



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

Reportable / Not Reportable

Appeal Case Number: A106/2024

In the matter between:

T. BONGE

Appellant

and

THE STATE

Respondent

Neutral citation: *T. Bonge v the State/A106/2024*

Coram: **Mhlambi ADJP, et S. GROBLER, AJ**

Heard on: **24 February 2025**

Delivered on: **06 March 2025**

Summary: The proper approach to deciding if the state has proven its case, is to determine if the probability of the State's case so far outweighs that of the defence, that all reasonable doubt is by that weighing exercise destroyed. The Magistrate in the present case applied the wrong test, by simply finding that the state's

version is the more probable. Not shown beyond reasonable doubt that the Appellant was guilty of the offence. Appeal succeeds.

ORDER

1. The appeal succeeds.
 2. The appellant's conviction of **26 March 2024** and sentence of **9 April 2024** are set aside.
 3. On the charge of contravention of s3 of the Criminal Law Sexual Offences and related Matters Amendment Act, 32 of 2007 – rape – read with the provisions of s51(1) of the Criminal Law Amendment Act, 105 of 1997, the appellant is found not guilty.
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JUDGMENT

INTRODUCTION:

- [1] When the matter was argued on 24 February 2025, we ordered as we did because we did not believe that justice allows the incarceration of the Appellant for one day longer as is now necessary. The parties were told that the reasons for the order will be handed down later. These are those reasons.
- [2] The Appellant was found guilty by the Regional Court on a charge of rape on 9 April 2024, and sentenced to life imprisonment.

- [3] It must be mentioned that the appellant noted his appeal against the sentence imposed upon him only. During argument however, Ms Kruger for the appellant and Mr Mabale for the State, both submitted that this court retains the inherent jurisdiction to deal with both the conviction and sentence. As an aside, I express the court's sincerest thanks to both Ms Kruger and Mr Mabale for the way in which the proceeding was conducted and the responsible submissions they made.

THE FACTS:

- [4] The appellant was charged with raping the complainant on multiple occasions over the course of two effective days in May 2023. He pleaded not guilty and provided a statement in terms of s115 of the Criminal Procedure Act.
- [5] His statement read that on the particular Wednesday, the complainant had telephoned him and asked him to fetch her at a tavern which was situated at the '*old location*'. This was around 20h00. When he arrived there, he met the complainant and one Mr Andries Moamoge. They all left the tavern, Mr Moamoge went home, and he and the complainant walked towards the complainant's place of residence. He entered the complainant's residence and thereafter had consensual sexual intercourse with her. He spent the night there and on the following Thursday morning they again had intercourse, whereafter the complainant had asked him for money. He refused. He also denied having prevented her from exercising her freedom of movement and keeping her captive in her house.
- [6] The State firstly submitted the J88-form, which stated that there were no injuries detected to the complainant. A medical examination of the complainant was done on 5 May 2023, almost immediately after the appellant's alleged transgressions.

- [7] The complainant then testified. She said she and the appellant have a child together. She testified that on 4 May 2023 the appellant had fetched her from a shebeen and they were not in a relationship at that time. He stood – according to her – at the gate of the shebeen whereafter he accompanied her to her home. Mr Moamoge left for his home.
- [8] When they arrived at the complainant's home, she unlocked the door and believed that the appellant would leave for his abode thereafter. He however entered her house, started swearing at- and slapping her and he then strangled her.
- [9] She testified that he wanted to undress her but when she resisted, he took out a knife out of his pocket. She managed to grab the knife out of his hands and throw it away. During the struggle she apparently also kicked the knife on the ground so that it was no longer within plain sight. It was ultimately left underneath the bed in her bedroom. She testified as well that she was '*not heavily intoxicated*'.
- [10] The appellant forced open her legs with his and had intercourse with her. After he ejaculated, he climbed off her. She took her telephone and told the appellant that she was phoning the Police. He took the telephone from her, threw it against the wall and it broke. She did not consent to having sex with him at that or any time thereafter.
- [11] She apparently stayed with him during the course of the evening until the following morning. In fact, they both fell asleep.
- [12] The next morning, he penetrated her again without her consenting.
- [13] Around 4h30 that morning, the appellant told the complainant that she should telephone her sister because he is going to kill her and he is going to kill himself. She did so and spoke to her child who was residing with her sister

at that time.

- [14] Thereafter they went back to the bedroom at her house and they slept again. The complainant testified that on this occasion the Appellant had sex with her for a third time. Again, she did not consent.
- [15] She did make food for them during the course of the evening as well and she visited the toilet inside the house with the Appellant's blessing.
- [16] The next morning Mr Moamoge came to fetch at her house what was only described as being his *container*. The appellant allowed her to open the door, whereafter she told Mr Moamoge that the appellant wanted to kill her. She went outside and ran to Mr Ndedeza's house. She found two boys there who accompanied her to her house again to go and look for the appellant, who had by then already left.
- [17] Under cross-examination most notably, she could not provide any explanation as to why she did not scream, call for help or most notably to my mind, why she did not leave during that evening. She also did not tell her sister or her child what had happened to her, made food for the appellant, etc. She also could provide no explanation why her torn undergarments had not been presented, or why the knife was not presented to the court. There was no mention of these two items in the SAP13 document. Under re-examination she testified that her relationship with the appellant had been '*on and off*' for a number of years.
- [18] Mr Moamoge then testified. He contradicted the complainant by stating that the appellant had found both in the shebeen. At that time, he was drunk.
- [19] He saw the complainant the following morning whilst he was on his way to work. He stopped by at her house. He testified that they spoke a little bit, and they walked across the street because she said that she wants to go to

Mr Ndedeza's house. She told him that she wants to do this because the appellant wanted to assault her.

- [20] Importantly and under cross-examination, he testified that he accompanied her across the street not because she told him that she had been raped or that the appellant had wanted to rape her, but because the appellant apparently wanted to assault her. She mentioned nothing about the rape to Mr Moamoge.
- [21] The appellant testified thereafter. He denied assaulting and swearing at the complainant, but admitted that from the shebeen he had accompanied her to her house. He testified that the complainant was drunk and he initially wasn't interested in any physical interaction with her, but in her house and after she had put his penis in her mouth, he had intercourse with her. They both fell asleep, and he had sex with her again when both woke up the Thursday morning.
- [22] He testified that the complainant wanted money from him on the Thursday morning to buy *mohlapolo*, which apparently is something that can be taken to clear one's head after a heavy night of drinking. When he declined the complainant became agitated. He left for work and the next day went back to the complainant's house, where he was arrested.

THE JUDGMENT:

- [23] The learned Magistrate found that that court was confronted with two contradictory versions. The learned Magistrate then correctly found that the complainant's version was contradicted by Mr Moamoge in various instances, that her allegation of having been strangled and assaulted on numerous occasions was not supported by the '*medical evidence*' (there was no such aliunde evidence tendered apart from the J88 submitted). It is not clear to what medical evidence the learned Magistrate referred. If the

reference is to the fact that the J88 indicates no injuries to the complainant, this obviously was correct.

- [24] The learned Magistrate also – I think correctly – found Mr Moamoge as an incredible witness. The court *a quo* found him to be disorientated and confused when relaying his account of the events. The Magistrate correctly found that Mr Moamoge had contradicted the complainant '*in terms of the report made to him*'. This of course – as I understand it – refers to the fact that nothing had been said to Mr Moamoge about any rape when he met the complainant the Thursday morning.
- [25] The learned Magistrate moreover correctly found that the prosecution bore the onus of proving the guilt of the appellant beyond reasonable doubt and that the appellant bore no onus to prove his innocence. He correctly also found that the accused need only put up a version that is reasonably possibly true.
- [26] Respectfully, the judgment then goes astray. The learned Magistrate incorrectly then proceeded to find that the contradictions and inconsistencies in the complainant's version, and her version compared to that of Mr Moamoge, were not material. So, for instance, he found that there is nothing in it if indeed the parties were in a relationship during that time or no. If indeed they were as the appellant testified, consensual coitus would have been had more probably than not.
- [27] He also found that the actions of the complainant immediately after meeting Mr Moamoge on that Thursday morning, are not consistent with someone who had sexual intercourse consensually. I have difficulty with this finding. The opposite seems to me more correct. One would have expected the complainant to say that she was raped, multiple times, during the course of that evening. She said no such thing; – and that is on her own version. Even the complainant's version was not that she had said to Mr Moamoge or to

anybody else she had been raped. It was thus not sufficient to state that Mr Moamoge's version was improbable and, somewhat peculiarly, to prefer the complainant's version. Both were the State's witnesses, and he could not find that the State had proven its case beyond reasonable doubt.

- [28] Fundamentally, I respectfully believe that the learned Magistrate erred when he found apropos the versions:

'Looking at the evidence and having analyse (sic) it as a whole I find that the probability favours more the version of the complainant than that of the accused.'

- [29] The Learned Magistrate did not enquire further. The court, of course, was to weigh up the probabilities. But the enquiry had to go further, and the court had to decide if the version of the State is so much more probable that it avoided any reasonable doubt that may exist. This the Learned Magistrate did not do. This is a serious misdirection.

- [30] The SCA held in **S v Trainor**:¹

*'A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidences that 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 out of necessity be evaluated, as much corroborated evidence, if any. Evidence of course, must be evaluated against the onus of any particular issue borne in respect of the case in its entirety.'*²

¹ 2003 (1) SACR 35 (SCA) at para 9.

² See also **S v Chabalala**, 2003 (1) SACR 134 (SCA) at para 15 where the court held:

[31] I have no difficulty in finding that the State did not prove its case beyond reasonable doubt, something to which Mr Mabale correctly conceded. Apart from the grounds mentioned in the court a quo's judgment, it seems to me improbable that the coitus was not consensual. This is easily shown up through a whole host of rhetorical questions, chief among them being – to my mind – how the complainant could not have escaped over the course of several hours since the first and last incident? Nothing seems to have prevented her from doing so.

[32] The Conviction cannot stand, which means a further debate on the sentence is unnecessary.

[33] I, therefore, make the following order:

4. The appeal succeeds.
5. The appellant's conviction of **26 March 2024** and sentence of **9 April 2024** are set aside.

'The correct approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strength and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs to heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'

See also *S v Mdlongwa*, 2010 (2) SACR 419 (SCA) at para 11;

See further: *S v Van der Meyden*, 1999 (1) SACR 447 (W).

6. On the charge of contravention of s3 of the Criminal Law Sexual Offences and related Matters Amendment Act, 32 of 2007 – rape – read with the provisions of s51(1) of the Criminal Law Amendment Act, 105 of 1997, the appellant is found not guilty.


S. GROBLER, AJ

I concur.


MHLAMBI, ADJP

On behalf of the State:

Adv S Kruger
On instruction of:
Legal Aid
BLOEMFONTEIN

On behalf of the Respondent:

Adv. S. Mabale
National Director Public Prosecutions
BLOEMFONTEIN