



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

Case Number.: CA&R182/2023

In the matter between:

GARETH PAYNE

First Appellant

and

THE STATE

Respondent

JUDGMENT – CRIMINAL APPEAL

Beshe J

[1] The appellant, a male person who was 28 years old at the time together with another male person stood trial in the Regional Court, Gqeberha on a charge of rape. Both the appellant and his co-accused who were legally represented pleaded not guilty to the charge. At the conclusion of the trial on 6 July 2023 they were both convicted as charged. They were each sentenced to undergo imprisonment for life. Subsequent to that they were granted leave to appeal against both the conviction and sentence. The Regional Magistrate's rationale for granting them leave to appeal against both conviction and sentence being that because they have an automatic

right to appeal against life imprisonment, the appeal court might as well consider the judgment on the merits.

[2] It is only the present appellant who was accused number one during the trial who filed heads of argument. This led to respondent applying that second appellant's appeal be struck off the roll. Respondent's application in this regard was acceded to, with second appellant's appeal being struck off the roll. During the hearing of the appeal, appellant's legal representative Mr O'Brien intimated that the appeal against sentence was no longer being pursued, it being abandoned. So, the appeal is against the conviction only.

[3] The charge that the appellant and his co-accused were facing was based on the allegation that on the 12 February 2020 at or near Whitehead Street, St. George's Park, Gqeberha, they unlawfully and intentionally committed acts of sexual penetration with the complainant by inserting their genital organs into her vagina. Four witnesses testified in support of the state's case. Appellant also testified and called his wife to testify in support of his case.

[4] Complainant's evidence was briefly that she was walking at Central when a Quantum minibus stopped next to her. The driver asked her for directions to St. George's Park. She recognized the driver as someone she would see at the taxi rank and identified him as the appellant. The latter asked her to come with him so that she can direct him to St. Georges Park and promised to drop her off at her destination which was at the garage or petrol station. He then drove towards St. George's Park. However, he did not stop at the garage but drove faster, pointed her with an object she could not identify on her neck and told her not to move. He drove off to St. George's Park and stopped the motor vehicle next to a block of flats. He told her to take off her clothes which she did because she was scared of him. He wore a condom and proceeded to rape her, firstly between the two front seats and later on the second row of seats from the back. Even though she did not observe him removing the condom, she felt wet afterwards. Appellant handed her a piece of cloth and instructed her to wipe her private parts. Unbeknown to her, there was a second man on the back seat of the bus who then told her to come to where he was. She

did, due to fear. The second man also raped her. She was thereafter dropped off at the garage she was initially going to.

[5] On a subsequent date she decided to go and report the matter at a satellite police station in Humewood realising that if she did not, the two men will continue doing what they did to her to other women unabated. She told the female officer who attended to her that she knows her assailants from the taxi rank where Greenacres taxis stop. They proceeded to the taxi rank but could not find her assailants. She was referred to Humewood main police station. It was at the Humewood police station that she formally laid charges against her assailants. A few days thereafter she spotted one of her assailants driving a minibus in Main Street. As luck could have it there happened to be a police van nearby. She told the police in that van that she had seen the person against whom she had opened a criminal case. She took the police to where the former accused number two was. The latter was taken to Humewood police station. During the discussions with the police at the police station accused number two denied that he had come across complainant, that she may be mistaking him for his brother. Two of his friends or brothers who had accompanied him to the police station joined the discussion. During the discussions at the police station, with arrested suspect and his friends disavowing that he raped the complainant, appellant's name was mentioned. He searched Facebook for a person with that name, appellant's image came up. Complainant described the second suspect, resulting in accused number two's friend asking her if that person resembled one who was in an image on a mobile phone. She confirmed that it was him. The police, accompanied by accused number two's companions proceeded to a car wash where complainant pointed the appellant out. It appeared to be common cause that the complainant was examined by a Doctor Mtini on the 18 February 2020 some six days after the incident.

[6] During cross-examination, she was taken to task about what appeared to be a contradiction between what she said in court and what she said to the first report, a female officer she found at the satellite police station, namely:

(i) whether she was on her way to or walking back from the garage.

(ii) whether she got into the minibus because she saw there was only one occupant or because she recognised the driver's face from the taxi rank.

It also transpired from complainant's evidence that there were streetlights as they were driving in the minibus, enabling her to see the driver's face.

[7] The first report was made to Sergeant Ngxonono at the Satellite police station. According to her, what prompted the complainant to lay a charge was that she had spotted one of two people who had raped her on an earlier date at the taxi rank and she was in a state. She narrated to her what occurred on the date of the alleged rape. It transpired that she did not reduce what complainant told her at the time she did so. She only did so at a later stage. Because they attend to petty crimes, she called her colleagues from the Humewood police station to come and deal with the report.

[8] The investigating officer's involvement began when she found the complainant and one of the suspects at Humewood police station. She confirmed that one of the suspects who was there showed complainant an image of a person who the complainant confirmed was that of one of her assailants. This led to her proceeding to the car wash where complainant pointed the appellant out.

[9] Constable Mohamed's testimony was in relation to the arrest of appellant's co-accused at the taxi rank. His evidence seems to have placed the issue of how the image depicting appellant came to the fore, into perspective.

[10] Appellant confirmed that he owned a taxi but that the driver thereof was one Alvin. That he would pick the driver up in the morning, Alvin in turn would drop him off at his then fiancé's place, now his wife. He would remain there the whole day. This was also the case on the day of the alleged incident. Also, that he also spent the better part of the night there because there was a party held that evening. He only went home at around 01h00 whereupon he drove in his minibus. His co-accused was known to him seeing his brother is married to appellant's sister. His co-accused is a taxi driver. Appellant testified that as a taxi owner he was known to many people. It transpired that he would take his driver home in the evening and

then drive home to Kensington. That on the day in question he took his driver home at about 19h00 and then went back to his fiancé's house. Driving home after leaving the party, he drove with his co-accused who he had given a lift as they both reside in Kensington.

[11] Appellant's evidence about his whereabouts on the day of the incident was confirmed by his wife. She however could not recall whether appellant's co-accused Zaheer attended the party at her home. That in a nutshell is the evidence that was at the trial court's disposal.

[12] After considering the evidence in its totality, the Regional Magistrate made the following findings:

That there may have been discrepancies in the evidence of the state witnesses, but none concerned material aspects of the case;

That the witnesses corroborated each other on material aspects of the case;

That the version of the appellant was not reasonably possibly true in so far as it contradicted that of the state and stood to be rejected.

[13] The appeal against conviction is premised on the grounds *inter alia* that: The trial court erred in accepting the veracity of the evidence of the state in circumstances where the standard thereof was of a poor quality and contradictory in material respects.

The magistrate provided no basis in law or fact why the version of the appellant stood to be rejected as not being reasonably possibly true.

[14] It is so that the trial magistrate did not give in depth reasons why she was of the view that appellant's version was not reasonably possibly true and therefore stood to be rejected. I also take note of authorities referred to by appellant's counsel in this regard. It is however trite that in a situation where the magistrate has not fully recorded her reasons for judgment, the court on appeal or review is obliged to

consider the issues afresh¹. In *S v Luzipho*² the magistrate had delivered a terse judgment and rejected appellant's version and accepted the evidence of the state. On appeal, the court had this to say:

[9] Our courts have on several occasions addressed the fundamental importance of a trial court, whether a lower or higher court, furnishing reasons for their decisions. The failure to set out the findings of fact and to furnish reasons for its judgment places an appeal or reviewing court at a disadvantage in adjudicating the matter.

[10] In *S v Frazenburg and Others* it was said:

'It is clearly in the interests of justice that a Judge, either sitting alone or with assessors, should give reasons for the finding of the trial Court— *S v Immelman 1978 (3) SA 726 (A)* at 729A-B and the cases there cited. This is now enshrined in s 146 of the Criminal Procedure Act 51 of 1977, which imposes on a trial Judge the duty to give the reasons for the decision or the finding of the Court on questions of fact, including where the Judge sits with an assessor or assessors and there is a difference of opinion, the reasons for the decision of the member of the Court in the minority. The importance of complying with this duty was recently emphasised by Howie JA, as he then was, in *S v Calitz en 'n Ander 2003 (1) SACR 116 (SCA)* in para [12], when he said:

“Hoe dit ook al sy, dit moet beklemtoon word dat die behoorlike beskerming, enersyds, van 'n appellant se grondwetlike reg tot appèl en, andersyds, die gemeenskap se belang dat oortreders behoorlik gestraf word, van 'n regterlike amptenaar vereis dat deeglike aandag gegee word aan die formulering en verstrekking van vonnisredes. Daarsonder word gesonde strafregpleging belemmer.”

¹ See Commentary on the Criminal Procedure Act Du Toit *et al* Volume 1 21-17 and the authorities cited therein.

² 2018 (1) SACR 635 ECG at [9].

[11] These remarks are, in my view, equally apposite to magistrates whose obligation to furnish reasons for a decision or finding is enshrined in s 93ter(3) of the Magistrates' Courts Act 32 of 1944. As was noted in Frazenburg in the absence of any or proper reasons, the appeal court–

‘(a) has to do its best on the material on record; (b) cannot proceed on the assumption that there was no misdirection or irregularity in the process of reaching the decision that was reached by the Court *a quo*; (c) cannot assume that the Court *a quo* had cogent reasons for seemingly accepting the witnesses who implicated the appellants; and (d) should have regard only to the question of the *onus* of proof once all the relevant evidence had been examined to see whether there is any doubt as to which version is acceptable’.

In *S v Kalogoropoulos*,³ likewise, the trial court had not given reasons for findings made. The court had this to say:

‘His failure to do so has caused needless problems for all concerned in the appeal. In this unfortunate state of affairs, we are called upon to consider appellant’s defence afresh, in the light of the evidence on the record.’

[15] That the magistrate went through the evidence with a fine toothcomb cannot be doubted as can be seen for her summation of the evidence. She was well conversant with the *onus* of proof applicable in criminal cases as is apparent also from her examination of the authorities in this regard. So was she cognisant of the need to approach the evidence of an identification witness with caution. She went on to analyse complainant’s evidence in this regard, in particular her ability and opportunity to observe the appellant. Regarding appellant’s evidence, she noted first that appellant’s co-accused was also in attendance at the party that evening, according to the appellant. Secondly, that his wife, even though there were approximately 12 people does not recall whether his co-accused was in attendance.

³ 1993 (1) SACR 12 (A)

[16] It is noteworthy that according to the appellant he gave his co-accused a lift home after the party as they stayed in the same area, Kensington. In my view, this serves to corroborate complainant's evidence that they were together that evening. A settled principle of our law is that a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are patently wrong. This principle had also been re-stated in *S v Francis*⁴ where the court held that the powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection, the court's conclusion including its acceptance of a witness's evidence is presumed to be correct. In order to succeed, the appellant must convince the appeal court on adequate grounds that the trial court was wrong.

[17] I am inclined to agree with the court *a quo* that there were no material contradictions in the evidence of the state witnesses warranting the rejection of the evidence for the state. In my view, complainant's evidence was clear and satisfactory in all material respects, both in relation to her being a single witness as far as rape is concerned and as far as the identification of the appellant is concerned. Upon examining the record of proceedings, I am unable to say that the trial court's findings are vitiated by irregularity or that the magistrate's findings are patently wrong.

[18] The appellant raised an alibi as a defence. It is trite that evidence relating to an alibi is to be viewed in light of the totality of the evidence and not in isolation.⁵ The magistrate noted that appellant only disclosed his alibi during his evidence in chief. It is also noteworthy that appellant's defence witness, his wife, could not recall whether erstwhile appellant attended the party that was held at her home that evening. There were only about 12 people at the party. According to the appellant, he offered former second appellant a lift as they were residing in the same area. It therefore sounds strange that appellant's wife would not recall if he was in attendance or not. And as indicated earlier, the fact that appellant and his co-accused were in each other's company during that evening lends some credence to complainant's evidence. This

⁴ 1991 (1) SACR 198 A.

⁵ *S v Malefo & Andere* 1988 (1) SACR 127 (W) 158 a-e. See also *R v Hlongwane* 1959 (3) SA 337 A 340 H – 341 B.

in my view suggests that appellant's version is not reasonably possibly true. Otherwise, how would complainant have known they were together that evening.

[19] It is often said that it is difficult to see how a defence can possibly be true if at the same time the state's cases viewed in the totality of the evidence, with which it is irreconcilable, is acceptable. See in this regard *S v Van Der Meyden*⁶ where the court had this to say:

'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.'

And later at page 449 g-h the following is stated:

'It is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is 'completely acceptable and unshaken'. The passage seems to suggest that the evidence is to be separated into compartments, and the 'defence case' examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence.'

[20] In my view, the magistrate did not misdirect herself in convicting the appellant. The appeal against conviction can therefore not succeed.

[21] Accordingly, the appeal against conviction is dismissed.

⁶ 1999 (1) SACR 447 at 448 (g).

N G BESHE
JUDGE OF THE HIGH COURT

ZILWA J

I agree.

P ZILWA
JUDGE OF THE HIGH COURT

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