



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR319/24

In the matter between:

N[...] S[...]

Appellant

and

THE STATE

Respondent

ORDER

On appeal from: The Regional Court of KwaZulu Natal, sitting at Ulundi (sitting as court a quo):

1. The appeal against conviction on Count 1 (Contravening section 3, read with sections 1, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007 and Part I of Schedule 2 (Rape on multiple occasions), is upheld;
2. The order of the court *a quo* is set aside and replaced with the following: "Counts 1: Acquitted".

3. The appeal against sentence on count 1 is upheld;
4. The sentence of the court *a quo* on count 1 is set aside.
5. The Orders made in terms of Section 103(3) and 103(4) of the Firearms Control Act, Act 60 of 2000, are set aside;
6. The Order made in terms of Section 50 of the Criminal Law Amendment Act, Act 32 of 2007, handed down on 13 June 2024 is set aside;

JUDGMENT

NORTJE, AJ (with TUCKER, AJ concurring)

[1] This is an appeal against conviction and sentence on Count 1, (Rape on more than one occasion) handed down by the Ulundi Regional Court on 13 June 2024. The court *a quo* found that the rape was performed multiple times, thereby triggering the minimum sentence provisions. The Appellant was acquitted of Count 2 (Attempted Murder).

[2] Before I deal with the substance of the matter, I find it necessary to express the court's ire at the conduct of counsel for the appellant, Adv Sibiya. The appeal itself reached us in the form of 904 typed pages of transcripts, which covered the entire trial from start to finish. Adv Sibiya deemed it proper to submit 181 pages of head of argument (about 20% the volume of the entire transcript).

[3] Heads of argument serves an integral role in the hearing of any opposed matter, and the courts rely greatly on counsel to provide their heads not only timeously, but also concisely, so as to assist the court in deciding the matter.

[4] The importance and function of heads of argument has been expressed many times by having regard to the comments of Marcus AJ in *S v Ntuli*:¹

"Heads of argument serve a critical purpose. They ought to articulate the best argument available to the appellant. They ought to engage fairly with the evidence and to advance submissions in relation thereto. They ought to deal with the case law. Where this is not done and the work is left to the Judges, justice cannot be seen to be done. Accordingly, it is essential that those who have the privilege of appearing in the Superior Courts do their duty scrupulously in this regard."

[5] Adv Sibiya's heads were grossly voluminous and offered no assistance to the court. Instead, the heads of argument attempted to often restate the evidence lead but with additional spin or inflection not part of the transcript, while simultaneously offering no legal argument or case law of assistance. The heads of argument were misleading and improper, and not in accordance with the duty imposed on legal representatives to first assist the court and thereafter to advance their client's case.

[6] Whether it was by design, or by fortune, he escaped the anger of the bench when Adv Xulu appeared in his place to argue the appeal.

[7] It must also be mentioned, on the other side of the coin, counsel for the Respondent, Mr Shah, submitted very helpful heads, which assisted the court greatly, even though they seemed counterproductive to the State's case. We were reminded that a prosecutor's primary function is to assist the court in arriving at a just verdict, and not to seek a conviction at any cost.

The substance of the appeal

[8] As a brief factual background to the appeal, the Complainant's evidence was that even though she was in a permanent relationship with the Appellant, and they have one child together, that relationship had now ended.

¹ *S v Ntuli* 2003 (4) SA 258 (W)

[9] In evidence the Complainant stated that the Appellant did not accept that the relationship had ended, and persisted in contacting her, despite the fact that she obtained a domestic violence order against him.

[10] On the day in question, he came to her homestead and persuaded her to go back to his homestead. She did so without much protestation, because she did not want him to make a scene at her homestead, something he has done before.

[11] Whilst walking to his homestead, the Accused beat her with a stick, and scolded her about seeing other men. After arriving at his house, she spent some time alone with his brother. She was also aware that other family members were present.

[12] That night they slept in the same bed, and during the night he raped her repeatedly, against her will, using a knife to threaten her, and overpowering her by holding her down. She described how he suffocated her, and how she lost consciousness several times during the night.

[13] She awoke the following morning, wrapped in three blankets, and alone in the house. She managed to free herself from the blankets and decided to walk home. Along the way she came across the Appellant, and they walked together for a while.

[14] He seemed surprised to see her and even said "I thought you were dead". He stopped a taxi to arrange a ride for her, but she did not accept, choosing to walk instead because she felt that she was too dirty on her person.

[15] They parted ways, and she decided to go home first to take a bath and get clean clothes. She then set off to the police station where she met some resistance against being served by a police member. It was only after she started crying out loudly that the police assisted her.

[16] She was taken to the clinic where an examination was conducted, and she gave the doctor her history of events. The doctor noticed some brown discharge and concluded that she was raped.

[17] The Appellant's version is that the two of them are still very much a couple, but the uncle of the Complainant is trying to lodge a wedge between them, as he wants the Complainant for himself.

[18] His evidence was that the Complainant met him outside her homestead, as he was not supposed to go to close due to the protection order. They walked to his homestead, with her singing happily along the way. Arriving at his place, she still joked with his younger brother, and he left her to go get some food.

[19] During the night they slept together and engaged in consensual intimate sexual conduct. The following morning, they walked past a shopkeeper who noticed how happy they looked together, and they were observed by a taxi driver who was stopped to give her a lift which she declined. They then parted ways.

[20] In his defence, much was made of the Complainant's uncle, one Mr Zwane, and how he was behind this whole complaint. Several witnesses were called to substantiate this version, without much credibility being established to do so. It prompted the magistrate to call two witnesses in terms of section 186 of the Criminal Procedure Act, whilst the Defence's case was still underway.

[21] It is apparent that the two witnesses called by the court were State witnesses who the State elected not to call. The State had the benefit of consulting with these witnesses prior to the Court deciding to call them, and even stated that she (prosecutor) would call one Zakhele during her cross examination of the Appellant.

[22] The Court did not advise the Appellant that he could lead further evidence, either in rebuttal, or further witnesses. The Appellant closed his case without calling the last witnesses which he told the court he still wanted to call just prior to the court invoking section 186.

[23] The Appellant tried to cross examine the Complainant on a prior statement that she made to the police, which seemingly contained quite a few discrepancies to her later statement, however the court found that the Complainant could not be blamed for those discrepancies, but rather the police who took the statement. I find the court misdirected itself by not allowing the Defence to develop its argument that the Complainant's versions contradict themselves, and the restriction of the ability by the defence to probe the discrepancy rather than have the Complainant answer to the inaccuracies.

[24] A few further elements of the Complainant's evidence were also cause for concern. The police officer, Ms Msimang, who was on duty when the Complainant reported to the police station, testified that she never observed the Complainant go outside and cry, or that only after that did the police go out to fetch her and gave her assistance.

[25] It is also of concern to me that the Complainant never mentioned to the police that a knife was used, with the subsequent result that there was no further investigation on the existence of the knife. The same goes for the stick that was used to assault her legs.

[26] The learned magistrate relied on the Complainant's evidence of having been threatened with the stick, and found that this aspect proves her unwillingness to go to the Appellant's homestead. However, there is no corroboration to this apparent beating, despite the Complainant having sought medical assistance on the following day. Throughout the encounter as detailed by the Complainant, the Complainant would have sustained injuries that would have been picked up in a medical examination. There was a complete lack of medical evidence of such injuries, however, and no regard was paid by the Court a quo to this lack of what would have been easily available evidence.

[27] There is another point that is of concern, and that is the Complainant's own version that she was singing quite merrily when she entered the Appellant's homestead, seemingly to alert other people of her presence. If it was her direct intention to portray a happy and willing attitude to being there to others, one has to

wonder how this would have influenced the Appellant's perception of the Complainant's attitude towards being with him.

[28] The impression she wanted to create for other people to see, was unfortunately the same impression the appellant was observing, and using to gauge her response to his advancements. The court *a quo* accepted the singing by the complainant, but failed to attach any weight to how this could have affected the Appellant's analysis of the state of affairs.

[29] The Appellant would have seen the same behaviour, and without the complainant telling him her "true" reason for singing, he was left to make of it as he wished, and the natural conclusion would be that this person seems to be cheerful about being in my company.

[30] Couple this with the Complainant's own admission that when he came to fetch her, she did not resist, she just "allowed him to do whatever he wanted." The magistrate recognises this flaw in the Complainant's evidence, but then goes on to claim that it must be viewed in the totality of the evidence, and seemingly dismisses it as it is but one blemish against the Complainant. Had the Magistrate considered this one element in conjunction with all the other slight flaws, he would have found that there area combined mass of inconsistencies in toto, in the evidence of the Complainant which cannot be ignored as if it were just one.

[31] The Court *a quo* paid far too much credence to the evidence of Dr Msomi. His finding of sexual assault seems to be based on two elements: Firstly, the presence of a brownish discharge, and, secondly her account of what had happened. He admits that the brown discharge could be attributed to other causes, such as an infection, which leads this court to believe that the only ground for his finding that sexual abuse did take place, is the Complainant's own account of events relayed to the doctor.

[32] The discharge does not mean that the complainant was assaulted. That is not the only conclusion that one can reach on the observance of discharge. Particularly so when the Appellant himself admitted that there was sexual intercourse.

[33] The Doctor further confirmed that he did not see any injuries on her legs from being hit with a stick. This was not taken much further by the prosecutor or the defence. The court *a quo* recognised that the Complainant's version described quite a severe physical assault, with the Appellant climbing on top of her, pressing her down and strangling her. He forced her thighs open by using his knees, all the while holding a knife against her neck.

[34] In assessing this evidence the Court *a quo* clearly misdirected itself when it chose to rely heavily on the evidence of the doctor in regard to the meaning of a brownish discharge, but then gives very little credence to the fact that no other injury in the form of bruising on the thighs or anywhere else on her body was observed.

[35] The court *a quo* readily accepted the complainant's version that the morning after, when she had now left the Appellant's house, she sees him following her on the road, and then chooses to walk with him, rather than try to get rid of his company.

[36] I am hard pressed to believe that a woman would choose to walk onwards with her rapist, and even rejects the opportunity of a taxi ride to get away from him, instead choose to walk with him, as if nothing had happened.

[37] She does not turn and run away, and she does not confront him about what he had just done. Instead, they walked in fairly peaceful circumstances. This is, of course, not determinative of her veracity. It does add another proverbial straw to the camel's back.

[38] She explains why she never tried to escape whilst with him, saying that he would know she went home, and he would find her there. Firstly, she does not give a reason why she could not have escaped and go to the police station, if not the clinic or her own house.

[39] This is in stark contrast with her own testimony that the following morning, she actually made the decision to go to her home, somehow forgetting that this is the place where she knows he will come find her. The court *a qua* paid no attention to

this inconsistency, or if it did, attached no significance to it. This again is a misdirection by the court *a quo* who later dismissed the Appellant's version as being "rigged with contradictions and half-truths." The court erred in nitpicking all the inconsistencies of the Appellant's version, whilst glossing over those of the Complainant.

[40] She testified that after getting back to her own homestead, she did not wake up her family members, saying they would be upset. I find that rather strange, and surprised that the court *a quo* accepted this as the truth, with the only corroboration being the fact that the version is consistent with what she told her witness.

[41] In evaluating the evidence, I am reminded of the case of **Matosa and another v S [1999] JOL 5502 (O)**, where it was held that "It is, of course, always permissible to consider the probabilities of a case when deciding whether an accused's version may reasonably possibly be true."²

[42] The explanation offered by an accused may be so improbable that it cannot reasonably be true. However, there is no room for balancing the two versions, ie the state's case against the accused's case and to act on preponderances. The correct approach for a court is to apply its mind not only to the merits and demerits of the state and the defence witnesses but also to the probabilities of the case. This is to ascertain whether the accused's version is so improbable as not to be reasonably true.

[43] This, however, does not mean a departure from the test as laid down in **R v Difford 1937 AD 370 at 373**, that even if an accused's explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false.

[44] If there is any reasonable possibility of their explanation being true, then they are entitled to an acquittal.

² see S v Singh 1975 (1) SA 227 (N); S v Muniai 1986 (4) SA 712 (W) at 716

[45] Whether a court subjectively disbelieves an accused is not the test.³ The test is to be found in the nature of the onus resting on the state, and that is that a court need not even reject the state's case in order to acquit an accused.

[46] The court is bound to acquit an accused if there exists a reasonable possibility that an accused's explanation may be true. Even if the state case stood as a completely acceptable and unshaken structure, the court is bound to investigate the defence case with a view to discerning whether it is evincibly false or inherently so improbable as to reject it as false.⁴

[47] I am not convinced that the Appellant's version of the state of affairs is correct, when he paints the picture of the Complainant's uncle as the mastermind behind the charge against him. He does not have to discharge a burden to prove why the Complainant has charged him, and therefore I do not have to consider that further.

[48] I am not concerned as much with the why, but rather the what - what happened between the Complainant and the Appellant that night.

[49] Slomowitz AJ said in regard to an accused's story: *"Whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State."*⁵

[50] Referring to this passage van der Spuy AJ said:

"In other words, even if the State case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false."

³ S v Kubeka 1982 (1) SA 534 (W)

⁴ S v Jaffer [1988] 1 All SA 407 (C)

⁵ S v Kubeka 1982 (1) SA 534 (W) at 537 O-H

[51] I agree. The test is, and remains, whether there is a reasonable possibility that the Appellant's evidence may be true. In applying that test one must also remember that the court does not have to believe their story; still less it has to believe it in all its details. It is sufficient if the court thinks there is a reasonable possibility that it may be substantially true.⁶

[52] In light of the improbabilities in the Complainant's evidence, which I have highlighted above, measured against the evidence of the appellant, I come to the conclusion that I have more than the reasonable amount of doubt, and therefore find that the State did not discharge the burden of proof on the desired level.

Order

[52]

- 1 The appeal against conviction on Count 1 (Contravening section 3, read with sections 1, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007 and Part I of Schedule 2 (Rape on multiple occasions), is upheld;
- 2 The order of the court *a quo* is set aside and replaced with the following: "Counts 1: Acquitted".
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6. The Order made in terms of Section 50 of the Criminal Law Amendment Act, Act 32 of 2007, handed down on 13 June 2024 is set aside;

NORTJE AJ

I agree

⁶ Rex v M 1946 AD 1073 at 1027

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