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

CA&R 73/2022

In the matter between:

AYANDA MAJONGILE Appellant

And

THE STATE Respondent

JUDGMENT

RUSI J

[1] A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly, but that such conduct must be manifest to all those who are concerned in the trial and its outcome, especially the accused.[1]

[2] The appellant was arraigned in the Tsolo Regional court on 24 August 2021 on charges of rape in contravention of section 3 of Sexual Offences and Related Matters

---

[1] *Le Grange v The State* 2009 (1) SACR 125 (SCA), para 14; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others - Judgment on recusal application* (CCT16/98) [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 (4 June 1999), para 35.

Amendment Act 23 of 2007 as count 1; assault with intent to do grievous bodily harm as count 2; and theft in contravention of section 132 of the Transkei Penal Code, Act 9 of 1983 as count 3. He was legally represented during the proceedings in the court *a quo*.

[3] It was indicated by the prosecutor at the start of the proceedings in the court *a quo*, that the charge of rape against the appellant fell within the purview of section 51(2) of the Criminal Law amendment Act, 105 of 1997 which prescribes various minimum sentences for certain categories of offences. For the charge of rape, the prescribed minimum sentence would be 10 years imprisonment.

[4] The appellant was acquitted of count 3 but convicted as charged on counts 1 and 2. In respect of count 1 he was sentenced to undergo 8 years' imprisonment while he was sentenced to a period of 12 months' imprisonment in respect of count 2. The two sentences were ordered to run concurrently. Having been refused leave to appeal by the court *a quo*, the appellant was granted leave to appeal on petition to this Court.

[5] In this appeal the appellant challenges his conviction on charges of rape and assault common based, *inter alia*, on the conduct of the regional magistrate, Tsolo during the trial proceedings against him. He asserts that the Magistrate failed to remain impartial during the said proceedings, resulting in him not having a fair trial. He also relies on other grounds of appeal in attempting to have his conviction overturned by this Court. Before us, the appellant was represented by Mr *Matotie* while Mr *Phomolo* appeared on behalf of the prosecution which is the respondent.

The background facts

[6] These are the facts on which the appellant's conviction was founded. On 06 August 2020 the appellant and complaint, Ms S[...] G[...], agreed to the appellant's visit at the complainant's home in the evening of that same day to enjoy alcoholic beverages. At the time this agreement was made, the appellant and the complainant knew each other from their locality in Sidwadweni Locality in the Tsolo district. They

would also visit each other in Johannesburg, Gauteng Province, where they sojourned while working at their respective places of employment in that Province.

[7] Around 20h00 on the day of the pre-arranged social meeting, the appellant arrived at complainant's home. He brought a bottle of brandy and the complainant provided fruit juice in turn which they would use to dilute the brandy. When the appellant asked the complainant for food at some stage during his visit, she prepared a meal and served him. During the course of the night, the complainant asked the appellant to leave which request the appellant did not heed and instead told her that he would sleep in her house. The appellant raped and stabbed the complainant during the course of his stay at her home.

[8] The appellant persisted with denying guilt in respect of all the charges against him. In respect of the rape and assault charges, he stated that in as much as he did visit the complainant in accordance with their agreement, he was no longer at her home when the incident took place. In essence, the appellant contended that the complainant who was intoxicated at the time of the incident mistakenly identified him as her assailant.

The grounds of appeal

[9] Appropriately paraphrased, the grounds of appeal on which the appellant relies are that the learned regional magistrate erred in:

(i) Descending into the arena thereby resulting in the appellant not having a fair trial.

(ii) Finding that the state had proven his guilt beyond reasonable doubt.

(iii) Failing to take into account the fact that the complainant had consumed alcohol on the day of the incident.

(iv) Failing to take into account the evidence of the appellant that he had no stab wound in his abdomen whereas the complainant had testified that she stabbed him in his abdomen with a knife in an attempt to escape from him.

(v) Not taking into account the inconsistency between the first report of the rape incident that the complainant made, and her *viva voce* evidence, and the fact that medical evidence in the form of the J88 report did not support her case in relation to rape charge.

(vi) Failing to exercise caution when dealing with the complainant's evidence on the counts of rape and assault common whereas she was a single witness.

(vii) Disregarding evidence which implicated another suspect besides the appellant and rejecting the evidence of the appellant and his witnesses.

[10] I interpose to mention that the appellant's heads of argument in this appeal were filed out of the time frames provided for in the Uniform Rules of Court. Condonation was sought by the appellant for their late filing, and it was granted unopposed by the respondent.

The evidence in the court a quo

(a) The complainant

[11] The complainant told the court *a quo* that she became drowsy at some point after consuming the alcohol that the appellant brought, hence, she asked him to leave but he refused. At some stage during his continued presence at her home after he told him to leave, the appellant went to urinate in the bathroom which was next to her bedroom. When he finished urinating, he let himself in her bedroom and got on her bed. This aroused suspicion in her that 'the appellant had ill-intentions'. With this realization she

went out to the students' quarters situated in the same premises in order to get help in evacuating the appellant from her house. Three male students, including Mr Luzuko Nqeketo lived in these quarters. She could not get any help as no one answered her knock on the door.

[12] It appeared that the appellant followed her out of the house, and when he caught up with her outside where she went to get help, he ordered her to get back inside the house demanding that she sleep with him. The appellant had a knife in his hand as he ordered her back inside the house. She and the appellant struggled over the knife resulting in her receiving a cut in her little finger. As a result of the cut, her little finger became deformed and could no longer bend.

[13] She eventually went back inside the house where the appellant once again wanted to stab her with the same knife. This time she grabbed the knife and received a cut to her middle finger as a result. She was subdued and the appellant pushed her to her mother's bedroom where he further pushed her to the bed, undressed her and himself. He forced her thighs apart by scratching them with the knife and raped her *per vaginum* without a condom.

[14] While the appellant had inserted his genitalia in her vagina the complainant asked him to let her loose as she needed to urinate. He refused to let her loose and ordered her to urinate on the bed. She indeed urinated on the bed and when this happened the appellant lost his erection. He tried to revive the erection using his hand, and while he did so she took the opportunity to dispossess him of the knife. She delivered a blow with the knife to the appellant's abdomen and managed to escape, running back to the student quarters where she knocked and was received by the three male students.

[15] When the three male students asked her what had happened, she told them that the appellant raped and stabbed her. Upon hearing this they went out of their quarters to look for her assailant who had apparently also gone out looking for her. None of the

male students were able to enter the house as they feared that her assailant was still inside and possibly armed. As they went back inside their quarters, they saw a male person leaving the premises through the gate. According to the complainant, the appellant stole her two cellular phones and money in the sum of R950.00. He had spent about 4 hours at her home since his arrival at 20h00. The police were called to the scene, and she told them that the appellant raped her. In turn, the police told her to go and lay a charge against her assailant as there was nothing they could do.

[16] The complainant denied the appellant's version that was put to her, that he and the appellant were in a secrete love relationship and that the appellant left her house around 22h00 when he received the news of death of his relative. According to her, the appellant left her home after he raped her. She was hard pressed in cross examination regarding a contradiction that appeared in a statement she made to the police a day after the incident. In her sworn statement it was recorded that she stabbed the appellant in his stomach, whereas in her testimony she told the court *a quo* that she delivered a knife blow at the appellant and could not say whether he stabbed him or not. She disavowed this aspect of her statement stating that that it is not what she told the police officer who took the statement and that the police officer wrote what she said in his own way

(b) The medico legal report

[17] A medico-legal report (the J88 report) compiled by Dr Mbombo who examined the complainant at 11h42 on 07 August 2020 was handed to court as an Exhibit without any evidence being led from the examining doctor. The clinical findings of Dr Mbombo were that the complainant sustained a 1centimetre laceration on her 3rd finger; a superficial 2centimetre laceration on the little finger; and an abrasion on the palm of her hand. In his gyneacological examination of the complainant, Dr Mbombo observed bloody discharge and a blood-stained cervix. The complainant had no genital injuries. He concluded that penetration could not be excluded. Asked to explain why she had

bloody discharge in her cervix, the complainant told the court *a quo* that when the rape incident occurred, she was about to menstruate.

(c) Mr Luzuko Nqeketo

[18] Mr Nqeketo, one of the three male students who were in the students' quarters when the complainant came in during the night was the only one among his companions whom the prosecution called to testify. He told the court that the complainant was totally naked when she came to their quarters. He and another male student were fast asleep when the complainant knocked at the door, and she was received by Mr Banele Madevula who was also present in the room. The complainant took a blazer that was in the student's quarters and put it on, grabbed something and quickly went out. She came back the second time screaming, and they realized that something may have happened to her as she was also bleeding. They asked her what had happened, she could not answer as she was 'furious' and crying but ultimately told them that *"there was someone who wanted to rape her outside and even stabbed her."*

[19] It was Mr Nqeketo's evidence further that he witnessed all of this in a state of sleep. He went on to state that he and his companions tried calling the police at that point to no avail. When the complainant indicated that she needed to use her phones which she left inside, he went out to get the phones. He could, however, not enter the house as he heard a noise of something falling from inside and realized that the complainant's assailant was probably inside the house. He therefore decided to hide himself out of fear, and while hiding, he saw a man exiting the house through the door while simultaneously putting a lumber jacket on. This man left the premises through the gate.

[20] When he told the complainant that there was someone in the house. The complainant remarked that *"that gentleman had left his lumber jacket. He must have come back for it."* When the police came and searched the scene, they picked up a knife and put it in exhibit bag. This concluded the evidence for the prosecution.

(c) The defence's version

[21] After his application for discharge at the close of the state case was refused, the appellant gave evidence and called two witnesses, *viz*, Ms Likhona Nenemba and Mr Ntobeko Didi who were members of the Community Police Forum of Sidwadweni at the time of the incident and to whom a report was conveyed regarding it. Mr Didi was also the appellant's uncle. It is to him that a report was made by the complainant's father.

[22] In his testimony, the appellant reiterated his version that he had already left the home of the complainant at the time it is alleged she was raped. He further testified that he was present when his uncle, Mr Didi telephonically received the report of the alleged rape from the complainant's father. It was his evidence in this regard that after speaking on the phone, Mr Didi asked him to lift his T-shirt up. Even though he did not understand at the time why he was to lift his T-shirt up, he later learned that the complainant alleged that it was he who raped her and that she stabbed him in his stomach during the incident.

[23] The appellant further told the court *a quo* that the complainant was his secrete lover but denied raping her. Confronted with an extract from the record of bail proceedings in which he stated that he had consensual sexual intercourse with the complainant, the appellant disavowed the affidavit in which such evidence was contained. He stated that it was an error made by his erstwhile attorney which he attempted to correct in vain. He further explained that after he secured bail, he terminated the mandate of the attorney who presented his bail application.

[24] Only a portion of the record of proceedings in those bail proceedings was referred to by the prosecution during the appellant's cross examination. I must add that we were not furnished with the full record of those bail proceedings either. Mr *Phomolo* was not able to explain how it came about that the said portion of the record was not placed before us.

[25] Ms Nenemba testified that when the report of the complaint's rape was brought to her attention by Mr Didi, the two of them made their own investigations based on the allegation that the person who raped the complainant was stabbed in his stomach. In essence they would be on the lookout for a person with a stab wound in the stomach. In course of their investigation, she came across a male person known as Nakisa whom she described as 'a notoriously troublesome young man in the community'. According to her, Nakisa happened to have sustained a stab wound on his stomach and was later said to have been seen selling cellular phones. She and Mr Didi subsequently conveyed this information to the investigating officer who did not consider it. I may mention that the investigating officer of the case was not called as a witness by the prosecution or the appellant.

[26] Mr Didi testified that he and the appellant spoke during the morning of 07 August 2020 as a continuation of a conversation he had with him during the previous night when he informed him of the passing of his friend. According to Mr Didi, the appellant was in a jovial mood when he phoned him on the night of 06 August 2020, and it seemed like he was not at home.

[27] He met the appellant again the next day in the morning and they had a further conversation about his deceased friend whom the appellant also knows. Whilst in the company of the appellant, he received a phone call from the complainant's uncle who told him that the appellant was alleged to have raped the complainant. The caller further mentioned that a fight ensued between the appellant and complainant and the complainant stabbed the appellant. He then confronted the appellant with this allegation, and he denied raping the complainant. The appellant, however, confirmed that he was at the complainant's home when they spoke on the phone the previous night. He inspected the appellant's body in order to ascertain if he had any stab wound and saw none.

[28] Since he, the appellant's and complainant's families lived in the same community and were members of the same church congregation, he and the appellant's father resolved to go to the complainant's home in order to ascertain more facts relating to the alleged rape incident. On arrival at the complainant's home, it was indeed reported that the complainant had been raped and assaulted by the appellant and they were shown blood that was on the floor and wall of the house.

[29] During their interaction with the complainant, she told them that the appellant raped her, and she stabbed him with a knife in his stomach. It was also mentioned to him by the complainant that even though the police arrived at the scene, they could not obtain a statement from her as she was still drunk from the alcohol she drank together with the appellant. They left after receiving this information from the complainant and her family.

[30] The court *a quo* further heard from Mr Didi that even though on their arrival they saw police officers investigating the scene of the alleged rape, their work inspired no confidence in them due to their alleged failure in investigating many acts of criminality in their community. As a result, it became customary for the Community Police Forum to conduct investigations and convey to the Police any information they gathered. He was also not satisfied with what the complainant told them as he had inspected the body of the appellant when he was called by the complainant's uncle in order to see if he had been stabbed since the report was further that the appellant was stabbed by the complainant during the rape incident.

[31] As a result, he made contact with his fellow members of the Community Police Forum with a view to conducting their own investigation of the matter. Such investigations entailed going to the local clinic in order to establishing if the clinic staff had treated any person who presented with a stab wound. He managed to get a hold of Ms Nenemba with whom he proceeded to the clinic. They did not get assistance at the clinic as its staff was busy. He confirmed the interaction between Ms Nenemba and the young man named Nakisa whom they met on the way to the taxi rank, and further

confirmed that the information obtained by Ms Nenemba of Nakisa's stabbing was conveyed to the investigating officer of the case for him to investigate it further.

The findings of the court a quo

[32] In finding that the prosecution had proven the appellant's guilt beyond reasonable doubt, the learned regional magistrate reasoned that the complainant who was a single witness gave evidence which was satisfactory in all material respects. Dealing with the submission made on behalf of the appellant that the complainant's evidence was contradictory in that she told Mr Nqeketo and his companions that the appellant wanted to rape her, it was the finding of the court *a quo* that this contradiction was not a material one. He further found that the J88 report confirmed the complainant's version.

[33] The learned regional magistrate rejected the evidence of the appellant as being inherently improbable and untrustworthy. He made this finding based on the evidence of the appellant during bail proceedings. Such evidence was adduced by way of an affidavit, and in it the appellant purportedly stated that he and the complainant had consensual sexual intercourse on the day of the alleged rape. He also rejected the evidence of two defence witnesses as having been conjured up in order to save the appellant from criminal liability.

Counsel's submissions on appeal

[34] Mr *Matotie* highlighted the court *a quo*'s failure to objectively evaluate the evidence that was presented to it. He further emphasized the learned regional magistrate's descension into the arena by interrupting cross examination of state witness by the appellant's legal representative, and his lengthy questioning of the appellant which intimidated him and hindered his presentation of his version.

[35] He further submitted that it was not without significance that the complainant reported to Mr Nqeketo and his companions that the appellant *wanted* to rape her, yet she testified that she was actually raped. This, he said, must be considered in light of the fact that the J88 report was inconclusive regarding the alleged rape, as well as the fact that no evidence of DNA analysis was adduced. In this regard, Mr *Matotie* submitted that this had a bearing on whether it could be said that the complaint as a single witness gave evidence which was satisfactory in all material respects.

[36] In any event, so the submission continued, Mr Nqeketo did not see the identity of the person who exited the home of the complainant, and therefore was in no position to identify him as the person who raped the complainant. Further according to Mr *Matotie*, the learned regional magistrate ought to have taken due consideration of the fact that the investigating officer's failure to investigate further information regarding a possible suspect amounted to an act of suppressing evidence.

[37] Mr *Phomolo* could not submit without demur that the findings of the court *a quo* cannot be faulted. He readily conceded that the learned regional magistrate descended into the arena. In his words, *"the conduct of the learned regional magistrate was not up to standard."* Regarding the record of bail proceedings to which the court *a quo* had recourse in concluding that the appellant's version was improbable for lack of candour, Mr *Phomolo* acknowledged the fact that the court *a quo* fell short to the extent that there was no full record of bail proceedings before it.

[38] It was further acknowledged by *Mr Phomolo* that the full record of those bail proceedings would indicate whether during the bail proceedings the appellant was invited to confirm the contents of his ostensible affidavit in support of his application for bail. He further accepted the omission which occurred in not placing the said record of bail proceedings before us.

The law

[39] Since this appeal engages foremost, the evaluation of evidence by the court *a quo*, suffice it to state that in criminal proceedings, it is the state which bears the onus of proving its case against the accused beyond any reasonable doubt. In *S v Shackell*[2], the Court said of this principle:

> '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.'

[40] That being the case, a court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court and will only interfere where the trial court materially misdirected itself insofar as its factual and credibility findings are concerned.[3]As was held in *S v Francis*[4]:

> 'The powers of a court to interfere with the findings of fact of a trial court are limited. 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's 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

---

[2] 2001 (2) SACR 185 (SCA) at 194g – *i;* also quoted in *Olawale v S* (165/09) [2009] ZASCA 121; [2010] 1 All SA 451 (SCA) at paragraph 13.
[3] *R v Dhlumayo and another* 1948 (2) SA 677 (A).
[4] 1991 (1) SACR 198 (A) at 198j – 199a.

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.'

[41] In criminal proceedings where the court convicts an accused on the evidence of a single witness, it must be satisfied that such evidence is satisfactory in all material respects.[5] In *S v Webber*[6] Rumpff JA remarked as follows:

'The trial judge will weigh [the witness's] evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded.'

[42] With the acceptance of the fact that no given witness could conceivably give evidence that is without flaws, it has been held that the exercise of caution in evaluating the evidence of a single witness should not be allowed to displace common sense. Paramount in the court's evaluation of the evidence of a single witness is to determine what weight is to be attached to such flaws or demerits and what their effect is when viewed in light of the entirety of the evidence presented at trial.[7]

[43] And in *S v Mkohle*[8] the court said of contradictions that appear in a witness's evidence:

'Contradictions *per se* do not lead to the rejection of a witness's evidence. As Nicholas J, as he then was, observed in *S v Oosthuizen*, they may simply be indicative of an error. And ... not every error made by a witness affects his

---

[5] *R v Mokoena* 1932 OPD 79 at 80; *S v Sauls* 1981(3) SA 172 (A); [1981] 4 All SA 182 (A) at 185.
[6] 1971 (3) SA 754 (A) at 758; see also S v Stevens [2005] 1 All SA 1 (SCA), para 17.
[7] *R v Bellingham* 1955 (2) SA 566 (A) at 569.
[8] 1990 (1) SACR 95 (A) at 98f – g.

credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence.' (footnotes omitted)

[44] Regarding impartiality and independence in adjudicating legal disputes, a warning was once sounded by the Appellate Division as it then was when it said that a judicial officer can only perform his demanding and socially important duty properly if he also stands guard over himself, mindful of his own weaknesses (such as impatience) and personal views and whims and controls them.'[9]

[45] Concerning the right of an accused to a fair trial, it bears mentioning that it requires fairness to the accused, as well as fairness to the public as represented by the state. It has to instill confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime, and will be threatened if a court is not independent, and does not apply the law impartially.[10] In the discussion that follows, I apply these principles to the facts of the instant appeal.

Discussion

[46] The warning against impartiality ought to resonate with a judicial officer at all times when a litigant appears before him or her. Once a court of law holds true to this warning, miscarriage of justice will as far as possible be eschewed. The right to a fair trial which obtains at every stage of the proceedings includes the right to cross examine witnesses. In this regard, section 35(3) of the Constitution of the Republic of South Africa, 1996 guarantees the accused's right to adduce and challenge evidence.

---

[9] S *v Sallem* 1987 (4) SA 772 (A); see also *Le Grange*, footnote 1 supra.
[10] *S v Jaipal* 2005 (4) SA 581 (CC) para 29 and 31; *S v Jaipal* (CCT21/04) [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC); 2005 (1) SACR 215 (CC) (18 February 2005).

[47] While a judicial officer is allowed latitude in the course of overseeing proceedings before her, by *inter alia*, curtailing purposeless cross examination of witnesses and preventing the leading of irrelevant and inadmissible evidence, such a discretion cannot be exercised in a manner that suppresses the accused's right to fairness at different stages of the proceedings.

[48] Granted that the trial court must in the end arrive at a just decision, a presiding judicial officer has a discretion to put additional questions to a witness in order to elucidate those aspects of a witness's evidence which remain obscure at the end of such a witness's testimony. This happens after both adversaries have questioned the witness. The judicial officer is also vested with a discretion to recall any witness including the accused, for re-examination.

[49] These matters are governed by the Criminal Procedure Act 51 of 1977 which sets out the circumstances under which these powers can be exercised by the court, and are further refined, with respect, in case law. As held in *Rall*, a trial judge or magistrate must ensure that 'justice is done'. Undue impatience and irritability on the part of a judicial officer is inappropriate and undesirable. He or she should conduct the trial that his or her mindedness, impartiality and fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused.[11]

[50] Regard being had to the enormous power that a judicial officer wields and the terrifying atmosphere of a court setting for many who are involved in the litigation, it is necessary that the judicial officer treats those appearing before him/her with courtesy and fairness. This will ensure that the person(s) appearing before the judicial officer, in particular the accused, is/are not caused to feel intimidated in the presentation of their case.

[51] The record of proceedings in the court *a quo* is replete with instances of the presiding judicial officer interrupting cross examination of the complainant by the

[11] *S v Rall* 1982 (1) SA 828 (A) at 831H.

appellant's legal representative. The entire cross examination of the two state witnesses by the appellant's legal representative was interrupted, frustrated and obstructed by the presiding judicial officer who regrettably displayed immense impatience with him. It would not be practical to reproduce the entire cross-examination of the two state witnesses without belabouring this judgment. Mr *Phomolo* conceded that the presiding officer did indeed descend into the arena. It is significant to emphasize that the interference was, regrettably, on the material aspects of the complainant's evidence.

[52] The purpose of cross examination being to elicit evidence that is favourable to the litigant and to show a witness's untrustworthiness, to curtail it beyond the permissible parameters is to deny the litigant their important right to a fair trial. I can do no better than quote PONNAN JA in *Le Grange*[12] when he said:

> 'Furthermore, one knows all too well how cross-examination can sometimes appear protracted and seemingly irrelevant. Impatience, though, is something which a judicial officer must, where possible, avoid and in any event always strictly control. For, it can impede his perception, blunt his judgment and create an impression of enmity or prejudice in the person against whom it is directed, particularly when such person is an accused person. It may serve to undermine the proper course of justice and could lead to a complete miscarriage of justice. . .'

[53] In the course of his cross examination of the complainant, the appellant's legal representative asked for the court's leave to cross examine her on the statement she made to the police regarding the knife blow that she delivered at the appellant. This was after he read its contents out to her the complainant having disavowed certain of its aspects. His cross examination on this aspect too, was interrupted by the learned regional magistrate.

---

[12] Footnote 1 supra, at para 18.

[54] I readily accept that the weight which should be given to discrepancies between a witness's statement to the police and his or her *viva voce* evidence in court is limited and must have regard to the circumstances in which the statement is given.[13] Hence, a witness's statement to the police should not in all circumstances be seen as a full and detailed statement of his or her evidence regarding a particular matter or incident. By parity of reasoning, it is therefore not reasonable to fault the witness in all circumstances for omissions and minor errors therein.

[55] In the instant matter, it was an important aspect of the complainant's testimony that she stabbed her assailant in the stomach. The importance of this fact appeared even when the complainant told her family the same thing which they in turn conveyed to Mr Didi, the appellant's uncle. Mr Didi must have understood its importance when immediately after the complainant's uncle phoned him, he asked the appellant to expose his abdomen.

[56] In her evidence-in-chief the complainant denied that she told the police officer that she stabbed the appellant with the knife in his stomach. This begs the question how the police officer would be that precise and record that the complainant stabbed the appellant with the knife in his stomach. This ought to have signaled to the learned regional magistrate that the complainant might not have been honest in her testimony on this aspect, instead he concluded that the complainant was too nervous when she narrated the events to the police officer. He made this conclusion without any explanation from the complainant that she was nervous when she narrated the rape incident to the police officer who recorded her statement.

[57] It is my finding that the complainant skillfully avoided committing herself to what she did exactly when she disarmed her assailant of the knife. It was convenient for her to state during cross examination that she was not sure if she actually stabbed her assailant or not as he merely directed a blow at him with the knife.

---

[13] *S v Govender* 2006 (1) SACR 322 (ECD) at 324I – 325C and 326C – 327B; *S v Mafaladiso en andere* 2003(1) SACR 583 (SCA).

[58] At the end of the appellant's testimony, proceedings were adjourned to the next day. On this day the learned regional magistrate indicated that that he wished to recall the accused for questioning by him. His questioning of the appellant spans 8 pages of the record. Suffice it to state, regrettably, that his questioning amounted to rigorous cross examination of the appellant.

[59] It is disconcerting to note that the learned regional magistrate tended at some stages to interrupt the evidence-in-chief of the defence witness by asking questions which were not strictly meant to elucidate a particular point, but clearly to challenge or pick holes in that specific aspect of the witness's evidence-in-chief. More disconcertingly, his questions to Mr Didi which span 12 pages of the record further evince his inclination to rigorously cross-examine the defence witnesses, and regrettably a premature and unfair display of his rejection of the evidence of the said witnesses. This relates to the appellant and both his witnesses.

[60] In *S v Mabuza*[14] it was held that the court should not conduct its questioning in such a manner that its impartiality can be questioned or doubted; it should not take part in the case to such an extent that its vision is clouded by the dust of the arena and is unable to adjudicate properly on the issues; it should not intimidate the witness or the accused so that his or her answers are weakened or his or her credibility shaken; and it should conduct the trial in such a way that its impartiality, its open mindedness, its fairness and reasonableness are manifest to all who have an interest in the trial, in particular the accused.

[61] Apart from the learned regional magistrate's interference in the fray, which, on its own violated the appellant's right to a fair trial, I have serious misgivings about the correctness of his findings on the facts. What ought to have been clear in the mind of the presiding judicial officer in the court *a quo* was that since the appellant's defence was that of an *alibi*, it was important that the applicant's evidence in identifying him as

[14] 1991 (1) SACR 636 (O) at 638 g-i; see also *S v Rall* 1982 (1) SA 828 (A) at 831H.

the culprit was credible. This is particularly so when regard is had to the fact that both the appellant and the complainant had been consuming alcohol during the night. I further note, with regret, that nowhere during the complainant's testimony did the presiding judicial officer seek clarity on what the complainant meant when she said *"she became drowsy"* particularly because she denied during cross examination, that she was drunk. It had been her evidence that she was drinking the type of alcohol that the appellant brought for the first time. There was no clarity sought from the complainant of how much she consumed of the alcohol that the appellant brought.

[62] When regard is also had to the fact that the J88 was inconclusive regarding the act of vaginal penetration of the complainant, coupled with the fact that no evidence of DNA was adduced, it was important that the court satisfies itself that any inference it sought to draw from the facts was the only one that could reasonably be drawn. Another instance of reasonable doubt with the case for the prosecution relates to the results of the examination of the complaint by Dr Mbombo within less than 24 hours of the alleged incident of rape.

[63] According to the complainant, the appellant forced her thighs apart in order to penetrate her by scratching her on her thighs with the knife and she sustained scratches as a result. That being so, the J88 does not record any such scratches which, in my view, would be an important fact which together with others, would give more credence to the version of the complainant that the appellant indeed forced himself on her in the manner she narrated to the court. I mentioned elsewhere in this judgment that Dr Mbombo was not called to testify in the light of the inconclusive nature of his findings.

[64] Before the court could place any reliance on the complainant's evidence as a single witness, it has to be clear and satisfactory in every material respect. The discomfort I have with the findings of the court *a quo* is that it misunderstood a fundamental aspect of the evidence given by Mr Nqeketo that when the complainant came to the students' quarters to report the incident she reported that the appellant

wanted to rape her.[15] Apart from his regrettable remark that it did no matter whether there was an attempt to rape the complainant or an actual rape, it was his finding that there was a stage when the complainant asked the appellant to leave the house and she had seen at that stage that he wanted to rape her.

[65] Significantly on this score, from the evidence on record, the learned regional magistrate ought to have properly considered whether such evidence proved attempted rape or rape, or whether any of these offences were at all established by the evidence. He did not do so, and in this regard he materially erred. The complainant's evidence was clear that she could not get help the first time she went to the student's quarters. At that time, she had only suspected from the appellant's refusal to leave that he had 'ill intentions.' Her intention at that time was to ask the three male students to help her chase the appellant away. It was never her testimony that the appellant wanted to rape her at that point.

[66] It was neither ventilated with the complainant what she meant when she said that she saw that 'appellant had ill intentions.' However, when she ran to the students' quarters the second time, her evidence was that the appellant *had raped her*. This is the version which clearly conflicted with that of Mr Nqeketo who told the court that when the complaint went to their quarters (on the second occasion) she reported that someone *wanted to rape her*.

[67] As mentioned elsewhere herein, the inconclusive nature of the findings in the J88 report which was compounded by the failure or neglect of the state to call Dr Mbombo, coupled with the already highlighted inconsistencies in the evidence of the complainant, ought to have cast a cloud of doubt on the version of the state. I add to this the fact that there was no evidence of DNA either in relation to vaginal and buccal swabs of the complainant and the appellant, respectively, or the blood that that was on the floor and wall of the house in which the incident occurred.

---

[15] Emphasis intended.

[68] It is my finding that the learned regional magistrate materially misdirected himself in his evaluation of evidence and in finding that the state had proved its case against the appellant beyond reasonable doubt on the rape and assault charges.

[69] During closing arguments, the learned regional magistrate engaged the prosecutor regarding the appellant's guilt in respect of the charge of theft, well within his discretion to do so. The portion of the record containing closing arguments made by the appellant's legal representative spans 31 pages of continuously interrupted closing arguments by the appellant's legal representative. The interruptions went beyond being an engagement of the legal representative on a particular aspect and turned into a continuous dialogue between the presiding judicial officer. The appellant's legal representative was frustrated in rendering closing arguments on behalf of the appellant.

[70] It must be emphasized that closing arguments are not only a vital aspect of trial in an adversarial system such as ours, but also form part of an accused's right to a fair trial. Pickering J, in *S v Shamatla*[16] held that, once it has been established that an accused's right to a fair trial under 35(3) has been flouted by the court's failing to give him or her an opportunity to address the court before judgment, the legal validity of the proceedings has been destroyed and the conviction and sentence must be set aside.[17]

[71] The cumulative effect of all the aforegoing is that the accused's right to a fair trial was vitiated by the manner in which his trial was conducted, in particular, by the learned regional magistrate's interference in the fray. Not only that, as I have found, the factual findings made by him warrant interference by this Court. The result is that the appeal must succeed.

[72] I would therefore make the following order:

---

[16] 2004 (2) SACR 570 (EC).
[17] *S v Zingilo* 1995 (9) BCLR 1186 (O); *Mbeje v S* [1996] 2 All SA 304 (N), *S v Mbeje* 1996 (2) SACR 252 (N) at 257e–h); *S v Mabote* 1983 (1) SA 745 (O).

1. The appeal is upheld.

2. The appellant's conviction on the charges of rape and assault is accordingly set aside.

3. The appellant shall be released from detention forthwith.

_____

L. RUSI
JUDGE OF THE HIGH COURT

I agree.

_____

Z. NCALO
JUDGE OF THE HIGH COURT (ACTING)

Appearances:

Counsel for the appellant : *Adv. L Matotie*

Instructed by : G. Mapena Attorneys
No. 22 Blakeway Street
MTHATHA

Counsel for the respondent : *Adv. L Phomolo*
The Office of the Director of Public Prosecutions Mthatha
94 Lower Sissons Street Fort Gale
MTHATHA

Date heard : 07 February 2024

Date delivered : 02 July 2024