



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO Of Interest to other Judges: YES/NO Circulate to Magistrates: YES/NO
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Case no. A82/2021

In the matter between:

THATO SAMUEL MOCHAWA

APPELLANT

and

THE STATE

RESPONDENT

CORAM:

MHLAMBI J, et DE KOCK, AJ

HEARD ON:

25 OCTOBER 2021

JUDGMENT BY:

DE KOCK, AJ

DELIVERED:

28 OCTOBER 2021

INTRODUCTION:

- [1] The Appellant was charged in the Court *a quo* with two counts. The first count is that of rape, the second count is that of robbery with aggravating circumstances. In respect of the first count of rape the State alleged that on or about the 31 of August 2018 in at or near Kwakwatsi Koppies, in the Regional Division of the Free State the Appellant did unlawfully and intentionally commit an act of sexual penetration with the Complainant to wit M[....] S[....] M[....] (“the Complainant”) without consent of the Complainant and thus raped her. In respect of the second count of robbery with aggravating circumstances the State alleged that upon or about the 31st August 2018 at or near Kwakwatsi Koppies, in the Regional Division of the Free State the Accused did unlawfully and intentionally assault the Complainant and did then and there and with force take the following items from her to wit 1 x Samsung J1 cellphone valued at R1 900.00 being her property or property in her lawful possession whilst during the commission of the said crime the Accused handled a dangerous weapon to wit a knife and threatened to injure the Complainant.
- [2] On 5 November 2020 the Appellant in the Court *a quo* pleaded not guilty in respect of both counts. The State called two witnesses, the Complainant and a second State witness being Mr Kamohelo Joseph Mofokeng. The medical report, J.88 was submitted and marked exhibit “A” and the statement of the Complainant submitted and marked exhibit “B”. The Appellant was the only witness that testified on behalf of his case.
- [3] The Appellant was convicted of rape and robbery with aggravating circumstances and sentenced to ten (10) years imprisonment. The Appellant applied for leave to appeal in the Court *a quo* which was denied. Petition against the Appellant’s conviction was granted on the 18 of June 2021. The Appellant now appeals against his conviction as given by the

Regional Court Magistrate Matambeka on 10 December 2020. The ground upon which the Appellant relies why his conviction cannot stand are:

- 3.1 The Court *a quo* erred in finding that the Appellant was guilty beyond a reasonable doubt; and
- 3.2 The Court *a quo* erred in finding that the Complainant and the State witnesses were credible witnesses and there were no material contradictions in their testimony.
- 3.3 Further the Court *a quo* erred in not accepting the version of the Appellant and by making a negative inference against him.

EVIDENCE OF COMPLAINANT IN THE CHIEF:

- [4] On the 31 of August 2018 the Complainant was at a tavern consuming liquor. Around 11 in the evening she left the tavern with her boyfriend who was the second State witness. Her boyfriend then proceeded to his home and as she entered her place of residence, when she was unlocking the door at her shack someone appeared from the direction of the toilet. This person grabbed her and threw her in front of the door on the ground. This person was in possession of a knife and put it on her neck demanding her cellphone. He then took her cellphone by force from her. He undressed her trousers and panty, he then attempted to open her thighs and she resisted. He then poked her with the knife on the thighs. He then penetrated her by putting his penis into her vagina and raped her. The Complainant tried to resist by closing her thighs but was unsuccessful. He proceeded raping her until she bled, she further mentioned that when she is very scared and hurt, she starts menstruating.
- [5] The Complainant further mentioned that before this person took away her cellphone she managed to light his face with a phone flashlight. She then realized that his face was familiar to her, although she did not know the name. It was not the first time seeing this person as he once came to her place with his girlfriend drunk in the morning. The Complainant further

mentioned that when the person raped her that the person who raped her is the Accused before Court. The complainant testified that while the Appellant was still proceeding, she managed to push him away, kicked him away from her and after escaping jumped the gate and ran away to the third house from where she resides. She further mentioned that on arrival the people were sleeping and slept in the toilet. At 3 am she then proceeded to the garage of the house and slept under the motor vehicle until 6 am. Around 6 am in the early hours of the morning she woke up knocked on the door of that house and reported the matter. The police were called, and she reported the matter to the police, the police arrived around 7 am in the evening hours of the morning.

- [6] Complainant mentioned that she never fought with her boyfriend the previous night and that her boyfriend arrived in the morning when the police were there already, and she informed her boyfriend what happened. The boyfriend also accompanied her to the hospital with the police. The Complainant sustained some injuries on her thighs as the Appellant poked her with a knife to open her thighs as he was raping her. The Complainant also mentioned that during the robbery her cellphone was taken and she never recovered her cellphone.

CROSS-EXAMINATION AND CONTRADICTIONS:

- [7] It was stated in her statement that she never mentioned that the Appellant had a knife as opposed to her evidence in Court. The Complainant never told the Court in examination in chief that she was grabbed by the neck. The Complainant was further cross-examined about the issue whether the rape happened first, or the robbery happened first. According to the Complainant's statement the rape took place first then she realised that her cell phone was missing. In Court the Complainant testified that the cell phone was first taken then she was raped. Regarding the latter, the complainant answered that she was very much confused on the day in question but persisted that the cell phone was robbed first, even though she noticed that it was missing when she woke up or after she woke up the next morning. The Claimant testified that she had abrasions on her knees and her

right thigh was stabbed with a knife. The Claimant was cross-examined about the abrasions on her knees and injuries on her right thigh. In the J.88 it was stated that there were small nail scratches on her left thigh. Regarding the latter, the Complainant gave no comment. The Complainant testified in chief that when she is hurt or sad, she bleeds through her vagina. During cross-examination she testified that she was bleeding because the Appellant raped her. She confirmed that she was not on her cycle. The J88, however stated that the exam was normal, only menstruation noted, but the doctor cannot discard the history of penetration.

- [8] The Complainant stated in her statement that she managed to run away when the Appellant tried to turn her and in Court in examination in chief, she stated that she overpowered the Appellant then managed to kick him on the chest and then ran away. During cross-examination the Complainant testified that it was in the process of the whole incident when the Appellant tried to turn her on her back or lay her down on her back on the ground that she got an opportunity to kick him and run away. Three versions in this regard emerged.
- [9] During cross-examination the Complainant admitted that she was drunk and stated that she started drinking between 8 and 9 the evening. The Complainant testified that the rape happened around 11 'o'clock, as she left the tavern before it closed.

THE SECOND STATE WITNESS

- [10] The second State witness Mr Mofokeng confirmed that the Complainant is his girlfriend. He further testified that on the 31 of August 2018 at 6 o'clock he found the Complainant at Tavern already drunk. This is another contradiction. The Complainant testified that she started drinking between 8 and 9 the evening.
- (11) They walked together from the tavern the tavern about 11 and when they were closer to the Complainant's residence he then proceeded to his place and the Complainant got inside the yard. In the morning he tried to call the

Complainant and she did not respond, he then proceeded to the Complainant's place.

- [12] The Complainant reported to him that she had been raped and could not see or recognize the person who raped her. He testified that the Complainant informed him that the perpetrator rapidly appeared, and the person were wearing a hoody. This does not accord with the Complainant's evidence that before this person took away her cell phone, she managed to light his face with a phone flashlight and realized that his face was familiar to her, although she did not know the name.
- [13] He testified that the Complainant also reported to him that her Samsung Galaxy phone was taken from her by the person who raped her.

APPELLANT'S EVIDENCE

- [14] The Appellant testified that he met the Complainant at Downtown Tavern around 11 in the evening. The Complainant showed interest in him, and he also showed interest in her. They then agreed that this relationship should stay between them. He further testified that the Complainant was with her boyfriend at the tavern but that at the time they were walking the boyfriend had vanished. The Complainant told the Accused that she fought with her boyfriend. The Appellant testified that at the tavern he bought two quarts of cider for the Complainant. They agreed to go together to have sexual intercourse. The Appellant further testified that he had unprotected sexual intercourse once with the Complainant with her consent. After they finished having sexual intercourse, he laid down a bit. Outside there was a noise of people from the tavern and the Complainant said that he must leave, she did not know if her boyfriend was amongst those people or not. The Appellant then stood up and left around 2 o'clock in the early morning. The Appellant denied that the Complainant sustained injuries on her thighs. The Appellant evenly denied that he stabbed the Complainant on her thighs and took her cellphone.

- [15] The Appellant was cross-examined. The Appellant persisted that he did not rob the Complainant and persisted that the sexual intercourse was consensual.

ALLEGED CONTRADICTIONS:

- [16] The Appellant submits that the following contradictions were material to the Accused's version and taken all the contradictions inconsistencies and improbabilities the Court must conclude that the State has not proven its case beyond a reasonable doubt. Whether the rape or the robbery happened first, the issue that no mention of the presence of a knife was made in the statement, no mention was made of grabbing behind the neck in the Claimant's testimony in chief, it was not explained how the Claimant got away from her attacker, the Complainant testified that she bled from her vagina because of rape whilst the J.88 states that she was on her menstruation, the Complainant told her boyfriend she could not recognize her attacker, and contradictions about the time the Complainant left the tavern with her boyfriend.

LEGAL PRINCIPLES:

- [17] The State bears the onus of proofing the guilt of the accused beyond a reasonable doubt. There exists no burden on the accused to prove his innocence. The accused version only has to be reasonably possibly true.
See: **S v Sithole and Others 1999(1) SACR 585 (W)**

- [18] The conviction of the Accused is based on the factual findings of the Trial Court. In **Mkhize v S (16/2013) [2014] ZASCA 52 (14 April 2014)** at paragraphs 14, Maja, Shongwe, Willis and Saldulker JJA concurring, Mochumie AJA held:

“The approach to be adopted by a Court of Appeal when it deals with the factual findings of a Trial Court is trite. A Court of Appeal will not disturb the factual findings of a Trial Court unless the latter had committed a material misdirection. Where there has been no misdirection on fact by the Trial Judge, the presumption is that his conclusion is correct. The Appeal Court will only reverse it where it is convinced that it is wrong. In such a case if the Appeal Court is merely left in doubt as to the correctness of the conclusion then it will uphold it.” This Court in **S v Naidoo and Others 2003 (1) SACR 347** at paragraph 26 reiterated this principle as follows:

“In the following analysis a Court of Appeal does not overturn a Trial Court’s finding of fact unless it has shown to be vitiated by a material misdirection or was shown by the record to be wrong.”

[19] In **Schuckle v S 2001 (4) ALL SA 279** it was held that:

“...a Court does not have to be convinced that every detail of the accused’s version is true, if the accused’s version is reasonably possible true the Court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused 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 be reasonably possible true.”

[20] It is accepted that the evidence of a single witness must be approached and evaluated with the necessary caution. See: **J V S ALL SA 1998(2) SA 267 (A)**

THE COURT A QUO’S FINDINGS:

[21] The Court *a quo* found that the Complainant reported the incident freely and voluntarily. The Complainant narrated to the Court as to how the incident happened and she stood by her version. Both State witnesses before Court were honest witnesses, they were not shaken during cross-examination. There were contradictions that were raised by the defence about whether the rape had happened first, or the robbery happened first. The Court *a quo*

was of the view that due to the evidence placed before the Court both incidents happened at the same place almost the same time whether which one happened first to the Court *a quo* is not a material contradiction. Considering the evidence placed before the Court *a quo* by the witnesses the Court *a quo* could not find any material contradictions in the evidence. It was mentioned that although the Complainant in her evidence could not properly and clearly identify the perpetrator. When she gave evidence, she mentioned that the face of the perpetrator was familiar and that it was the Appellant, but she did not know the Appellant's name. When the second State witness testified, he mentioned that the Complainant when she reported the matter to him mentioned that she did not know the perpetrator and could not identify the perpetrator. Although there were these contradictions in the evidence of the Complainant whether indeed, she clearly identified the perpetrator or not, the issue of the identification fell away at the time the Appellant admitted having sexual intercourse with the Complainant and therefore the identification issue is not in issue in this case.

[22] The evidence of the Appellant was not reliable and an honest witness. The Appellant came up with a new version, it was for the first-time hearing about the Complainant showing interest on him and that he showed interest on the Complainant that was never put to the Complainant. The Appellant testified that he bought the Complainant a can of cider at the tavern. The Court *a quo* only heard about it when the Appellant testified about it, it was evenly never put to the Complainant. It was furthermore never put to the Complainant that they agreed to keep their love relationship a secret. It was further not put to the Complainant that after they had consensual sexual intercourse the Appellant lied down for a bit in the bed. Evenly it was not put to the Complainant that when the Appellant left, he asked the Complainant to close the door.

[23] The Court *a quo* in evaluating the evidence that was placed before it concluded that the Appellant's version is a fabrication and not to be reasonably possibly true. Under the circumstances the Court *a quo* believes the Complainant's version that on the day in question the Appellant had sexual intercourse without the consent of the Complainant thus raping her.

The Court *a quo* evenly believed the Complainant regarding count 2 that the Complainant was threatened with a knife by the Accused as the knife was put on her neck when the Appellant demanded her cell phone, and the cell phone was taken away from her. The Court *a quo* in considering all the evidence placed before it was satisfied that the State has proved its case beyond a reasonable doubt.

CONCLUSION:

- [24] This Court finds that the Court *a quo* materially misdirected itself in accepting the evidence of the Complainant, as single witness. This Court is of the view that by virtue of the consumption of alcohol by the Complainant and her admission that she was drunk, that the evidence of the Complainant called for a cautionary approach, by the Court *a quo*. Clear contradictions existed between the statement the Complainant made, her testimony in chief evidence during cross-examination, the J88 and the second state witness's evidence. The discrepancies are evident from the evidence outlined in this judgement. The Court *a quo* could only convict the Appellant on the evidence of the complainant as single witness if such evidence were satisfactory in every material respect. The learned magistrate incorrectly accepted the version of the Complainant and failed to properly apply the cautionary rule to the evidence of the Complainant as a single witness who was under the influence of alcohol, at the time of the incident. The evidence of the Complainant was certainly not satisfactory in every material respect. The Court *a quo* further made a material misdirection in finding that the Appellant's version is not reasonably possibly true. The Court *a quo* most importantly made a material misdirection, in finding that the State proved the Appellant's guilt beyond a reasonable doubt. Thus, the conviction cannot stand.

ORDER:

- [25] Accordingly the following order is made:

1. The appeal succeeds.
2. Both convictions of the Appellant are set aside.

DE KOCK, AJ

I concur.

MHLAMBI, J

Appearances:

For the Appellant:
Instructed by:

Adv S Kruger
Bloemfontein Justice Centre

For the Respondent:
Instructed by:

Mr. L. B Mpemvane
The Director of Public Prosecutions
Bloemfontein