



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable /Unreportable

Appeal number: A154/24

In the Appeal between:

MPUMELELO SAKMAN

Appellant

And

THE STATE

Respondent

Neutral citation: *Mpumelelo Sakman v The State (A154/24)*

Coram: **Reinders, J et Daniso, J**

Order issued on: **10 February 2025**

Reasons issued on: **18 February 2025**

Summary: Criminal law and procedure-Appeal against conviction and sentence-whether the cautionary rule pertaining to a single witness's evidence was applied correctly-whether the appellant's consensual sex defence is reasonably possibly true.

REASONS FOR ORDER

Daniso, J (Reinders, J concurring)

[1] On 22 August 2023 the regional court sitting in Bethulie convicted the appellant for raping a 17year-old girl thereby contravening the provisions of section 3 of the Criminal Law (Sexual Offence and Related Matters) Amendment Act¹ read with section 51(1) of the Criminal Law Amendment Act² ("the CLAA"). He was subsequently sentenced to life imprisonment the trial court having found no substantial and compelling circumstances warranting a deviation from the prescribed minimum sentences in terms of the CLAA.

[2] Aggrieved by the conviction and sentence he launched an Appeal in this court seeking an order for the setting aside of both the conviction and sentence. The Appeal was opposed by the State.

[3] On 10 February 2025, having considered the application and the submissions made, we made the following order:

1. The appeal is upheld against the conviction and the resultant sentence.
2. The order of the Regional Court, Bethulie is replaced with the following:
 - 2.1. "The accused is found not guilty and discharged."
3. The Reasons for this order shall be given at a later date.

¹ Act No, 32 of 2007.

² Act No, 105 of 1997.

[4] What follows hereunder are the reasons for that order.

[5] The conviction pertained to the incident which occurred on the night of 4 September 2021. In the court a quo the fact that the appellant and the complainant had engaged in a sexual intercourse at his place of residence on the date alleged in the charge sheet was not in dispute.

[6] The appellant was duly legally represented throughout the trial. When the charge was put to him, he pleaded not guilty and tendered a plea explanation in terms of section 115 of the Criminal Procedure Act³ in which he denied raping the complainant and pleaded consent. He averred that on the night of the incident, he met the complainant next to the Phelindaba stadium. He was on his way home after a night-out of drinking with friends. The complainant asked to go home with him to have some fun. She explained that she will have to go home very early as her mother was ill. When they reached his home which he shared with friends, they engage in a sexual intercourse. While they were busy having sexual intercourse one of his housemates disturbed them by shining a cell phone torch on the complainant's face and also made some denigrating comments by uttering the following words: "who is this bitch that you are busy with." He was offended by these utterances, he responded by telling his house mate that she is "not a bitch and don't make her one." He then tried to cover the complainant to shield her from the torch but from then on, she seemed uncomfortable and told him to take her home. He obliged and also offered her his tracksuit because her jeans got ripped when she was taking them off.

[7] He accompanied her home. He knew where it was since he and the complainant knew each other quite well before the incident. Upon reaching the complainant's home she entered the house through the window. She retrieved a pair of scissors and was very angry, calling out her neighbour named Fanie. When Fanie came over he spoke to the appellant and suggested that he (the appellant) should go

³ Act No 51 of 1977.

home. He thereafter heard that police were looking for him. When he went to enquire from the police about the reason thereof, he was promptly arrested.

[8] In convicting the appellant, the trial court relied on the testimony of the complainant, Ms Sharoline Rosy Afrika (Babikie), the arresting officer constable Mohase Eunice Moseousenyane and the J88 medical report.

[9] The complainant was a single witness implicating the appellant in the rape. She confirmed that she also knew the appellant very well before the incident, his friend also dated her cousin. She told the trial court that shortly after 6pm she went to Toni's tavern and later Langost's tavern looking for her cousin Nubisa. She could not find her and decided to rather go home. She was walking by Phelindaba stadium when she saw the appellant following her and as the appellant had previously threatened to rape her, she started to walk faster but he caught up with her. He tripped her, slapped her causing her to fall and hit her head against a wall rendering her unconscious. When she regained consciousness, she found herself in a strange place and the appellant was on top of her raping her whilst four of his housemates held her down. When she asked them to help her, they swore at her by calling her a bitch. The appellant raped her the whole night without stopping until the next morning at 4am when she asked him to let her go home. He opened the door for her to leave but followed her until she arrived home.

[10] It was her testimony that as a result of being slapped by the appellant she hit her head on the wall with the result that her brain was affected. She also sustained a bruise on her leg which left a blue mark and a bleeding wound on the arm.

[11] When she arrived home there was no one as a result she gained entry through the window. She put some pants on and went to Babikie's home where she relayed to her that the appellant had raped her. Upon her return from Babikie's place she called out to Fanie and informed him that the appellant raped her and he (Fanie) spoke to

the appellant and told him that what he did was wrong, he should be arrested. On the advice of Babikie and Fanie, she went to the police station where she reported the matter, thereafter she went to the clinic where she showed her injuries to the to the doctor and also the social worker.

[12] The J88 medical report was handed in by concurrence of both the State and defence, it indicated no physical or gynaecological injuries.

[13] Under cross-examination she stated that after the appellant caught up with her on the street, he dragged her to his home whilst threatening her with violence. When she was asked to explain when exactly did she see the appellant's housemates, she explained that she saw them when she arrived with the appellant. One of them was sleeping on the bench and there were many pairs of shoes indicating that there were other people in there.

[14] She vehemently denied the appellant's version that she had been drinking on the night of the incident, she however did not dispute the appellant's version that one of the appellant's housemates shone his cell phone torch in her face whilst they were having sexual intercourse. He also made some derogatory remarks referring to her as a bitch thereafter she told the appellant that she wanted to go home, he opened the door for her and walked behind her.

[15] With regard to her injuries, when it was put to her that no injuries were recorded in the J88 medical report, she recanted her version and stated that she was not examined when the J88 medical report was completed. She also said that she actually made the first report regarding the rape to Fanie and thereafter to Babikie.

[16] Babikie told the trial court that it was early in the morning when the complainant came to her home. The complainant was crying and reported to her that Mpumelelo raped her. The previous evening, she was at the complainant's home where they

drank liquor. It was her testimony that after the complainant reported to her that she was raped, she accompanied her to the police station to lay a charge. She did not observe any injuries on the complainant's body.

[17] Constable Moseousenyane confirmed that he arrested the appellant after the complainant opened the case. He also retrieved her torn jeans from the appellant's home.

[18] On the other side, the appellant testified and also called Fanie (Sfadie Fanie) as a witness. He essentially repeated the explanation of his plea and denied having attacked or raping the complainant. He reiterated that the complainant is the one who actually initiated the sexual encounter by asking to go home with him to have some fun.

[19] He was adamant that the sexual intercourse was consensual and that the complainant's morose attitude only arose after they were disturbed by his house mate who shined his cell phone torch on the complainant's face. She then asked him to take her home. He offered his tracksuit which she took and he accompanied her home. All was well when they left his home, when they arrived at her home, she went inside the house through a window whilst he waited outside in order for the complainant to give him his tracksuit back. She emerged brandishing a pair of scissors and called out to her neighbour Fanie who spoke to him and advised him to rather go home.

[20] Fanie confirmed that he went over to the complainant's home after she called out his name and that he also spoke to the appellant. His version differed to the complainant's version in the sense that he testified that except for telling him that she was going to lay a charge, the complainant did not tell him why. He enquired whether she and the appellant were dating, the complainant said no and told him that the appellant had taken her from Nombus tavern and they left the tavern together. She

looked a bit drunk from yesterday's drinking whilst the appellant appeared sober. Fanie then suggested to the appellant that he should go home.

[21] The appellant assailed the trial court's judgment on the grounds that in its conclusion that the State's evidence proved his guilt beyond a reasonable doubt, the trial court erroneously held that the complainant was a credible witness and this is despite that fact that the complainant was not a truthful witness. Her assertion that she did not consume alcohol at all on the night of the alleged rape was controverted by the witnesses, Babikie and Fanie. Her version regarding the alleged rape was contradictory and the physical injuries she allegedly sustained were not supported by the J88 medical report.

[22] For the appellant, Mr van der Merwe stated that the J88 medical report also does not indicate any vaginal injuries and this is despite the complainant's allegations that the appellant raped her for the whole night based on all these reasons, the conviction ought to succeed. In the event that the conviction is not upheld, the court must then reconsider the sentence imposed by the trial court on the grounds that life imprisonment is harsh considering the personal circumstances of the appellant namely that: he was 21 years at that time, a Grade 10 scholar and had no previous convictions. The trial court ought to have taken into account that no injuries were proven that could be attributable to the alleged rape including any lasting trauma suffered by the complainant.

[23] According to Mr van der Merwe, the factors taken cumulatively warranted a deviation from the prescribed sentence of life imprisonment accordingly, the sentence must be reduced to twenty (20) years imprisonment.

[24] For the State, Mr Ontong conceded that there were contradictions in the complainant's testimony with regard to the circumstances under which she was allegedly raped however, he was of the view that the contradictions are not material to warrant the rejection of the entire testimony proffered by the State's witnesses. He

reasoned that the contradictions in the complainant's evidence could be as a result of confusion resulting from the head injury and the resultant loss of consciousness upon being assaulted by the appellant. It was his view that it was unlikely that the complainant could have been dragged from the street without her clothes getting dirty. Her jeans were not soiled when they recovered by the police therefore, the version that is sensical is the one that she was unconscious when the appellant took her from the street. The fact that the J88 medical report does not refer to any injuries does not mean that she was not injured as a slap would not cause any visible injuries. Furthermore, whether she was drunk or not during that night is also not relevant in any event, if she was drunk the appellant could have seen it as an opportunity to execute the rape. The trial court was thus correct in accepting the complainant's version as the truth and rejecting the appellant's version as false.

[25] Mr Ontong argued that the trial court was also correct by taking into account that the appellant had previously threatened to rape the complainant therefore, the rape was pre-meditated. His personal circumstances taken individually or cumulatively did not constitute compelling and substantial reasons warranting a deviation from the prescribed sentence of life imprisonment.

[26] The principles applicable in appeals where the findings of a trial court are attacked are now well established: the appeal court will not interfere with or tamper with a trial court's judgment or decision regarding either conviction or sentence unless, it (the court of appeal) finds that the trial court misdirected itself as regards its findings of facts or the law.⁴ The principle was also restated in *AM & Another v MEC Health, Western Cape*⁵ as follows:

"It is trite that an appeal court is reluctant to disturb findings of that character by a trial judge, who was steeped in the atmosphere of a lengthy trial and had the advantage of seeing and hearing the witnesses. Such findings are only

⁴ *R v Dhlumayo & Another* **1948 (2) SA 677** (A).

⁵ *AM & Another v MEC Health, Western Cape* **2021(3) SA 337** (SCA) at paragraph 8.

overturned if there is a clear misdirection or the trial court's findings are clearly erroneous. That has consistently been the approach of this court...."

[27] On the available facts, the only issue for determination by the trial court was whether the sexual intercourse between the appellant and the complainant occurred as a result of rape as alleged by the State or it was consensual as proffered by the appellant.

[28] The onus to prove all the elements of the rape charge including absence of consent rested with the State.⁶ Having regard to the totality of the evidence proffered in this matter, there is a monumental misdirection regarding the facts of this matter and the basis upon which the trial court arrived at its conclusion that the evidence relied upon by the State proved the appellant's guilt beyond a reasonable doubt.

[29] It is equally trite that:

*"A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong."*⁷

[30] In its judgment, the trial court sets off by misconstruing the appellant's plea and states that after pleading not guilty, the appellant elected to remain silent (record page

⁶ *Vilakazi v The State* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA) para 47.

⁷ *S v Trainor* 2003 (1) SACR 35 at para 9.

96, line 13 -14) whereas he invoked the provisions of section 115 of the CPA and explained the basis of his defence. (Record pages 1 -3).

[31] The complainant was a child witness and also a single witness implicating the appellant in the rape therefore her evidence called for a cautionary approach before it could be accepted. From the record, it is clear that the trial court was alive to the fact that the complainant's evidence was not satisfactory in all material respect.

[32] To justify its acceptance of evidence of such poor quality (record 98 -103), the trial court improperly rendered an explanation on her behalf regarding the reason she was untruthful about her sobriety on the night of the alleged rape and also attributed the complainant's inability to give a clear and succinct version of the events to a memory loss resulting from a brain injury unconsciousness and this is despite its own findings that there was no medical evidence to support this conclusion. It is also important to point out that the complainant backtracked from this version by asserting that she was actually conscious and walked with the appellant to his home immediately before the alleged rape. The complainant's version regarding the assault on the head, arm and leg was also not corroborated by the medical evidence and this is despite the fact that she had testified that she sustained a bleeding wound. The trial court went further and found an unsound corroboration of the rape from the complainant's torn jeans and held that if it was the complainant who mistakenly ripped the jeans when she was taking them off as alleged by the appellant, she would have worn them afterwards or taken them with her. There was no rational basis for this conclusion.

[33] The complainant's version that upon arriving home, she also reported the rape to Fanie in the presence of the appellant and that Fanie had remarked that the appellant must be arrested was also not corroborated by Fanie.

[34] On the other side, immediately after pleading not guilty, the appellant explained the basis of his defence by setting out the circumstances under which he had sexual

intercourse with the complainant. He repeated his version regarding the consensual intercourse under direct evidence and it was succinct and it remained intact even after cross-examination. His version was also corroborated by the complainant when she was under cross-examination to determine the truth in her version. She conceded that that they were busy having sexual intercourse when they were disturbed by one of the appellant's housemates who, after shining a torch on her face insulted her by referring to her as a bitch. She immediately asked the appellant to open the door for her to leave and he did not only do that, he walked with her to her home where she continued to rage brandishing a pair of scissors.

[35] The appellant's version was also corroborated by Fanie who was in my view, an impartial witness. As opposed to the complainant's assertion that she reported to him that the appellant raped her and he told the appellant that he must be arrested, it was his testimony that at no stage did he mention that the appellant must be arrested. The complainant did not even mention to him that the appellant had raped her, he only observed that she was very angry and had a pair of scissors in her hands and that was the reason that he suggested to the appellant that he should rather go home.

[36] A thorough analysis of the evidence proffered reveals that the nature and number of the discrepancies in the complainant's evidence regarding the alleged rape affected her credibility and rendered her evidence unconvincing and untrustworthy and that all the factors which pointed towards the appellant's guilt against all those which were indicative of his innocence were not taken into account as pointed out in *S v Chabalala*⁸ that:

"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. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning

⁸ *S v Chabalala* **2003(1) SACR 134** (SCA) at para 15.

an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence..."

[37] Taking into consideration the facts of this matter and the evidence proffered including the appellant's version, there was no justification for the trial court's findings upon which it found that the State's case proved his guilt beyond a reasonable doubt. The trial court misdirected itself by rejecting the appellant's version as false beyond a reasonable doubt. The conviction could not be sustained, it followed too that the resultant sentence could not stand. In the result, I proposed the following order.

Order

1. The appeal is upheld against the conviction and the resultant sentence.
2. The order of the Regional Court, Bethulie is replaced with the following:
 - 2.1. "The accused is found not guilty and discharged."

The Honourable Justice
 2025 -02- 18
 N.S. Daniso NS DANISO, J

I concurred and it was so ordered.

C REINDERS, J

On behalf of Appellant:

Mr PL van der Merwe

Instructed by:

Bloemfontein Justice Centre

Attorneys for the Appellant

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On behalf of the Respondent: Adv. EB Ontong
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Instructed by: Director of Public Prosecutions
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