Appellant and/or whether the State has discharged the onus of proving all of the elements of the offence, whereas the said *dicta* are relevant and properly considered in connection with the imposition of an appropriate sentence.

[6] There are well-established principles that govern the hearing of appeals against findings of fact.³ An appeal court's powers to interfere with the findings of fact by the court *a quo* is limited.⁴ In the absence of demonstrable and material misdirection by the trial court, its findings of facts are presumed to be correct. Such findings will only be disregarded if the record shows them to be clearly wrong⁵:

'In the absence of any misdirection, the trial Court's conclusion, including its acceptance of a witness's evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony.'

[7] In order to determine whether the trial court materially and demonstrably misdirected itself, it is necessary to evaluate the evidence as reflected in the typed record of the proceedings against the trial court's findings.

[8] As the Court of appeal, I am quite alive to the fact that I should proceed on the basis that the factual findings of the trial court are correct. This entails that I must defer to the trial court as it was the one that was steeped in the atmosphere of the trial and had the opportunity of observing the witnesses testify, and drawing inferences from their demeanour. In *Powel and Wife v Streatham Nursing Home*⁶ Lord Wright put this in clearer terms as follows:

'Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court

³ *R v Dhlumayo and Another* 1948 (2) SA 677 (A); *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) 645E-F.

⁴ *S v Francis* 1991 (1) SACR 198 (A) 198I-199A.

⁵ *Ibid*

⁶ *Powel and Wife v Streatham Nursing Home* 1935 AC 243 at 265

ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.'

[9] At the same time, care should be taken not to overstate the indubitable duty of the Court of appeal to show deference to the factual findings of the trial court and, as a result, render the rights of appellants on appeal illusory. In this regard, the Constitutional Court dictum in the case of *Bernert v Absa Bank Ltd*⁷ is authoritative. The Court reasoned as follows:

'What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading "the cold printed word". The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to "tie the hands of the appellate courts". It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.'

[10] The following facts are common cause:

10.1 the parties engaged in full consensual sexual intercourse, including oral sex.

⁷ *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) at para 106

- 10.2 sexual intercourse was interrupted (on complainant's version because she asked the Appellant to stop and on the Appellant's version because he needed a rest).
- 10.3 the Appellant stopped the full sexual intercourse when instructed to do so.
- 10.4 the complainant remained naked on the bed after full sexual intercourse had stopped.
- 10.5 the Appellant and the complainant continued to lie on the bed, side by side while completely naked.
- 10.6 it is the complainant's version that she did ask him (i.e. not tell or demand him) to take her home, which he did.

Whether the complainant had withdrawn her consent

[11] The Appellant argued that the Court *a quo* erred in finding that the evidence of the complainant (who was a single witness regarding the rape incident) was clear and satisfactory in every material respect, and as such found her to be a credible witness, when regard is had to the following:

- 11.1 because the complainant is a single witness, her evidence can only be accepted as decisive, if it is found to be clear and satisfactory in every material respect.⁸
- 11.2 that the version which the complainant gave to her friends, the doctor and police, does not establish consistency, and as such adversely affects the credibility of the complainant.

⁸ *S v Leve* 2011 (1) SACR 87 (ECG)

11.3 the trial court erred in relying on the uncorroborated evidence of the complainant, and erred by accepting the evidence of the complainant without the degree of caution required by the circumstances.

11.4 the presiding Magistrate failed to have any or adequate regard to the contradictions between the police statements of the complainant and the witness, Ms SJ, which were material and unexplained, more particularly:

11.4.1 in court the complainant emphasized that she “*had blacked out*” (i.e. lost consciousness) when the Appellant’s grip around her neck increased (i.e. that he strangled her) whereas:

11.4.1.1 in her statement to the police (Exhibit ‘B’) she indicated that she ‘thought she may have passed out from the strangling, but she was not sure; and

11.4.1.2 when examined by Dr Venter she also did not mention to him that strangulation caused her to lose consciousness (that it caused a “*blackout*”).

11.4.2 in her statement to the police (Exhibit “B”) it is recorded that the complainant told the police that the Appellant “*bit her boobs as well as her clitoris*” whereas, when she testified in court and when she was examined by Dr Venter, she made no mention that the Appellant “*bit her boobs and clitoris*”.

11.4.2.1 it must be accepted that if she had informed Dr Venter about assault on her, he would have recorded such allegations and would

have examined her to confirm her allegations.

11.4.2.2 in assessing the credibility of the complainant's version of violent rape following consensual sex, the presiding Magistrate failed to have any or proper regard to the evidence of Dr Venter (a state witness found to be a credible witness) that he would have expected to find evidence of bite marks on examination. That evidence was simply ignored.

11.4.2.3 in her evidence in court the complainant stated that while she was on her way home, she sent her cousin a message that "*Kholo had raped me*", whereas according to her cousin, the complainant forwarded her a message stating that "*I regret everything. Kholo had raped me*". The complainant when testifying in court denied that she informed her cousin that she regretted what had happened.

11.4.2.4 in court, the complainant stated that after the Appellant had left the room, she "*started to cry hysterically and telephoned a friend to inform him of what happened*".

11.4.2.4.1 no mention of this can be found in her statement to the police (nor is there evidence that she told this to her cousin). The state failed to

place evidence before the court to confirm that she had, immediately after the rape incident, contacted a friend and told him what had happened.

11.4.2.4.2 no evidence was placed before the court to explain why the complainant's friend was not called to corroborate her version.

11.4.2.4.3 on the complainant's version one would have expected her to make a report to the police. She did not do so.

[12] For no apparent reason the Presiding Magistrate had no or proper regard to the unchallenged fact that the complainant's prescribed medication (Lyrica and Triptyline) had side effects, *inter alia*, confusion, dizziness and memory impairment which are exacerbated by alcohol.

[13] On the other hand, the complainant's evidence that she suffers from post-traumatic stress disorder (PTSD) was accepted without medical evidence to support such diagnosis and that evidence was treated as corroboration for the rape.

[14] It was submitted that the evidence of the complainant's cousin, Ms SJ, does not corroborate the complainant's version. Ms SJ did not, and was in no position to, testify to whether the further intercourse was consensual or not. This is understandable because she was no longer present at the time. She made no contribution, and her evidence was that the complainant "*had told her what happened*". She did not elaborate.

Whether the Appellant was aware that the complainant had withdrawn her consent

[15] When dealing with sexual assault cases, certain principles and decisions cannot be ignored and are pivotal. In *Otto v S*⁹ the Supreme Court of Appeal held:

“The onus rests on the State to prove all of the elements of the offence of rape, including the absence of consent and intention.¹⁰ That is so even where, as in this case, the version put to the complainant by the Accused’s legal representative was a denial of any sexual contact with her.”

[16] To sustain the conviction the State had to prove, beyond a reasonable doubt, that the Appellant was aware that the complainant had withdrawn her consent. According to the record the State failed to do so.

[17] Even if the evidence supports a finding that the complainant had indeed withdrawn her consent, there is no evidence to support the finding that the Appellant was aware that the complainant had changed her mind. The basis of the Magistrate’s rejection of the Appellant’s evidence of a genuine belief that the complainant had not withdrawn her consent is not clear. The Magistrate’s exposition of the facts was that the complainant repeatedly asked the Appellant to stop and that the latter well knew that he was being asked to stop but he continued, nevertheless. Unfortunately, the evidence suggests the converse.¹¹

[18] Whether there really was a mistake (which excludes “*intention*”) is a question of fact which can be determined by considering the Appellant’s true state of

⁹ *Otto v S* [2017] ZASCA 114

¹⁰ *Mugridge v S* [2013] ZASCA 43, 2013 (2) SACR 111 (SCA)

¹¹ The complainant testimony was that:

“After the completion of consensual sex, after the accused had stopped consensual sex at my request, the accused then proceeded to finger me without my consent. I asked him to stop manipulating with his finger. I pushed his hand away from my vagina while he was trying to touch me and I asked him to stop. After penetration, after full sexual intercourse I screamed - Kholo, you are raping me, you are raping me.”

This complainant’s version suggests one instance and not repeated instances asking to stop the rape (full intercourse with penetration).

intelligence, his background and psychological disposition and his conception of the relevant events and circumstances.¹²

[19] The test to determine “*intention*” is subjective, i.e., it is not whether a “*reasonable person*” in the accused position would have made a mistake. The test being subjective, it requires taking into account the considerations present at the time. The question is whether “*the accused had mistakenly believed that the complainant had consented*”¹³.

[20] In light of the undisputed evidence of Dr Venter and Ms Fielding that it was reasonable possibly true that any delay on the part of the Appellant in responding to a request to stop following prior consensual oral and penetrative sex, was due to alcohol and the commonsense and expert evidence that the Appellant may have taken a while to get the message. I will elaborate on this issue later in this judgment.

[21] The clinical psychologist, Ms Fielding¹⁴, in assessing the Appellant’s “*general functioning and personality style*” considered:

21.1 the Appellant’s true state of mind (his degree of intelligence, background and psychological disposition); and

21.2 the Appellant’s conception of the relevant events and circumstances.

and found it to be highly unlikely that the Appellant would have ignored the complainant’s call for him to stop having sex with her. Why would the Appellant not have done so given that he had already had full sexual intercourse with the complainant and hoped to start a relationship with her? According to Ms Fielding, the Appellant genuinely, honestly and *bona fide* believed that the complainant did not withdraw her consent.

¹² *S v Reabow* 2007 (2) SACR 292 (ECD) at para 20 - 21

¹³ *S v Makgatho* 2013 (2) SACR 13 (SCA) at para 10; Snyman: Criminal Law Seventh Edition at page 168

¹⁴ She was registered in 1987 and has been practicing as such for 35 years.

[22] On sentence the Appellant argued that the Magistrate misdirected himself in:

- 22.1 imposing a sentence of five years direct imprisonment as the sentence is shockingly inappropriate and harsh.
- 22.2 attaching insufficient weight to the Appellant's personal circumstances and erred in overemphasizing the interests of society, complaint, and the gravity of the offence. No regard was had to the unusual circumstances and the common cause facts of consensual intercourse.
- 22.3 failing to consider the Appellant as suitable candidate for a sentence of correctional supervision, in terms of Section 276(1)(h) or (i) of the CPA.
- 22.4 failing to exercise his sentencing discretion properly so as to reflect an appropriate balance between the seriousness of the particular offence and the need to avoid lengthy imprisonment.

Discussion

[23] What underpins the State's case, it appears, is that the complainant withdrew her consent as she was entitled to do so, and that the Appellant, against her wishes, continued and violently assaulted her. The State's case is further that all that happened after the Appellant had conducted an extended campaign to pursue the complainant to form a romantic relationship with her and have her as his girlfriend. It is clear that he had his eye on her since they had been youngsters at a school in Kingwilliamstown.

[24] It also bears mentioning that this case falls within the category of alleged sexual violence committed in the context of an intimate interaction between the Appellant and the complainant. Consequently, it can be particularly difficult to navigate given their relationship (dating back to their high school days), familiarity coupled with the fact that the parties would sometimes hang out together prior to an allegation of rape by the complainant.

[25] This alleged rape followed after the consumption of alcohol, namely, six shots of tequila and one or two beers according to Ms SJ who testified on her behalf. All of that was on top of medication that had a side-effect of impairing cognition, memory and also had to do with the memory loss and even hallucinations. All of this was followed by full sexual intercourse in which the complainant was a willing participant, which stopped without any difficulty. The complainant, on her version, had changed her mind because it had just dawned on her that they were only friends and that this was not the right thing to do. After this first episode, on the complainant's version, when the sexual conduct had stopped, she continued to lie naked on the bed, she didn't get up, she didn't get dressed, she did not leave the room, but she allowed the Appellant to rejoin her on the bed and lie next to her naked.

[26] It appears, if the complainant's version is anything to go by, that what happened next was that the Appellant had a sudden change of personality. He went from cultivating a romantic relationship with a girl he has had his eye on, to a proverbial sex craved monster and an out-of-control violator of woman's rights, who violently assaulted her private parts, and bit her. But again, he stopped nevertheless, without completing the sex act, when the complainant demanded, forcefully, that he stop. The Appellant then took the complainant home in his car when, on the complainant's evidence, she was in fear of her life and terrified. This was then followed by profuse and excessive apologies from the Appellant. This is improbable, in my considered view.

[27] Against all of this, the Appellant is in full agreement with the complainant with regard to the first sexual escapade. Their versions are in all respects similar. He differed from her when she came to explain that he turned into a proverbial sexual monster. He said that consensual intercourse resumed after a break, but then ultimately stopped when she tapped him on the shoulder and spoke to him face to face during the sex act, asking him to stop, he stopped. He agreed the sex act was interrupted and never completed. As to subsequent events, it is difficult to know what should be made of them as it amounts to speculation, in my view. The accusation of rape, an explanation for the week which elapsed before reporting the assault, the social media campaign labelling the Appellant as a rapist. There could be a few possibilities which can suggest themselves including, but not limited to, the fact that

the Appellant may have upset her by not stopping immediately or soon enough for her liking. In this regard, Ms Fielding's evidence is illuminating but it appears that the Magistrate had a scant regard to it notwithstanding her vast experience and the fact that there was no opposing expert evidence. Nowhere did the Magistrate say that her expert testimony was in anyway helpful.

[28] As I have indicated, the complainant's cognition and memory were impaired by alcohol and drugs. In this regard Dr Venter who had a very impressive Curriculum Vitae, who testified on behalf of the State and who qualified himself as an expert, when confronted with what one Professor De Cloete said about the effects of the two drugs said he agreed 100% with the Professor when he said these drugs had the above-mentioned side effects.¹⁵

¹⁵ MR KOEKEMOER: At the next page where there is – this is paragraph 10. It refers to Lyrica that medication and then paragraph 11, it deals with the side effects. He says amnesia, confusion, dizziness, balance impairment and in coordination, disturbance in thinking, primarily related difficulty of attention, concentration and hallucination. Now, if she had been taking that medication, and I mean I know you've said that she had been taking trampoline before this incident.

MR VENTER: Yes

MR KOEKEMOER: If she had in fact also been taking Lyrica, that also would have certain side effects on her. If she was taking that medication as well. This is now Lyrica.

MR VENTER: Yes, if she's had those side effects and she's been prescribed those side effects in the past 18 days, is not something that is going to come and go. That type of things that you're referring the side effect profiles specifically with the paraglabolins which Lyrica is one of, is not something that is going to come and go. You know you have it one moment and you don't have it the next. It's long acting drugs these, that over periods will give you those effects and there's no ways that you can function then with those things. You need to write that in the inserts and stuff like that. But it's not going to just appear out of the blue and disappear and come and go like that. It's not the type of reaction that we experience long acting drugs, with Trepiline peeling and Lyrica, where those things is going to come and go. It will be there all the time.

MR KOEKEMOER: Now, if she had taken this, this medication, and I'm talking here about Lyrica and Trepiline, at the time that this incident happened. It was on the 24 January 2019.

MR VENTER: Yes

MR KOEKEMOER: If that happened and she also had consumed alcohol, let's not dispute that she head didn't consumed alcohol.

MR VENTER: I cannot dispute.

MR KOEKEMOER: With the consumed alcohol. If that had been what was taken then would you say she could have been confused in regards to what happened that night?

MR VENTER: Very definitely with alcohol if those drugs was taken with alcohol, yes.

MR KOEKEMOER: Memory impairment is some of the consequences?

MR VENTER: Yes

MR KOEKEMOER: Depression?

MR VENTER: Yes

MR KOEKEMOER: Incoordination?

MR VENTER: Yes

MR KOEKEMOER: Did I actually mention to you memory impairment?

MR VENTER: Yes, very definitely. Alcohol with these two drugs, as the professor or the person here says, those are definitely alcohol with those two drugs, definitely can enhance those, the symptoms and things that you mentioned there. (underlined for emphasis)

[29] It is not difficult to glean that the Magistrate obviously liked the complainant as a witness, and he found her to be a single witness whose evidence was satisfactory in all material respects. That being the case, the issue then becomes as to on what conceivable basis the Magistrate was entitled to reject the Appellant's version as false beyond a reasonable doubt. There are lots of formulations in the authorities of the test to be applied. In the case of *National Employers' General Insurance Co. Ltd v Jagers*¹⁶, sitting as a Full Bench, Eksteen AJP had an occasion of stating the following:

“it seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken or falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricable bound up with the consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case anymore than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.”

[30] The above exposition is a useful test in my view. It is my view that the Magistrate had an imperfect and selective understanding of the factual evidence. He seemed not to have had regard to what Dr Venter said and as a result thereof he

¹⁶ *National Employers' General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (ECD) at 440 D-G

started at a low ebb. For instance, he started his judgment on the first page by explaining that there was an arrangement that after the complainant had written her learners driver's license on 24th January, the three of them would meet. It is common cause that on this day they indeed met and the three of them celebrated the complainant's passing of her learner's driver's license at the King Club. This is incorrect. The correct version is that the complainant had passed her driver's licence some days before, the Appellant had helped with transport, the three of them went off to celebrate at the Spur restaurant. At Spur they arranged to meet on a later occasion at the King Club because tequila shots were on special. This is not nit picking, in my respectful view. This is important because it is part of the Appellant's case that he was pursuing the complainant romantically. So, this is an important step that the Magistrate left out.

[31] The Magistrate went on to say:

"During the course of sexual intercourse, the complainant decided to discontinue the sexual act and alerted accused to the decision, but the accused having stopped briefly continued, albeit now as per complainant's version. It is this continuation of sexual penetration that is apparently in dispute."

[32] This is a misstatement of the complainant's own version.

[33] On the issue of alcohol consumption, the Magistrate held that the complainant should be forgiven for contradictions. The complainant indicated that she had two tequilas whereas her cousin testified that she had six and the Appellant said six or more and other ciders and further alcohol. The Magistrate said that she should be forgiven because she was an impressive witness. He said her evidence was satisfactory in all material respects. In my view, a contradiction on the amount of alcohol consumed in the circumstances of this matter is very material. It goes to the effect that the alcohol might have had when combined with the two drugs. Interestingly, the Magistrate found that the alcohol evidence was inconclusive, and no reliance can be placed on it i.e., alcohol mixed with the drug.

[34] Another material contradiction was between the complainant's evidence and her police statement. She told the police that the Appellant began fingering her in and around her vagina without her permission. This is inconsistent with her evidence that the first sexual episode was consensual.

[35] The question still remains as to why the Magistrate decided to reject the Appellant's version. There must be a good reason to find that his evidence was false. One wonders as to what does not have the ring of truth (as the Magistrate puts it) in the Appellant's evidence, if regard is had to the background of an evening out at the King Club with tequila shots, then going off and stopping for food, and then getting rid of the cousin since the complainant wanted some time with the Appellant, going off to the Appellant's house where the parents were absent, engaging in petting in the lounge, moving into the bedroom, getting completely naked, each undressing themselves, having full consensual sex in which the complainant was a willing participant, for her to say at some point - this is not right, we are just friends, better stop.

[36] The Magistrate found Dr Venter's evidence as credible when he indicated that his evidence was accepted in all respects¹⁷. He went on to say the complainant's evidence - that it was possible she took the medication the same month - be ignored, as was Dr Venter's evidence that he prescribed both drugs on 18 January. So, the Magistrate found that there was no evidence that the drugs were having any effect on the complainant at the time because she didn't seem wobbly on her feet, and she didn't seem impaired. Clearly, the Magistrate did not understand the part about the loss of memory and that she may have suffered hallucinations, and that her cognitive faculties might have been affected. He ignored that and he said even if there was an impact, it is not known whether the drugs were in her bloodstream at the time. However, Dr Venter testified unequivocally that these drugs have a long-lasting effect in the bloodstream. It was common cause that he prescribed them on 18 January 2019. The complainant went to the doctor because she was suffering from migraines, and she felt that something needed to be done about it. In all likelihood,

¹⁷ Pg. 37 of the Judgment reads: *The medical evidence of Dr Venter needs no scrutiny and the Court will accept his evidence as credible and reliable.*

she got the script, went to the pharmacy, got the drugs and drank them and that was on 18 January and some 3 days later the offence happened. It is improbable that the complainant could not have taken the medication whereas her condition needed attention.

[37] *Mr Vena*, counsel for the State argued that there was no evidence that the complainant did take the drugs and mix them with alcohol. As I have indicated earlier, this is improbable and outlandish. He further argued that there was no reason for the Magistrate to venture into the side effects that may be caused by those drugs mixed with alcohol. He sought to bolster his argument by arguing that even the Appellant did not observe these side effects on the complainant. My view is that this argument cannot be sustained considering that even the Appellant was under the influence of alcohol¹⁸ and, secondly, he is not an expert in observing such side effects.

[38] It is further so that the Magistrate did not take heed to the fact that Dr Venter said that there were no marks on the breasts, as the complainant alleged that she had been bitten by the Appellant during the alleged violent rape. The doctor went further, and he was quite clear that had the complainant been bitten, the marks would have remained for a period of five days, and he would have seen them when he examined the complainant. Surely, had the Magistrate had some regard to that, that would have, certainly, affected the credibility of the complainant. That is a material misdirection, in my view, and it should not be to the State's benefit but the defense. This fact was correctly conceded by *Mr Vena*. He further conceded that it becomes material in the sense that the Magistrate did not take this into account in his reasoning because he found the complainant to be an unblemished witness.

[39] *Mr Vena* further tried to persuade us on the issue of the complainant suddenly changing her mind and asked the Appellant to take her home after the second

¹⁸ Understandably, there was some dispute whether the Appellant and the complainant were under the influence of alcohol or drunk after taking more than six shots of tequila. However, a mere search on Google of the words '*can you be drunk when having 6 tequila shots*', the results read thus "*The general rule of thumb is you should start feeling moderately drunk after 3 drinks and totally drunk after 4-5 drinks within an hour. Anything more than 4 shots in one hour can be dangerous as it may lead to blackouts and alcohol poisoning.*"

sexual episode. His argument is that the Appellant should have noticed some awkwardness and had he asked himself what the cause was, he would have established that it was because of the consent that was withdrawn. I have some difficulty with this analogy and *Mr Vena* correctly conceded that there can be many inferences that can be drawn from that. Even though he argued that his preferred inference is that there was something wrong happened, he did not rule out the following inferences or scenarios as reasonably possible:

39.1 That the Appellant could have been fed up with being stopped midway and did not have a problem when the complainant wanted to be taken home; or

39.2 That, since the Appellant had been eyeing the complainant for years, now that it came to fruition on that particular evening – his dreams were being fulfilled, everything was happening but somewhere during the course of all that she said, *'no stop, I don't want this anymore'*. If regard is had to Ms Fielding's evidence, this may well have impacted on him quite seriously, and probably would on any youngster who feels 'have I done something wrong, what have I done' – so he withdraws. He wonders whether he has ruined his newly born relationship, without having raped or done anything wrong. It can be reasonably possibly true that the Appellant sat with his head hanging, he did not know what to say or do but when he suddenly received a message saying, *'you raped me'*, he reacted as he did.

[40] In addition to the above scenarios, Ms Fielding suggested a further scenario under cross-examination which unfolded as follows:

"PROSECUTOR: What is wrong, ja. Okay. And in this case the accused person told the court himself whilst he was giving evidence- in- chief. That is his version that I would not say it was a little bit longer than the one of the victim but he said that whilst we were busy the second time having sex, the victim tapped me on my shoulder and said stop. And I got off her. Then I asked the accused, did you ask her why you said I must stop because this is the lady that you have been wanting to have a relationship with for a very long time and we are both enjoying did. Did you because I would expect that from

a man want to please the woman that he loves, baby, what is wrong, why do you want me to stop? He said no, he did not ask it. Okay, you do not know.

MS FIELDING: *I think that, I would expect that he would say what is wrong. But I would also think that he would be in quite a state of shock and kind of maybe not want to talk about it straightaway and do what she wanted. If she said, I want to go home that he would say, okay, well, I will take you home. Hoping that tomorrow they could sort it out or sometime, you know, that this is not the end of the relationship.*

PROSECUTOR: *And also the version of the state is, I am sorry of the accused is that the victim was supposed to sleep over. She brought her bag with, her clothing that she was going to wear the following day and on that night she said no, take me home. And he did not ask why must I take you home because this is the lady that she loves and would assume that you would want to see that she is happy, he would want to please her. What is wrong, why do you want to go home, that was never asked from his victim.*

MS FIELDING: *One could also say that if he wanted to please her and she said she wants to go home and he was very aware of not abusing her and doing what is right, that is the first thing he would do then is take her home.*

PROSECUTOR: *Okay."*

[41] During cross-examination of Ms Fielding, the Prosecutor sought to pigeonhole the Appellant's apology to refer to the alleged rape. Ms Fielding maintained that the apology was referring to the failure to stop timeously and resulting to the complainant being hurt emotionally. This episode resulted in the Magistrate interjecting and referring the parties to the transcribed record of the complainant's evidence. It went as follows:

"COURT: *Yes, I do have the transcribed record here so if you are talking in chief, she ...[inaudible] in chief. So you are referring to the messages in chief, Ms Hasheni?*

PROSECUTOR: Yes, evidence of the victim in chief and the response of the accused. And the same response as the ask the accused during cross examination ...[inaudible].

COURT: Thank you, in chief this was this was her evidence.

"The message said that what you did was rape. And that I asked you to stop and you did not stop. And then I told him that I never want to see him again. After that I went to sleep and when I had woke up he had replied. He replied and said that he knows what he did was wrong and that he asked, that I asked him to stop and he did not stop. Then he sent a series of messages that said that he regrets doing what he did and he is sorry for hurting me."

MS FIELDING: Sorry for?

COURT: Hurting me.

"He went on to say he took it too far and that he is heartbroken broken. And then the messages went on to say that he wishes me joy and happiness and that he is sorry for not protecting me and honoring me. She replied and I asked him did you come? In other words did you ejaculate and he replied no."

And then she blocked his number thereafter. That was the actual context of the text message she referred to in chief according to her evidence.

MS FIELDING: I suppose the question that I would be asking is when he said what I did was wrong, was he referring to not stopping immediately or was he referring because there were the two things that

went before. She said it was rape. He said I am sorry, I did not stop when you asked me to. Now when he said it was wrong, did he mean and his regret, was that to do with not stopping when she asked him to immediately or was it to do with the rape accusation. Being a very sensitive person, and as I said, I just looked at my notes here. That he would question his own perceptions if they differ from people he values. And can cause inappropriate guilt and consent self-disgust. That is under 4.2.3. The sixth point there. So my pictures of this person why is being woke, very sensitive to being a good person and very caring of women and very aware of things like any kind of abuse. Now someone accuses him of that he is going to overreact. So he is going to say she is thinking I have done this terrible thing. He said, I did not stop, you are right I did not stop. But or he is saying, I am sorry I raped you. I think this has to be but all I am pointing out is it could be either that he was responding to.

COURT: It could be either, yes."

(underlined for emphasis)

[42] What is clear from the debate is that there is doubt whether the Appellant was apologizing for not stopping soon enough for the complainant's liking or for the alleged rape. This remains unclear to sustain conviction, in my view.¹⁹

[43] Ms Fielding's expert testimony, which was never disputed, on the state of mind of the persons engaged in a sexual act becomes relevant in establishing intention. Her evidence in chief unfolded as follows:

¹⁹ This is contrary to the Magistrate's mistaken understanding of what happened which permeated to his finding, when he sought to summarize the evidence as follows:

"After 20 to 30 seconds she testified that accused climbed back on top of her and despite her protestations and having warned him verbally that he is now committing rape, he without her consent started to sexually penetrate her."

“MS FIELDING: No. He is not an aggressive person, he would not be physically aggressive.

MR KOEKEMOER: And if she had asked him to stop, would he be the type of person who would ignore that and just carry on?

MS FIELDING: I wrote those words down because I found it quite interesting that she said he ignored her and he said he did not know. As a sex therapist which is part of my training, there are times in the human sexual response where the ability to respond to external stimuli is shut off by the actual response of the body at the time. And the brain can only deal with a certain of stimulation and so I do understand that it is quite possible that she I want to stop. And he if he was at an intense moment of physical and there is evidence in the literature, and he was at an intense moment, he would not immediately get the message and that may take time. Or some other kind of intervention on her part like pulling away or something to let him know wait, she wants to stop. So that is how I would understand that she would experience herself as being ignored and he would still be thinking everything is fine. But that time would be very short.”

(underlined for emphasis)

[44] It remains a concern as to why this material expert testimony was never considered by the Magistrate in the absence of the opposing expert testimony suggesting the contrary. Clearly this is a material misdirection especially when this is considered against the complainant’s version under cross-examination which went as follows:

“MR KOEKEMOER: And did he listen to what you asked him to do? Did he then got off you?

MS SOKUTU: Yes. He listened.

MR KOEKEMOER: If he wanted to rape you, you agree, he could have carried on.

MR SOKUTU: *He did not carry on so ...[intervenes]*”

[45] A proper approach to evaluation of evidence in a criminal matter, bearing in mind that the onus is on the prosecution to prove its case against the accused beyond reasonable doubt, the current state of the law is settled. What Nugent J said in *S v Van der Meyden*²⁰ on this score is instructive. The learned Judge said:

'The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 especially at 373, 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.'

[46] Van der Meyden was cited with approval in *S v Chabalala*²¹ in which Heher JA said:

'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

²⁰ *S v Van der Meyden* 1997 (2) SA 79 (WLD) at 80H-81B; 2001 (2) SACR 97 (Van der Meyden)

²¹ *S v Chabalala* 2003 (1) SACR 134 (SCA) at para 15

balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'

[47] The concept of 'proof beyond reasonable doubt' has been a subject of judicial discussion in numerous judgments made by our Courts. I do not find it necessary to rehash the principles appertaining thereto in this judgment, suffices to reiterate that proof beyond reasonable doubt does not equate to proof 'beyond all shadow of doubt' or 'absolute certainty' as to the guilt of the accused.²²

[48] The common law crime of rape was abolished by the Criminal Law (Sexual Offences And Related Matters) Amendment Act ('Sexual Offences Act')²³ that took effect on 16 December 2007 when the legislature settled for an extensive definition of rape. Section 3 thereof has the following provisions:

'Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape.'

[49] I need to highlight that for purposes of s 3, 'consent' is defined in s 1(2) of the Sexual Offences Act as 'voluntary or uncoerced agreement'. Section 1(3), in turn, lists instances where a complainant would be taken not to have voluntarily or without coercion agreed to an act of sexual penetration.²⁴

²² *S v Ntsele* 1998 (2) SACR 178 (SCA); *S v Mashiane en Andere* 1998 (2) SACR 664 (NC) and the cases therein cited.

²³ 32 of 2007

²⁴ See: s 1(3) which reads:

'(3) Circumstances in subsection (2) in respect of which a person ('B') (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 and 4, or an act of sexual violation as contemplated in sections 5 (1), 6 and 7 or any other act as contemplated in sections 8 (1), 8 (2), 8 (3), 9, 10, 12, 17 (1), 17 (2), 17 (3) (a), 19, 20 (1), 21 (1), 21 (2), 21 (3) and 22 include, but are not limited to, the following:

(a) Where B (the complainant) submits or is subjected to such a sexual act as a result of-

(i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
(ii) a threat of harm by A against B, C or D or against the property of B, C or D;

(b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;

[50] In analysing s 3 of the Sexual Offences Act, I first deal with the concept of 'consent' as defined in s 1(2) with special reference to the word 'agreement'. In my mind, such a word suggests the meeting of the minds of the willing participants to engage in penetrative sexual intercourse. The Sexual Offences Act explicitly requires that consent must be 'given consciously and voluntarily, either expressly or tacitly by persons who have the mental capacity to appreciate the nature of the act consented to. The consent to a penetrative sexual act must be based on true knowledge of the material facts relating to the act in question.²⁵

[51] Undoubtedly, intention (*mens rea*) is a prerequisite for a conviction as it is an integral part of the definition of the statutory crime of rape. X must know that Y had not consented to a penetrative sexual act.²⁶ The accused may 'escape [criminal] liability on the ground of absence of knowledge of unlawfulness of his conduct if he [or she] believed the complainant . . . was consenting.²⁷

[52] In my view, the Learned Magistrate paid little regard to the fact that the complainant and the Appellant were intoxicated, if regard is had to the amount of alcohol they consumed on the day. The complainant's level of intoxication was even higher if regard is had to the fact that he mixed alcohol with drugs. The evidence of Dr Venter, on the effect of the drugs when mixed with alcohol, was never disputed,

(c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that-

- (i) B is committing such a sexual act with a particular person who is in fact a different person; or
- (ii) such a sexual act is something other than that act; or

(d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act-

- (i) asleep;
- (ii) unconscious;
- (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
- (iv) a child below the age of 12 years; or
- (v) a person who is mentally disabled.'

²⁵ *S v Nitito* [2011] ZASCA 198 para 8.

²⁶ *R v K* 1958 (3) SA 420 (A) at 421; *R v Z* 1960 (1) SA 739 (A) at 743A-745D.

²⁷ Burchell Principles of Law 5ed at 414 paras 235-236.

namely, *amnesia, confusion, disturbance in thinking and hallucination*. These were serious impairments on the complainant's part and it was a serious misdirection for the Magistrate to accept her evidence without caution. There are chances that the complainant was not in a complete good state of mind hence she realized midway that she was doing something she was not supposed to do. However, her poor state of mind at the time cannot translate to absence of consent thereby proving all the elements of rape. It is highly possible that her recollection of the version of events was also compromised and her reliability was thus in doubt.

[53] As narrated above, there are a number of inconsistencies in the evidence led in support of the State's case as well as the defence. The court *a quo* was therefore faced with two mutually destructive versions and in the circumstances the evidence must be considered and evaluated holistically in order to determine whether the State has discharged the onus it bears.²⁸

[54] Logic dictates that, where there are two conflicting versions or two mutually destructive stories, both cannot be true. Only one can be true. Consequently, the other must be false. However, the dictates of logic do not displace the standard of proof required either in a civil or criminal matter. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and, in the process, measured against the probabilities. In the final analysis the court must determine whether the State has mustered the requisite threshold — in this case proof beyond reasonable doubt.²⁹

[55] Insofar as the evidence of Ms Fielding is concerned, the Magistrate decided not to rely upon her evidence particularly with regards to the Appellant's state of

²⁸ *S v Chabalala* 2003(1) SACR 134 (SCA) para 15. "*The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen* 2001(1) SACR 97 (SCA). *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.*"

²⁹ *S v Janse van Rensburg* 2009 (2) SACR 216 (C) at para 8

mind during the sexual act, so as to establish the element of intention. The Learned Magistrate was obliged, in my view, to rely on all her evidence, save where it had been impeached. None of her evidence was impeached by any expert but he completely disregarded her evidence in his evaluation of the evidence. The use of emotive language by the Magistrate in evaluation of the evidence before him is unhelpful and it only served to obfuscate the fact that he had overlooked dealing with important aspects.

[56] The duty is on the State which bears the onus of proving the guilt of Mr Mazosiwe ‘beyond any reasonable doubt’ and the latter needed to show only that his version is ‘reasonably possibly true’.³⁰ In my considered view, the version of the complainant casts a shadow of unreality over the thrust of her evidence. Her version amounts to no more than a pregnable veil of incongruity when the contrasting versions are analysed in the context of each other.

[57] The failure on the part of the Court *a quo* to properly consider all the evidence in his evaluation and consideration of whether the State had discharged the onus upon it, was in the circumstances, in my view a material misdirection and patently wrong.³¹

³⁰ *R v Difford* 1937 AD 370 at 373. *S v Shackell* 2001 (4) SA 1 (SCA) at para [30] – “*Though I am not persuaded that every one of these suggested inherent improbabilities can rightfully be described as such, I do not find it necessary to dwell on each of them in any detail. There is a more fundamental reason why I do not agree with this line of reasoning by the Court a quo. 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. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain improbabilities in the appellant’s version, the reasonable possibility remains that the substance thereof may be true. This conclusion is strengthened by the absence of any apparent reason why the appellant would, without any motive, decide to brutally murder the deceased by shooting him in the mouth at point blank range. As a consequence, the matter must be decided on the appellant’s version. According to the appellant’s version he never intended to fire a shot. On the acceptance of this version there is no room for a finding of dolus in any of its recognised forms. It follows that the conviction of murder cannot stand.*”

³¹ *S v Mabena* 2012 (2) SACR 287 (GNP) at para [11] – “*On appeal it was argued that the regional magistrate ought to have accepted that the evidence of the appellant was reasonably possibly true. It was, however, not suggested that the regional magistrate misdirected herself in any respect. The power of an appeal court, to interfere on fact with the findings of the court below, is*

[58] In light of the view I am taking in respect of conviction, I do not find it necessary to deal with the appeal on sentence.

[59] In the circumstances, the following order shall issue:

59.1 The appeal against conviction is upheld.

59.2 The order of the court *a quo* is set aside and replaced with the following order:

“The accused is found not guilty and acquitted.”

H ZILWA
ACTING JUDGE OF THE HIGH COURT

I agree

R. GRIFFITHS
JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Adv RP Quinn SC
Instructed by: Hutton & Cook Attorneys, Kingwilliamstown c/o Huxtable
Attorneys, Makhanda

For Respondent: Adv Vena
Instructed by: Director of Public Prosecutions, Makhanda

limited. Interference in this regard is only permissible where the findings of the court below are vitiated by misdirection or are patently wrong.”. See also Quartermark Investments v Mkhwanazi 2014 (3) SA 96 (SCA) at para [20] referring to R v Hepworth 1928 AD 265 at 277.

Date Heard: 13 March 2024

Date Delivered: 11 June 2024