

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A172/2009

In the appeal between:-

EPHRAIM MARROLOANE

Appellant

and

THE STATE

Respondent

CORAM: CILLIÉ, J *et* VAN DER MERWE, J *et* MOLEMELA, J

HEARD ON: 25 JANUARY 2010

JUDGMENT BY: CILLIÉ, J

DELIVERED ON: 4 FEBRUARY 2010

JUDGMENT

[1] The appellant in this matter was convicted in the Regional Court of rape. As the complainant was at the time 12 years of age and therefore under the age of 16, the provisions of section 52 (before its amendment) read with Part 1 of Schedule 2 of Act 105 of 1997 was applicable. The regional

magistrate accordingly referred the matter to this court for sentencing.

[2] When the matter was called in this court, Wright J who presided, confirmed the conviction and sentenced the appellant to 15 (fifteen) years imprisonment. An application for leave to appeal against the conviction was refused by Wright J. However, on petition to the Supreme Court of Appeal, leave to appeal to the full court of this Division against the conviction only, was granted to the appellant.

[3] The appellant's conviction is based on events that took place the night of 11 December 2004 at 1189 Dinoting, Zastron. The complainant slept there that night with her friend Masabata, who happens to live on the premises with her grandfather. The appellant also stays on these premises but in a separate shack in the backyard. He is Masabata's uncle on the basis of being the brother of Masabata's mother. The complainant and Masabata shared a bed that night. The grandfather was absent attending a vigil of a relative. He is of course then the father of the appellant.

- [4] That night someone entered the room where the complainant and Masabata were sleeping. The complainant was then raped. A few hours later the complainant was examined by Dr. Keeve. She testified that there were signs of recent sexual intercourse.
- [5] The complainant testified that during the incident the perpetrator asked her whether she knew who he was. To that she responded that it was Mazambaan. It is common cause that that is the name of the appellant. According to her evidence, she recognised the appellant by his voice. It was dark in the room, but when he left the room she allegedly saw him. She knows him as she on occasions visits her friend Masabata at that house and she saw the appellant around.
- [6] Masabata's evidence was to the effect that she was sleeping together with the complainant on one bed. During the night she was grabbed, but managed to free herself. The complainant was then pulled to the floor. The witness hid under a table. Eventually she ran out and summoned help from a neighbour by the name of Mlotshwa. When she came

back she found the complainant at the gate. She instructed the complainant to go and call the police. Mlotshwa chased the suspect and the person jumped on the back of the house. However, when the person “jumped the fence he looked towards us” and she managed to see that it was the appellant. She indicated a distance of about six metres that they were apart at the time.

[7] Sergeant Johannes Sefadi of the police at Zastron responded to a telephone call from the complainant and went to the scene. He took the complainant to hospital after she reported that she was raped. The witness makes no mention of Mlotshwa being at the scene at the time.

[8] The defence case gives a completely different picture. According to the appellant he was at the same vigil where his father was and from there he went to a friend where he slept. He on occasions admonished the complainant and Masabata when they were late at night out on street. That, he says, might be the reason why he is implicated in the events.

[9] The aforementioned Mlotshwa was called as defence witness. He testified that he knows the complainant and Masabata. The night of the incident he was at home. He denies that Masabata ever summoned his help, nor did he chase anybody that night. As a matter of fact he was never woken up during the night. In short, he denies Masabata's evidence *in toto*.

[10] Masabata's grandfather, that is the appellant's father, also testified for the defence. According to him, his granddaughter Masabata and the complainant are spoiled youths who loiter around coming home late at night. The appellant reprimanded them and on occasions even assaulted them. Masabata responded thereto by threatening to lay a charge against the appellant. The night of the incident the appellant was with him at the vigil, but left later informing the witness that he was going to sleep at a friend's place.

[11] The correctness of the appellant's conviction of course depends on whether his version, as corroborated by the defence witnesses, is reasonably possibly true. An

accused's evidence cannot be rejected on the basis that it is improbable – it must be so improbable that it cannot be reasonably possibly true. The court does not have to be convinced that every detail of an accused's version is true. See **S v SHACKELL** 2001 (4) SA 1 (SCA) on 13A. The regional magistrate rejected the evidence of the appellant, but more important so, also the evidence of the said Mlotshwa and the grandfather. The issue on appeal is whether there were sufficient reasons for the regional magistrate to do so.

- [12] Valid criticism can be raised against the evidence of the appellant. The evidence that he slept at a friend's place at the night of the incident was raised at a very late stage during the trial. In this regard the impression was initially conveyed by his attorney, during the cross-examination of the state witnesses that he, in fact, returned home from the vigil that night and not to a friend. The appellant, also in his evidence, did not make mention of the fact that he informed the grandfather, that is his father, when leaving the vigil that he would be sleeping at a friend's place, as the father testified he did. Mr. Harrington, for the State, emphasised

these unsatisfactory aspects in the appellant's evidence and I take note of that.

- [13] The problem for the State, however, lies with the evidence of Mlotshwa and to a lesser extent the evidence of the grandfather. The evidence of Mlotshwa was rejected by the regional magistrate on the basis that he is a friend of the grandfather and on occasions borrows building tools from him. It was also mentioned that there is some contradiction between the evidence of Mlotshwa and the grandfather as to whether the grandfather on occasions visits Mlotshwa's place to drink. Mlotshwa confirmed that that is the position whilst the grandfather said that, in fact, it is only his wife who does so. There is further some contradiction as to whether Mlotshwa on the morning before he testified, spoke to the grandfather. The grandfather, in his evidence, said so, whilst Mlotshwa denied it. Be that as it may and accepting that they did speak to each other, it is unknown what they spoke about or what the nature of their conversation was. The evidence of the grandfather was found to be untruthful because of the contradictions between his evidence and that

of the appellant whether the appellant told him when he left the vigil that he would be sleeping with a friend.

[14] The advantages a trial court has as to issues of credibility is appreciated. However, in the present appeal I am left with the firm impression that the evidence of Mlotshwa and the grandfather was rejected for insufficient reasons. Separating the wheat from the chaff it seems that the real reason why their evidence was rejected, is the family and friendly relationship with the appellant.

[15] As to Masabata's identification of the appellant, as the perpetrator, it is clear that if the evidence of Mlotshwa is to be accepted, Masabata's evidence cannot be correct. It is to be noted that the policeman who arrived at the scene does not make any mention in his evidence of the presence of Mlotshwa. It is highly improbable that Mlotshwa, if summoned to the scene and knowing that the police are on their way, would leave the complainant and Masabata unattended and return home.

[16] As far as the complainant's identification of the appellant, it is to be mentioned that Masabata could not identify the appellant in the house as it was too dark. The complainant's alleged identification of the appellant was done when he left the room. This the complainant, however, did not mention in her evidence in chief, but only raised this during cross-examination. The impression from her evidence in chief is that the appellant was recognised by his voice only. Be that as it may no proper identification parade, either with reference to voice or person, was held.

[17] I realise that an appeal is not a retrial and the court of appeal must be convinced that the trial court's finding is wrong before an appeal can succeed. However, for the reasons set out above I came to the conclusion that the regional magistrate should have entertained doubt as to whether the appellant's guilt was proved beyond reasonable doubt. In reaching this conclusion, the evidence of Mlotshwa played a major role.

In the result the appeal against the conviction is upheld and the conviction and sentence are set aside.

C.B. CILLIé, J

I agree.

C.H.G. VAN DER MERWE, J

I agree.

M.B. MOLEMELA, J

On behalf of the appellant: Adv. R.J. Nkahle
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv. W.J. Harrington
Instructed by:
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