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IN THE HIGH COURT OF SOUTH AFRICA

(FREE STATE DIVISION, BLOEMFONTEIN)

Case Number: A180/2017

In the matter between:

WILLEM MASALA Appellant

and

THE STATE Respondent

CORAM:	VAN ZYL, J *et* MURRAY, AJ
HEARD ON:	30 OCTOBER 2017
JUDGMENT BY:	MURRAY, AJ
DELIVERED ON:	29 NOVEMBER 2017

[1] On 30 October 2017 this Court in the interests of justice made the following order because the Appellant had been incarcerated for four years already:

"1. The Appeal is upheld.
2. The convictions and sentences on both Counts 1 and 2 are set aside.
3. The reasons for the aforesaid order will follow in due course.
4. The person in charge of the Appeals in this Court is requested to forthwith bring this order under the attention of the Department of Correctional Services."

[2] These are the reasons for the order:

[3] The Appellant was arraigned on charges of Rape of the First Complainant who is a minor, by contravening *inter alia* s 3 of Act 32 of 2007 read with s 51 of Act 105 of 1997, (Count 1), and of Indecent Assault of the Second Complainant, also a minor, by contravening *inter alia* s 5(1) of Act 32 of 2007, (Count 2).

[4] On 4 July 2014 Regional Court Magistrate, Mr Mkhanzi ("the court *a quo"*), convicted the Appellant on both counts, and on 24 July 2014 sentenced him to Life Imprisonment on Count 1 and to three years' imprisonment on Count 2.

[5] Because of his sentence of Life Imprisonment the Appellant had an automatic right of appeal against both his conviction and sentence on Count 1. Regarding Count 2 he immediately on 24 July 2014 applied for leave to appeal against both his conviction and sentence on that count, and the court *a quo* granted such leave on that same day.

[6] Due to the Appellant's lack of funds to further retain his present attorney after the trial, and a second attorney's failure for more than two years to file the appeal, the appeal regarding Count 2 was never enrolled in the High Court and the notice for the automatic appeal against his conviction and sentence on Count 1 was only filed on 23 May 2017. The Appellant therefore on affidavit sought condonation for the late filing of the appeal. This Court granted condonation because the delay was not due to the Appellant's own fault or tardiness, and because of his good prospects of success on the merits.

[7] The appeal therefore lay against the convictions and sentences on both counts. Adv M Strauss appeared for the State and Adv IJ Nel for the Appellant. Mr Strauss confirmed that the State does not support either the convictions or the sentences, and conceded:

7.1 that the court *a quo* erred in finding that it was not in dispute that the complainant in Count 1 ("N.") was raped and that the complainant in Count 2 ("N.") was sexually assaulted;

7.2 that the court *a quo* erred in finding that there were no material contradictions in N.'s evidence;

7.3 that the court *a quo* erred in not taking into account the material contradictions between the evidence of N., N., R.. and S.; and

7.4 erred in finding that there was an onus on the Appellant to explain why the complainants would falsely implicate him.

[8] Mr Strauss accordingly submitted on behalf of the State that the appeal against the convictions should be upheld. He argued that, if the court were to find that the convictions were in order, the sentences were disturbingly harsh and created a sense of shock, and that this Court would then be justified to interfere. Mr Nel asked that in such event, the sentences be set aside and replaced with suitable and just sentences.

[9] The charge sheet regarding Count 1 alleged that the Appellant had raped N. ("The First Complainant"), "from 2009 until 2013" when she was between the ages of 9 and 11, by penetrating her vaginally on more than one occasion. The charge sheet on Count 2 alleged that the Appellant had sexually assaulted N. ("the Second Complainant") between 2009 and 2012 when she was between the ages of 13 and 15, by touching her breasts on different occasions.

[10] In my view the court *a quo's* first misdirection was to conclude that it was not in dispute that the First Complainant had been raped and that the Second Complainant had been sexually assaulted and that the only dispute was whether the Appellant raped and sexually assaulted them. The Appellant denied the alleged rape, the alleged sexual assault and his having perpetrated the alleged deeds. He averred that the allegations might be fabrications.

[11] The court *a quo*'s further misdirection was in finding that both Complainants gave thorough and detailed explanations, remained calm and composed and answered every question promptly and without hesitation whereas it is clear from the record that that was not the case. Both girls were vague and hesitant on numerous occasions, both during evidence-in-chief and in cross-examination, and when pressed for specific detail, events or dates, could not answer the questions or simply alleged that they could not remember, could not be sure, or did not know.

[12] Regarding the First Complainant's evidence, the court *a quo* erred in finding that it was clear and satisfactory in all material respects, with no material contradictions, whereas her evidence was vague and contained numerous contradictions and discrepancies. She testified, for instance, that the Appellant touched her buttocks while she was not wearing any clothes, but later averred that he did so when she got up and walked past him when he was sitting on the couch in the lounge. Although she could not explain how it all came about, she testified that it "all started" when she was still 8 or 9 years old. She even alleged that "The police officers took the photos of him when he did it."

[13] The Charge Sheet alleged that the Appellant penetrated the First Complainant vaginally on more than one occasion between 2009 and 2013. In evidence-in-chief she averred that the first time he penetrated her was when she was 9 years old and that she was 'raped' "many times". In cross-examination when confronted with this evidence, she said she could not remember the first time.

Thereafter she insisted that the first penetration was in 2013 when she was 11 years old, "late in the afternoon"… "a little while after the Appellant came home from work" and again "early at night".

[14] When questioned about her use of the term *"rape",* she testified that the Appellant started touching her buttocks when she was between 8 and 9 years old. When asked if she knew wat 'rape' means, she said no and said she was talking about 'rape' because her "mother told [her]" but admitted that she still did not know what it meant.

[15] In cross-examination she maintained that the first time the Appellant allegedly penetrated her was in 2013 when she was 11 years old. She alleged that it happened in the Appellant's bedroom and averred that the Appellant *while holding her hands* removed his clothes except for his t-shirt and then removed all her clothes but for her t-shirt. According to her she was wearing a jean and a t-shirt. She said she could not remember what happened before he penetrated her and maintained that they were alone in the house when it happened. Later on she averred that the Appellant's children were there. At first she alleged that her sisters were in a shanty in the backyard, but later averred that they were also in the sitting-room. When she was asked at what time the alleged incident happened, she at first said "In the afternoon and also in the night", then specified that it happened at four o'clock and again after six.

[16] When she was asked about that again after a postponement she said she could not remember. She then averred that he 'raped' her after they had all finished watching the television show '7de Laan' in the sitting room. Later on during cross-examination she said that the alleged rape on 12 February 2013 only occurred once and averred that she told the court that it had happened twice because "I forgot".

[17] She testified that the Appellant first raped her in his room, then changed her version and alleged that the first 'rape' occurred while he was lying on top of her in the sitting room while they both had all their clothes on, and that the second 'rape' was the one in his room when it was dark already. Then she averred that she could not remember when the second time was.

[18] In my view, the First Complainant's version was so vague, confusing and contradictory that the court *a quo* could not have regarded it as clear or consistent in any way. Even if one allows for the fact that the witness is an 12-year old child, there were simply too many contradictions and vague answers for her testimony to be accepted as credible and as proving beyond a reasonable doubt that she was indeed raped, let alone raped more than once.

[19] The court *a quo* erred, furthermore, in finding that her version was corroborated by Dr Krieger's medical report and evidence in court. The court maintained that the Doctor testified that the complainant's hymen was 'out stretched'. There was no such

evidence, either in the report or in the doctor's evidence in court. Dr Krieger's report and testimony stated that there was no history of or visible signs of extra-genital or anal swelling, injuries or violence, although she cautioned that that did not exclude penetration. Her conclusion that the First Complainant was 'probably' being 'sexually abused', on her own version was based only on 'the clear, detailed, constant history'.

[20] It is trite that in a criminal case, the guilt of the accused needs to be proved not on a balance of probabilities, but beyond a reasonable doubt. The Appellant cannot be convicted of multiple rapes and sentenced to life imprisonment on a mere 'probability of sexual abuse', especially not in view of the many material contradictions and discrepancies in the First Complainant's own evidence, and those between her evidence and that of the other State witnesses.

[21] The court *a quo* also erroneously found the Second Complainant's evidence to be 'clear and satisfactory, with no material contradictions' although the record showed her evidence to be vague in the extreme. Despite being 17 years old already, and despite alleging that the Appellant started 'molesting' her by touching her breasts and buttocks when she was 13 and only stopping when she was 16, she 'could not remember' how it came about that the Appellant allegedly started to touch her, when it allegedly happened, either for the first or for second time, how or on how many occasions it allegedly happened. She then averred that it 'could happen every day' when the Appellant returned from work.

[22] She was unable to describe any incident that occurred in Bloemfontein, although that is what the Appellant was charged with. She averred that the last occasion on which he allegedly touched her was in December 2012 in Cape Town, when she allegedly lay down on the bed and the Appellant came in and lay down beside her and started rubbing her breasts and buttocks. Then, according to her, they both got up and went on with their day. She never told her mother about that alleged incident because she "did not think about it" when she talked to her mother.

[23] The court *a quo* erroneously held that the contradictions between the evidence of the two Complainants were not material. According to the Second Complainant she never talked about what was happening to her until February 2013 when "they" (the two Complainants) told their uncle's wife, S., after she told them how her father had abused her. According to her, before that day the First Complainant never told her anything. At first she averred that she was the only one who said anything, then she said that the First Complainant also started talking on the same day as she did, but alleged that she could not hear what her sister said to S.. She said the First Complainant told *her* how the Appellant had pulled down her panty and tried to rape her, but then changed her story and said the First Complainant did not tell *her* this, but told it to their Aunt S..

[24] The Second Complainant alleged that they never told their Uncle R. B. anything, but that their Aunt S. told him. Thereafter she said

that they did talk to him but averred that she could not remember what they told him. And still later she stated that she never told him anything. The First Complainant, on the contrary, testified that she told her Aunt S. and Uncle B. what had happened to her and that they told her mother who did "nothing'. The record shows that her mother only went to the police ten days later. She also alleged that she told her teacher, but that her teacher did not say anything to her either. She admitted that she knew that her Uncle R.. B. and the Appellant were mad at each other and were not talking.

[25] The court *a quo* failed to take into account the significance of the contradictions in the evidence of R.. B., and the material differences between his evidence in court and his statement to the police. In his statement he averred that the Complainants had told him that the Appellant was touching their breasts and private parts which made them feel uncomfortable, and that the First Complainant had told him that the Appellant had pulled off her pants and touched her on her private parts. Yet neither of the Complainants ever mentioned in court the Appellant's 'touching their private parts'.

[26] In court B. alleged that the First Complainant had told him the Appellant had "slept with" her and wanted her to suck his penis, which the First Complainant never mentioned either in her statement or in court. Upon being confronted with the police statement, which was only made two-and-a-half months after the alleged 'rape', B. averred that the contents thereof were correct

and that the First Complainant's version of the 'rape' was only conveyed to him a few months later.

[27] Contrary to what the First Complainant herself had testified, he averred that she told him that the Appellant had 'slept with' her between 12:00 and 13:00 on a day that she came home from school early, when the other children were still at school and no-one else was in the house, while she was still wearing the skirt of her school uniform. He admitted that she did not tell him of any other incident when she was allegedly raped.

[28] There are also discrepancies between the evidence of the Complainants, B. and S., regarding how it came about that the girls told them what had happened to them, about who had been present when it was told to them and about what was told to them. S. averred, for instance, that she was the only one present when the Complainants told B. what had happened, but averred that she could not remember anything that they said to him.

[29] As is apparent from the paragraphs above, the court *a quo* erred in finding "no material contradiction in the State evidence with the exception of minor discrepancies "; in finding that "… it is inherently impossible that the two complainants will implicate their uncle, that the accused raped them"; and in accepting their version despite all the contradictions and discrepancies to the point that it declared itself satisfied that "the truth has been told".

[30] The Appellant denied all the allegations against him. He testified that he worked at the South African Weather Bureau from 8:00 to 16:00 every day and arrived home between 16:45 and 17:00. His wife worked at the Sandwich Shop on Second Avenue, also from 8:00 to 16:00 and usually arrived home between 17:00 and 17:30. His wife confirmed all of the above.

[31] The Appellant explained that during the week of the alleged rape incident on 12 February 2013 they had four guests from Prieska who stayed with them from 8 to 17 February. He testified that the three ladies slept in his and his wife's room and the man and the Appellant's father-in-law in the children's bedroom, while the Appellant, his wife and their children slept on the living room floor. The guests were there during the day, mostly sitting and chatting on the 'stoepie' outside where he and his wife would join them when they got home. He testified that during the evenings of that week he also had to transport staff from B.'s place of work at the University to their homes. His wife confirmed this and stated that during that week she would join their guests as soon as she got home from work and would either be on the 'stoep' chatting with them or in the kitchen preparing dinner, or doing something else somewhere in the house.

[32] One of the Prieska guests, Ms Bosch, also confirmed their visit from 8 to 17 February 2013. She testified that she was home at the Appellant's house all day long because she had only accompanied her sister to Bloemfontein to fetch a child who had been removed from a relative's home by Social Services. For that

week she therefore took over the household tasks of cleaning and cooking lunch for the Appellant's children when they came home from school. She testified that she only saw the Complainants there when they came into the kitchen to fetch vegetables to prepare meals at their own home in the backyard.

[33] Ms Bosch confirmed that in the afternoons they all sat chatting on the 'stoepie' in front of the Appellant's open bedroom window. It was a small paved area between the bedroom door and the kitchen door and she denied that anything like the alleged rape of the First Complainant could have occurred in the week that they were there since she was around the house all day long.

[34] The Appellant could not provide a specific reason why the Complainants would lie, but upon being questioned about that, he suggested that they might have been told to say what they did. He mentioned some possibilities, one being that the family feud about the 'big house' into which he and his family had been allowed to move after his mother-in-law's death. When this happened, his wife's sister Ronel and B. and their children who had lived with the mother until she died, as well as the Complainants and their mother, Susan, had to move out and into *makoekoes* or *shanties* in the backyard which led to serious discord. According to him, Ronel had even threatened to burn down the house with him and his family in it.

[35] The Appellant testified that his wife, Eva, told him of the Complainants' allegations against him on a Monday evening. Eva

confirmed this and described how the Appellant just threw his hands into the air and said “Oh, wat soek die mense?” (“Oh, what do these people want?”) when she told him of B.’s allegations. She confirmed that the Appellant denied the allegations and offered to leave when she told him she needed to get away for a while. He testified that he offered to do so because the family’s animosity was directed at him, not her, and said he told her that at least that way she and their children would still have a roof over their heads. He explained that that was because she would be allowed to stay in the house if he were to leave, but not the other way round since she was the deceased’s daughter.

[36] The Appellant testified that he knew his leaving and staying in Lückoff until he was arrested in July 2013 could look like he was running away, but that the Complainants’ allegations against him just became too much for him since they had previously had a very good relationship and he knew that he did not do the things they were accusing him of. Because of the animosity between B. and his wife’s sister and himself, he simply could not face a confrontation, and, furthermore, in his Police Statement, B. had threatened to kill him, which is why he rather decided to leave.

[37] The court *a quo* erred in finding that the Appellant “under cross-examination contradicted himself in every material aspect’ without specifying at least some of the alleged contradictions. It, furthermore, failed to consider the material evidence of the

Appellant's two witnesses, Eva and Ms Bosch, at all, [1] and simply dismissed the Appellant's version as false in its entirety because he could not provide a plausible reason why the Complainants would falsely implicate him.

[38] The court *a quo* erred, especially, in concluding that there was an onus on the Appellant to provide an explanation for why the Complainants would falsely implicate him and in finding, for that reason, that the Appellant's version could not be reasonably possibly true and "is therefore rejected as a whole as false."

[39] In **S v Ipeleng**[2] Mahomed J, as he then was, already warned that:

> "It is dangerous to convict an accused person on the basis that he cannot advance any reasons why the State witnesses would falsely implicate him. The accused has no *onus* to provide any such explanation… the Courts have repeatedly warned against the danger of the approach which asks: "Why should the State witnesses have falsely implicated the accused."

[40] In **S v BM**[3] Wallis JA with reference to the above warning, held that questions requesting an accused to explain why the complainant/s would lie in their evidence, are frequently encountered but are not proper questions since they call upon the witness to speculate about the subjective state of mind of another

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1 See S v Van der Meyden 1999 (1) SACR 447 (W) where the court held: "the conclusion which is reached … must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

2 1993 (2) SACR 185 (T) at 189 c – d.

3 2014 (2) SACR 23 (SCA) at para [22] at 32h - 33b.

person, and to speculate about matters about which he could have no knowledge. He explained that:

> "[It] is a matter of speculation or conjecture and as such the answer [is] irrelevant and inadmissible. It follow[s] that questions directed at eliciting this type of evidence [are] impermissible and [have] to be disallowed. … An accused person who claims to have been falsely accused is under no obligation to explain the motives of the accuser and should not be asked to do so."

[41] Wallis JA added that:

> "the natural human inclination in that situation is to provide some answer however speculative or far-fetched, which may then be used to attack one's credibility."

[42] The court *a quo* focused in dealing with the Appellant's version almost exclusively on the Appellant's lack of a plausible reason for being falsely accused and 'elevated the Appellant's perceived inability to provide a plausible reason to the major reason for convicting him', just like the court of the first instance in *S v BM* did. That is clear from the court ***a quo's*** remark regarding one of the reasons suggested: "now you change your version, that is when the State was asking hammering on the same aspect…" and is abundantly clear from the judgment where the court *a quo* states:

> "You gave a number of far-fetched reasons … [you] gave the impression that you were groping for anything that can serve as possible answers… but as you answers were far removed from the compatible general circumstances of the case, they merely emphasise

> the unreliability of your version … you could not provide any reason why the complainants will falsely implicate you and during the evidence of the complainants, when these complainants testified you never put your version about why they will falsely implicate you … while you had every opportunity to test whatever theory about why these complainants will falsely implicate you."

[43] I have to find, like the court in **S v T**[4] did, that in the present instance "it is apparent that the court *a quo* failed to apply its mind properly in assessing the Appellant's story". The court *a quo* accepted the State's version with all the contradictions and discrepancies in the various witnesses' evidence as 'clear and credible' and declared itself satisfied that as far as the version of the Complainants and the State witnesses are concerned that "the truth has been told".

[44] The court clearly did not believe the Appellant and therefore rejected his version, which approach was manifestly incorrect. Even if the court *a quo* subjectively disbelieved the Appellant, it was still required to *consider* by taking into account all the evidence whether there was a reasonable possibility that the Appellant's version might be true. It could not have rejected it out of hand because he could not provide a plausible reason for the alleged fabrication.[5]

[45] As Zulman JA stated in **S v V**[6], it is trite that there is no obligation upon an accused person to prove his innocence. Therefore, if the

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4 2000 (2) SACR 658 (CKH).

5 See also: S v Ramachela 1997 (2) SASV 682 (O) and S v Kubeka 1982 (1) SA 534 (W) at 715G : "in applying that test one must also remember that the court does not have to believe her story; still less has it to believe it in all its details…"

6 2000 (1) SACR 453 (SCA).

Appellant's version is reasonably possibly true, he is entitled to his acquittal even though his explanation may be improbable. The court *a quo* was not entitled to convict him unless it was satisfied that his explanation was beyond any reasonable doubt false. Whether the court *a quo* subjectively believed him or not, is not the test.

[46] In **S v BM** Wallis JA, too, warned that the approach that accused persons are necessarily guilty because the complainants have no apparent motive to implicate them falsely and they are unable to suggest one, is fraught with danger.[7] Yet the court *a quo* in this case succumbed to the very same pitfall that Wallis JA warned against by postulating that:

> "only N.… testified that accused raped her, if these two complainants were fabricating evidence against the accused the second one Nazil … had ample opportunity to say the same but she only testified that the accused touched her breasts and buttocks. There is no indication of any motive the witnesses may have had to falsely implicate the accused…"

[47] The court *a quo* then went further and added that:

> "it is inherently impossible that the two complainants will implicate their uncle, that the accused raped them … your evidence cannot be reasonably possibly true, it is therefore rejected as a whole as false."

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[7] S v BM, *supra,* at para [25] at 33h.

[48] It is so that in certain circumstances the absence of any apparent reason for the prosecution witnesses to fabricate a case against the accused may be a relevant factor to take into account in the overall assessment of the evidence. But virtually on its own with no other reliable evidence pointing to the guilt of the accused, it cannot be a proper or a sufficient basis for a conviction. The proper approach would have been for the court *a quo* to evaluate both versions, the State's and the Appellant's, against the inherent probabilities, taking into account all the evidence. If, after properly doing so, it appeared to the court *a quo* that the Appellant's version could reasonably possibly be true, even if it were improbable or even in some respects untruthful, the Appellant was entitled to be acquitted.[8]

[49] In the instant case the court *a quo* evidently committed several misdirections, as Mr Nel duly pointed out in the Notice of Appeal and in his Heads of Argument. In my view those misdirections were material enough that the Appellant's conviction could not stand.

[50] I am satisfied, therefore, that there was no proper basis for the rejection of the Appellant's evidence which could, in view of all the circumstances of this case, and in view of all the contradictions and discrepancies in the State's version, reasonably possibly be true. The Appellant was therefore entitled to his acquittal and in the premises the appeal against his conviction had to succeed.

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[8] S v BM, *supra,* at para [27] at d – f.

[51] Accordingly, as set out in paragraph [1] above, the convictions and sentences were set aside.

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H. MURRAY, AJ

I concur.

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C. VAN ZYL, J

On behalf of the State:	Adv M Strauss Office of the Director of Public Prosecutions BLOEMFONTEIN
On behalf of the Appellant:	Adv I J Nel Instructed by: Bruintjies Attorneys BLOEMFONTEIN