FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable: NO
Of Interest to other Judges: NO
Circulate to Magistrates: NO

Case No. : A113/2018

In the matter between:-

LESOLE JOHANNES SEMASE Appellant

and

THE STATE Respondent

CORAM: DAFFUE, J *et* MOLITSOANE, J

HEARD: 6 AUGUST 2018

JUDGMENT BY J P DAFFUE

DELIVERED: 10 AUGUST 2018

I INTRODUCTION

[1] On 11 December 2015 the appellant was convicted by Regional Court magistrate H S Van Niekerk on two counts of rape and one count of theft of a cellphone. He was sentenced to 12 months' imprisonment for theft and in respect of the rape counts, having been taken together for sentence, sentenced to life imprisonment.

[2] Appellant, who had an automatic right of appeal as he was sentenced to life imprisonment, appealed against his convictions and sentence of life imprisonment.

II THE PARTIES

[3] Appellant is Lesole Johannes Semase, an unmarried male, who according to the charge sheet was 45 years old at the time of his arrest in May 2015. He was duly represented at the trial and Mr TJ Modise of Legal Aid SA appeared for him in the appeal before us.

[4] The State was represented in the appeal by Adv MMM Moroka.

III GROUNDS OF APPEAL

[5] Appellant is of the view that the court *a quo* did not approach the complainant's evidence with the necessary caution. She was a single witness and there was not sufficient corroboration for her version.

[6] He also submits that the court *a quo* should have found his version as reasonably possibly true and acquitted him.

[7] The usual submissions are made in respect of alleged misdirections in respect of sentencing, which I do not intend to quote, but it should be mentioned that no submissions are contained in the notice of appeal as to which substantial and compelling circumstances were present which the court *a quo* failed to take into consideration.

IV THE COUNTS PUT TO APPELLANT AND HIS PLEA EXPLANATION

[8] The appellant was charged with robbery of the complainant's cellphone (count 1) and three counts of rape in that he raped her by penetrating her anally with his penis (count 2), by penetrating her mouth with his penis (count 3) and by penetrating her vaginally with his penis (count 4). All these offences allegedly occurred on 25 April 2015 near Caledonspoort in the Free State Province. It is common cause that the complainant and appellant had sexual intercourse in the veld next to a spruit approximately ten kilometres outside the town, Fouriesburg.

[9] Appellant pleaded not guilty and gave a plea explanation. According to him complainant gave her cellphone to him for repairs and they had one consensual deed of sexual intercourse in terms whereof he penetrated her vaginally with

his penis, but in the process accidentally also penetrated her anally.

V SUMMARY OF THE EVIDENCE AND THE COURT *A QUO*'S JUDGMENT ON CONVICTIONS

[10] The court a quo was called upon to consider whether complainant voluntarily handed her cellphone to appellant and whether there was sexual intercourse against her will as alleged by appellant. As mentioned, appellant admitted consensual sexual intercourse in terms whereof he penetrated complainant vaginally on one occasion only in which process he accidentally penetrated her anally as well. On his version he never put his penis in her mouth and also did not have sexual intercourse at a different spot as complainant testified. In fact, on his version she requested sex a second time, but he refused. On complainant's version appellant penetrated her vaginally and anally as well as orally the first time and anally the second time. He also had her hands tied behind her back during these episodes and requested her to wash her private parts afterwards. Finally he instructed her to drink an unknown substance that made her feel dizzy. Afterwards and when she dressed up, she could not find her one sock and decided to leave the other sock behind. These socks, a used condom, a torn open condom packet and a Hansa beer bottle were found on the scene later by members of the police as pointed out by complainant and photographed. Complainant testified that, before the ordeal and whilst walking along the Clarens/Fouriesburg road, they came across a jogger who

appeared to be appellant's former teacher. This person turned out to be Mr Mbhele who testified for the State. After the rape, the complainant went back to the Clarens/Fouriesburg road where she was given a lift by a person who turned out to be a police offcer, Mr Sebeko who also testified for the State. She made a report about the rape to him whereafter he took her to the Fouriesburg police station.

[11] The court *a quo* accepted that complainant's version should be considered with caution, but found corroboration for her version. Not only did she make a good impression on the court *a quo*, but she was corroborated by the admitted evidence contained in the J88 medical report, indicating tears to her anus. The court *a quo* found that the injuries were inconsistent with appellant's version that they did not have "*rowwe seks*".

[12] Mr Sebeko, a police officer who travelled the road between Fouriesburg and Clarens on the night of 25 April 2015, found complainant along the road. She reported to him that she was raped and instructed to drink an unknown substance. He persuaded her to lay a complaint. He even took her to the Fouriesburg police station.

[13] According to appellant he introduced himself to complainant and she knew what his names were. This is clearly not the case. She was also not introduced to the jogger, except that she was informed that he was one of appellant's former teachers and that he was living in Fouriesburg. During the investigation Mr Mbhele, the teacher, was identified as the

jogger and he confirmed this in his testimony in court. It was put to Mr Mbhele, after the attorney took a further instruction in court, that appellant was holding complainant around the waist when they met along the road, but the witness denied this, saying that the two persons walked normally without any physical contact between them.

[14] The court *a quo* found appellant to be an evasive witness whose version was highly improbable, or as it was put, "… (dit) strook nie met lewenswerklikhede nie". It was found improbable that complainant would borrow R400 to visit appellant in Fouriesburg, only to walk away from the town for about 10 kilometers to have sex whilst any other convenient and/or suitable place in Fouriesburg might have been visited. Furthermore, his version that she became angry because he could not pay her the amount of R400 requested and that this led to the false charges, is contradicted by the version of Mr Sebeko who testified that she did not want to lay charges and that he had to convince her to do so.

[15] Contrary to logic, appellant did not leave the cellphone in his relative's hands for him to arrange a new battery, but hid it somewhere in the house before he left.

[16] Eventually the court *a quo* found that appellant's version could not reasonably possibly be true and he was convicted in respect of counts 1, 2 and 4, the court having found that the facts indicated one continuous sexual act regarding counts 3 and 4. He was therefore acquitted in respect of count 3.

VI EVALUATION OF THE JUDGMENT AND ARGUMENTS ON THE MERITS

[17] An appeal is a re-trial on the record although the ambit thereof is limited to the issues raised by the appellant. There is no reason why this court may not reconsider the complete record of the entire proceedings in the court *a quo*. See *S v Zondi* 2003 (2) SACR 277 (W) at 242h.

[18] When an appeal is lodged against a court *a quo*'s findings of fact, the appeal court should take into account that the court *a quo* was in a more favourable position than itself to form a judgment because it was able to observe the witnesses during their questioning and was absorbed in the atmosphere of the trial. See Schmidt and Rademeyer, *Law of Evidence* 3-40. Therefore the appeal court will normally accept factual findings made by the court *a quo,* unless there is some indication that a mistake was made. See *R v Dhlumayo* 1948 (2) SA 677 (A) at 696 and 705/6. The Supreme of Appeal summarised this issue as follows in *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e - f:

> "Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of

fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong."

[19] Based on the above observations and *dicta* it is presumed that the trial court's conclusion on the facts is correct. The appeal court will only reverse it where it is convinced that such conclusion is wrong. If the appeal court is merely left in doubt as to the correctness of the conclusion, it will uphold it. The Supreme Court of Appeal in *S v Naidoo and Others* 2003 (1) SACR 347 (SCA) at para [26] reiterated this principle as follows:

'In the final analysis, a court of appeal does not overturn a trial court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong.'

[20] No judgment is perfect and the fact that certain issues were not referred to does not necessarily mean that these were overlooked. The appeal court should be hesitant to search for reasons that are in conflict with or adverse to the court *a quo*'s conclusions. See *Dhlumayo loc cit* at para [12] on 706. However, in order to prevent a convicted person's right of appeal to be illusionary, the appeal court has a duty to investigate the court *a quo*'s factual findings in order to ascertain their correctness and if a mistake has been made to the extent that the conviction cannot be upheld, it must interfere. See *S v M* 2006 (1) SACR 135 (SCA) para [40] at 152a - c.

[21] To secure a conviction the State had to prove all the elements of the crime beyond reasonable doubt. The test in a criminal case has been restated in *S v V* 2000 (1) SACR 453 (SCA) at para [3]. If there is a reasonable possibility that the accused is not guilty, he should be acquitted. An accused's version cannot be rejected merely because it appears to be improbable. It must be shown, in light of the totality of the facts, to be so untenable and/or improbable and/or false that it cannot reasonably possibly be true. See S v Schackell 2001 (2) SACR 185 (SCA) at para [30] and *S v V supra*. It is not necessary for the court to believe an accused person in order to acquit him.

[22] I mentioned that the State has to prove its case against an accused beyond reasonable doubt, but in evaluating the evidence, the trial court is entitled to consider the probabilities and improbabilities. This issue was considered in S v Chabalala 2003 (1) SACR 134 SCA at para [15] where Heher AJA (as he then was) held:

> "The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."

See also: *S v Trainor* 2003 (1) SACR 35 (SCA) at 41b – c.

[23] The police officer, Mr Sebeko, testified in detail as to what complainant had relayed to him and that version corresponds

with complainant's version in material aspects. Her report to Mr Sebeko was made shortly after the incident and as indicated, he picked her up as she was looking for a lift to Clarens. Her version to the witness and initial unwillingness to lay a charge are surely not indicative of a person that intended to frame appellant because he failed to give her money.

[24] Mr Mbhele's version may be seen as neutral, but it is important to recognise that his name was never communicated to complainant. He did not give the impression that he came across two lovers, but appellant's belated version as stated to him in cross-examination is not only in direct conflict with that of complainant – also it was never put to her - but it was denied by Mr Mbhele. In my view this new version was nothing but an afterthought.

[25] Constable PF Ntobela testified that on 6 May 2015 she was on duty at the Fouriesburg police station when appellant handed himself over on a charge of rape. Her version was not contested at all, but in his evidence appellant denied this and presented a long explanation as to why he reported to the police station. Apparently he received a message that he had to attend as members of the Department of Correctional Service were looking for him in respect of community service to be undertaken by him.

[26] W/O MD Mokone, the investigating officer, testified as well. He explained his meeting with the complainant at the police station the particular evening and that she mentioned that she was

raped by an unknown person. Based on the information she provided in respect of the jogger she and appellant had come across earlier, the IO traced Mr Mbhele who confirmed that he met appellant whilst jogging along the Clarens/Fouriesburg road. He requested the complainant the next day to take him to the place where she had allegedly been raped. He made observations about a used condom, an open condom packet, a Hansa beer bottle and complainant's socks. Photographs were taken in his presence and the album was accepted as an exhibit. After appellant's arrest he also found the complainant's cellphone where Mr David Moyeng was staying in the district of Paul Roux. The phone was properly identified.

[27] Mr Moyeng confirmed that appellant visited him and that they discussed replacing the battery of a cellphone. However, appellant left without handing the phone to him. When the IO arrived at his home, telephonic contact was made with appellant through intervention of the IO and they were told where appellant had hidden the cellphone, which they eventually found.

[28] It is trite that an accused may be convicted on the single evidence of any competent witness if such evidence is clear and satisfactory in every material respect. Our courts have indicated that evidence can be satisfactory, even if it is open to a degree of criticism. See *S v Sauls* 1981 (3) SA 172 (A) at 180G–H. Furthermore, the exercise of caution should not be allowed to displace the exercise of common sense. See *S v Artman* 1968 (3) SA 339 (A) at 341C.

[29] Complainant was a single witness. The court *a quo* was acutely aware thereof. I do not deem it apposite to discuss her evidence or even summarise it, bearing in mind appellant's concession of consensual sex. Her version was largely confirmed by Mr Sebeko to whom she made the first report. Even the IO explained during his testimony what she had revealed to him and although there are differences between these two versions the fact that complainant was penetrated more than once vaginally, anally and/or orally stands out as an edifice. The court *a quo* cannot be criticized for concluding that complainant's version was corroborated by the medical evidence and other evidence of State witnesses and that the State's version was to be accepted above the highly improbable version of appellant.

[30] In my view the record shows that complainant gave a detailed and comprehensive version and that her version is supported by the probabilities. The only reason for being in the veld next to the spruit in the middle of nowhere is appellant's insistence that she might be employed and that she needed to go to the particular farmhouse for an interview.

[31] Appellant was an evasive witness who refused to answer simple questions and also came up with long and irrelevant replies. He clearly changed his version to leave the impression that he and complainant were lovers, already at the stage when they were walking along the Clarens/Fouriesburg road when they met Mr Mbhele. Bearing in mind the fact that the

J88 medical report would have been shown to and/or discussed with him before the start of the trial, I have reason to believe that he knew that he had to come up with some excuse as to why complainant's anus was torn. However, as the court a quo correctly found, his version is far-fetched, improbable and false, not only in this regard, but considering the totality of the evidence. The same cellphone on which he called complainant earlier was not defective as alleged and/or needed a new battery. Even so, no reason exists why appellant would take the cellphone to the district of Paul Roux for his relative to buy a battery. This could surely be done in Fouriesburg. The relative was also unaware that the cellphone was left at his house. Appellant's version that complainant falsely laid a complaint because he could not give her R400 as requested which caused her to become angry is in conflict with the complainant's version as corroborated by Mr Sebeko.

VII THE SENTENCE

[32] The court *a quo* gave a one page judgment on sentence. It may be argued that it did not consider all relevant factors and/or committed misdirections. I am not convinced.

[33] Appellant was sentenced to 8 years' imprisonment for rape in March 2011. In January 2015 he was released on parole after doing less than half of his sentence. Three months later he

committed multiple rape on the complainant after having devised a plan to get her away from the public eye.

[34] I invited Mr Modise to set out all factors which he considered to be compelling and substantial factors that might have persuaded the court *a quo* to deviate from the prescribed minimum sentence of life imprisonment. He mentioned three factors, to wit (1) complainant did not suffer any extra-genital injuries, (2) in the mind of appellant complainant was subjected to one continuous act of rape and (3) appellant handed himself over to the police.

[35] None of the grounds relied upon by Mr Modise holds any water. Not only did complainant suffer from tears to her anus, but she suffered emotionally as set out in the victim impact statement, exhibit “B”. The accepted evidence is clear: there was more than one rape incident and appellant can count himself fortunate that the court *a quo* found the penetration of complainant’s mouth and vagina to be one incident of rape. It is the State’s case that appellant handed himself over, but he steadfastly denied that to be the case during his testimony. In any event, the evidence obtained by the IO was apparently such that appellant had no choice than to hand himself over. Such conduct is in any event insufficient to constitute substantial and compelling circumstances.

[36] The sentence is appropriate. There is no reason to interfere. Appellant has not learnt from his mistake and in my view he has not shown that he could be rehabilitated. The women in

our country must be protected against appellant and other like-minded evil men that commit these heinous deeds against our women. I fully support the views of Supreme Court of Appeal judges like Ponnan JA and others and wish to refer to the *dicta* in *S v Matyityi* 2011 (1) SACR 40 (SCA) at paras [23] and [24]. Appellant's callousness is demonstrated by the facts of the case. He planned the rape and led complainant into a trap. If life imprisonment is not appropriate for repeated and brutal rape by a sentenced rapist three months after being placed on parole as *in casu,* I do not know how justice could be served otherwise. See also: *S v Mhlongo* 2016 (2) SACR 611 (SCA) at para [22].

VIII CONCLUSION

[37] Consequently, the court *a quo* correctly found that the State had proven its case beyond reasonable doubt and no misdirections were committed in sentencing appellant. Any other sentence would not be in the interests of justice. The appeal against the convictions and sentence of life imprisonment has no merit and it should be dismissed.

IX ORDERS

[38] The following orders are issued:

(1) The appeal against convictions and sentence is dismissed.

(2) The convictions and sentence of life imprisonment are confirmed.

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J. P. DAFFUE, J

I concur

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P.E. MOLITSOANE, J

On behalf of appellant: Mr T J Modise
Instructed by:
Legal Aid SA
BLOEMFONTEIN

On behalf of the 1st respondent: Adv M M M Moroka
Instructed by:
Director of Public Prosecutions
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