REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A26/2023

DPP REF NO: SA 5/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 24-01-2024

SIGNATURE: PD. PHAHLANE

In the matter between:

BULE BULELANI **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

PHAHLANE, J

[1] The appellant who was legally represented during trial proceedings, was convicted of rape for contravening the provisions of section 3 of the Sexual Offences and Related Matters Act 32 of 2007, read with the provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997 and sentenced to ten (10) years imprisonment by the Tsakane Regional Court in

the Regional Division of Gauteng, Tsakane, on 17 November 2021. On the 11th of February 2022 his application for leave to appeal against conviction and sentence was dismissed by the trial court. He subsequently lodged a petition with Judge President of the above Honourable Court and leave to appeal was granted on 10 November 2022 against conviction only. The appellant approaches this court on appeal against conviction.

[2] The grounds of appeal as noted in the notice of appeal are as follows:

1. *"The Learned Magistrate erred in making the following findings:*

1.1 that the State has proved the guilt of the appellant beyond a reasonable doubt.

1.2 The state witnesses gave evidence in a satisfactory manner, and the fact that the contradictions in the state's case were on material aspects.

1.3 The complainant was a credible witness despite her disrespectful demeanor in court and the improbabilities in her evidence.

1.4 The minor differences between the evidence of the appellant and the version put to state witnesses were sufficient to reject the appellant evidence.

2. *In convicting the appellant, the Learned Magistrate erred in failing to:*

2.1 Properly analyse and evaluate the evidence of the state witnesses, especially to the fact that the complainant was a single witness and there was no corroboration for her evidence.

2.2 Accepting the medical evidence and not considering the surrounding circumstances that could have contributed to the alleged injuries.

2.3 Properly consider the improbabilities inherent in the state's version.

2.4 Rejecting the evidence of the appellant as not being reasonably possibly true".

[3] As a court of appeal, this court must determine what the evidence of the state witnesses was, as understood within the totality of the evidence led, including evidence led on the part of the appellant, and compare it to the factual findings made by the trial court in relation to that evidence, as to whether the trial court considered all the evidence before it, weighed it correctly and then determine (a) whether the trial court applied the law or applicable legal principles correctly to the said facts in coming to its decision, and **(b)** whether the appellant was correctly convicted.

[4] It is trite law that a court of appeal will not interfere with the trial court's decision unless it finds that the trial court misdirected itself as regards its finding or the law. To succeed on appeal, the appellant needs to convince this court on adequate grounds that the trial court misdirected itself in accepting the evidence of the State and rejecting his version as not being reasonable possibly true. There are well-established principles governing the hearing of appeals against findings of fact. 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[1].

[5] The conviction of the appellant arose from the events which occurred

[1] S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f. See also: S v Monyane and Others 2008 (1) SACR 543 (SCA) at para 15; S v Francis 1991 (1) SACR 198 (A) at 204e.

on 12 October 2019 at or near Tsakane in the Regional Division of Gauteng in that the appellant did unlawfully and intentionally commit an act of sexual penetration with Ms N[...] C[...] N[...], by inserting his penis into her vagina without her consent.

[6] It is common cause that the appellant and the complainant were in a love relationship around February/March 2017, but that relationship ended around June 2018 because the appellant was physically abusing her. On the day of the incident, the complainant was coming from Madoda's tavern where she had earlier gone with her friend M[...]. The friend had apparently left the tavern with her boyfriend, and around past 2:00 AM to 3:00 AM, the complainant went looking for her friend so that she could sleep over that night at her friend's place. While walking, the appellant emerged from behind her. They were at a distance of approximately 200 meters from the appellant's home.

[7] The appellant tapped her on the shoulder, greeted her, and slapped her twice across the face with an open hand. He took out an okapi knife and threatened to stab her with it and instructed her to go with him to his residential place. He grabbed her on her upper hand and pulled her to his place of residence and into his room which is outside the main house at the RDP houses. He instructed her not to make noise as he did not want his grandmother to be disturbed.

[8] The appellant then locked the room after they entered and pushed the complainant onto the bed and took out a knife and tore her trousers on the waist area. He slapped her on the face and ordered her to take off her pants. The complainant pleaded with him, and the appellant tore her underwear using the same knife, and undressed himself and thereafter got on top of the complainant and forcefully removed her pants whilst being on top of her. He forced opened her legs with his legs and forcefully inserted his penis into her vagina and had sexual intercourse with her without her consent, and he thereafter fell asleep.

[9] The complainant testified that the keys of the room were not on the door and when she asked the appellant where the keys were, the appellant responded by saying he wants to sleep. She sat on the chair and covered herself with a blanket which she pulled from the appellant's bed and cried herself to sleep. When she woke up in the morning, she asked the appellant to give her the keys to the room and he did after he took them from underneath his pillow.

[10] It was around 7:00 AM when she left the appellant's home and went straight to her friend Mr. S[...] M[...] ("Mr. M[...]") and reported the incident. Mr. M[...] gave her R50 to go to the police station to report the matter. She first went home to get a hoodie jersey and then went to the police station. She was thereafter taken to Tsakane clinic for medical examination.

[11] On appeal, criticisms were levelled against the trial court in that the court was selective in the evaluation of the evidence, and that it had in fact, held that the complainant was a credible witness despite 'her disrespectful demeanor' in court and the improbabilities in her evidence. In this regard, Mr. Kgokane appearing for the appellant highlighted what the appellant refers to as 'the improbabilities in the evidence of the complainant, which the court should have drawn an inference to', as it relates to the complainant's honesty and credibility. He argued in his heads of argument that:

> *11.1 "The fact that the appellant was scared of his grandmother and that the grandmother did not want girls in her home, was an added advantage to the complainant to have the grandmother come to her rescue by alerting her that she had been kidnapped by the appellant.*
>
> *11.2 The fact that she could not scream at all, is an aspect which did not mean that she could not cause a*

disturbance of any sort in order to alert occupants in the main house and or in other outside rooms". (sic)

[12] Mr. Kgokane submitted that the trial court failed to accord due weight to the improbabilities and material contradictions inherent in the evidence of the complainant. The basis of the submission is that the complainant failed to take her torn underwear to the police and to the clinic where she was examined by a nurse who had observed the condition of her clothing. He insisted that the complainant knew that her clothing was an important piece of evidence in her case. Further that even though the evidence of the complainant was that she had been slapped four times, medical examination found no injuries or bruises where she was slapped.

[13] The respondent on the other hand submitted, and correctly so, that the appeal against conviction is void of merits and that the trial court did not misdirect itself because it had properly evaluated the evidence before it to come to a just decision.

[14] It does not appear anywhere in the judgment of the trial court or the record that the trial court had concluded that the complainant was a credible witness "despite her disrespectful demeanour". In my view, this ground of appeal is misplaced and cannot stand. As far as the appellant's argument as noted in paragraph 11.1 and 11.2 *supra,* the trial court described the complainant as petit in built with a voice not being high pitched. It stated that the complainant has a soft voice with a lower range or key, and her version is probable that she could not scream. In this regard, the trial court held, and correctly so, that *"a person cannot be dictated on how they should react under such circumstances, especially when they are scared and threatened".* (underlining added for emphasis)

[15] The trial court having considered the probabilities and improbabilities inherent in the facts before the court, it found it probable that the complainant did not sustain any injuries from being slapped and that there

was nothing wrong or improbable with the complainant's version. The nurse who examined the complainant testified and confirmed this aspect as being consistent because the complainant had reported to her that she was assaulted with an open hand. In this regard, she testified that the complainant could not have suffered or sustained any injuries from being slapped with an open hand on the face.

[16] The nurse further corroborated the complainant's version when testifying that the complainant looked like she was crying and was in pain when she examined her. Although the J88 does not depict any physical injuries, it is on record that the complainant was threatened with a knife. The trial court accepted that at the time when the appellant and complainant reached the appellant's home, the complainant was instructed not to scream; that she had already been assaulted in the street; threatened; and dragged into the appellant's room, and further assaulted.

[17] On the same token, the court having considered the circumstances of the case, found that the complainant went to the clinic for medical examination and in the circumstances, she could not have been expected to think that her torn clothes could assist her with the medical examination as argued on behalf of the appellant. It is important to note that the complainant was not wearing her undergarment when she went to the clinic because according to her, it was completely torn. She explained that she was scared, emotional and not in a mood to talk or explain everything to the nurse. The trial court found this to be understandable and accepted the explanation.

[18] In my view, the submission that the complainant failed to take her torn underwear to the police and the clinic is misplaced because there is no evidence to suggest that the complainant knew that her clothing would be used as part of the evidence in her case. On the other hand, it would be absurd to suggest that the nurse would have been able to observe the condition of the complainant's clothing if it was really torn - as if her pants were completely ripped apart for everyone to see. This cannot be, because

the complainant specifically said her pants were torn around the waist area.

[19] Be that as it may, as regards her clothing being part of evidence, it was never established if the complainant had knowledge of what evidence would be required in the investigation of her case, or whether she was required to take her underwear to the police or the clinic where she was ultimately examined. Consequently, there is no basis in submitting that the trial court misdirected itself as it relates to how it evaluated the evidence before it in this regard.

[20] Having said that, what is actually reflected on the J88 are vaginal injuries and an abrasion at the 6 o'clock position which was a confirmation that the complainant was forcefully penetrated. The trial court held that the complainant did enough to resist forced sex on her and found that the appellant overpowered her, and the complainant did not give consent. The trial court held further that 'there was no evidence pointing to the testimony of the nurse being medically wrong' because the medical examination shows that the injuries were caused by forceful penetration. It accepted the evidence of the nurse and took into consideration that she had many years of experience as a nurse.

[21] The appellant's defence is that of consent. He testified that on the day of the incident the complainant informed him that she was going to spend the night at his place because they were trying to get back together, and upon arrival at his residence, they undressed themselves and had consensual sexual intercourse, and the next morning when they woke up, he accompanied the complainant halfway to her home.

[22] In convicting the appellant, the trial court found that the appellant was hesitant to tell the court that he had sexual intercourse with the complainant, and that he spoke about other things - but his sexual encounter with the complainant. It took into account that that information was solicited by his attorney. Put differently, that the appellant's defense of consensual sexual

intercourse had to be taken out of him. In this regard, the trial court stated the following: *"the accused is facing only one count of rape and consensual sex is his defense. This is the one thing that he should quickly state over and above everything that he stated but he could not state it until it had to be dug out of him."*

[23] In the circumstances, I agree with the findings of the trial court, and I am of the view that the trial court did not misdirect itself in holding that the appellant raped the complainant.

[24] Over the years, our courts have emphasised the principles which should guide a court of appeal in an appeal purely on facts. These were articulated by the Appellate Division in ***R v Dhlumayo & Another***[2] when it held that:

> *'The trial court has advantages which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has the trial court had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked. The mere fact that the trial court has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as it was. Even in drawing inferences the trial court may be in a better position than the appellate court, in that it may be more able to estimate what is probable or improbable in relation to the particular people whom it has observed at the trial...The appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial court. Where the appellate court is constrained to decide the case purely on the record, the question of onus becomes all-important. In order to succeed, the appellant has to satisfy an appellate court that there has been 'some miscarriage of justice*

[2] 1948 (2) **SA** 677 (A) at 705-706

or violation of some principle of law or procedure".

[25] With regards to the evidence of a single witness, the trial court found that there were no contradictions and improbabilities in the complainant's evidence. Section 208 of the Criminal Procedure Act Slof 1977 states clearly that *"an accused person may be convicted of any offence on the single evidence of any competent witness".* The trial court was mindful of the cautionary rule and held that the evidence of the complainant was satisfactory in material respects. It also considered the totality of the evidence while being mindful of the fact that firstly, the State was vested with the burden of proving the guilt of the appellant beyond a reasonable doubt, while simultaneously bearing in mind that if the version of the appellant is reasonably possibly true, he is entitled to an acquittal. It is clear from the record that the trial court carefully considered and evaluated the evidence before it because it also referred to the decision in ***S v Sauls and Others***[3]***.***

[26] In order to determine whether the accused's version is reasonably possibly true, the Supreme Court of Appeal in ***S v Trainor***[4] stated that:

> *"A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must be of necessity, be evaluated, as must corroborative evidence, if any. Evidence of course, must be evaluated against the onus of any particular issue or in respect of the case in its entirety".*

[27] With regards to the question whether trial court was correct in finding that the State proved its case against the appellant, the evidence of the State

---

[3] 1991 (3) SA 172 (A)
[4] 2003 (1) SACR 35 (SCA) at 9

has to be measured against the evidence of the appellant as to whether his version could be said to have been reasonably possibly true. Of course, this cannot be done in isolation, but the court must consider the totality of the evidence before it, to come to a just decision. The trial court also had regard to the evidence of Mr Mashinini that the complainant was also crying when she went to report the incident to him.

[28] It also had regard to the contradictions between the evidence of the complainant and that of Mr Mashinini as to whether the full details of the rape incident were given to him and whether Mr Mashinini recognized if the complainant's clothes were torn. Mr Mashinini's evidence was that he believed that he stopped the complainant from giving full details because they were both in an emotional state, while the complainant believed that she informed him of all the details. Accordingly, the trial court considered the contradiction as trivial and immaterial and took into account that there has been a lapse of two years since the incident occurred -to the time when the evidence was given in court.

[29] There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond a reasonable doubt. The corollary is that the accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true[5].

[30] This principle was followed by the trial court. On the conspectus of the evidence as it appears on record, I am of the view that the trial court properly evaluated the facts before it and correctly followed the above principles as it had correctly pointed out that it had to consider the totality of the evidence before it, and not to follow a piecemeal approach in order to come to a correct and just decision. In ***S v Chabalala***[6] the Supreme Court of Appeal amplified as follows the *'holistic'* approach required by a trial court in examining the evidence on the question of the guilt or innocence of an

[5] S v Sithole 1999(1) SACR 585 (W).
[6] 2003 (1) SACR 134 (SCA) at 15.

accused:

> *"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 weights so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt".* (See also: S v Mdlongwa 2010 (2) SACR 419 (SCA) at 11; and S v Van der Meyden 1999 (1) SACR 447 {W))

[31] Having read the transcript and having given proper and due consideration to all the circumstances of this case, I am unable to find any fault with the assessment of the evidence of the witnesses by the trial court, which had the advantage of seeing them testify and observing their reactions to questions during cross-examination. This gave the trial court an advantage which this court does not have as a court of appeal. In the absence of any misdirection by the trial court, I decline to interfere with the finding of the trial court. Accordingly, I agree with the finding of the trial court, and I am of the view that the trial court did not misdirect itself in convicting the appellant.

[32] In the circumstances, the following order is made:

1. The appeal against conviction is dismissed.

PD. PHAHLANE
JUDGE OF THE HIGH COURT

I agree,

COETZEE AJ

JUDG E OF THE HIGH COURT

APPEARANCES

Counsel for the Appellant	: Adv. Kgokane
Instructed by	: Legal Aid South Africa
Counsel for the Respondent	: Adv. M. Marriott
Instructed by	: Director of Public Prosecutions, Pretoria
Heard on	: OS October 2023
Date of Judgment	: 24 January 2024