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**IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)**

CASE NO: A28/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES:

(3) REVISED:

SIGNATURE: Naude-Odendaal J

DATE: 08/10/2024

In the matter between:

JOHANNES RAMODIKE

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

NAUDE-ODENDAAL J:

[1] The Appellant was charged with two counts of Rape read with the provisions of Section 51(1) of the Criminal Law Amendment Act, 105 of 1997 in the Regional Court Seshego for the Regional Division of Limpopo. The Appellant was

found guilty as charged and sentenced to two terms of life imprisonment.

[2] The Appellant was legally represented throughout the proceedings. The Appellant pleaded not guilty to both counts and gave a plea explanation. No formal admissions in terms of Section 220 of the Criminal Procedure Act, 51 of 1977, were made. The Appellant appeals against both the conviction and sentence in terms of his automatic right to appeal.

[3] The Appellant applied for condonation for the late filing of the appeal, which condonation application was not opposed and consented to by the Respondent. In the result, the condonation application was granted.

[4] The grounds of appeal are as per the Notice of Appeal and will not be repeated herein.

THE LAW AD APPEAL AGAINST CONVICTION:

[5] It is an established principle that where an appeal is lodged against a trial court's findings of fact the court of appeal must take into account that, that court was in a more favourable position than itself to form a judgment. Even when inferences from proven facts are in issue the court *a quo* may also be in a more favourable position than the court of appeal, because it is better able to judge what is probable or improbable in the light of its observations of witnesses who have appeared before it. Therefore if there are no misdirections on the facts a court of appeal assumes that the court *a quo*'s findings are correct and will accept these findings, unless it is convinced that these are wrong. See **R v Dhlumayo and Another 1948 (2) SA 677 (AD) at 705-6.**

[6] Therefore in order to interfere with the court *a quo*'s judgment it has to be established that there were misdirections of fact, either where reasons on their face

are unsatisfactory or where the record shows them to be such. See also **S v Monyane and Others 2008 (1) SACR 543 (SCA) at para [15]** where the SCA stated that it is only in exceptional cases that it would be entitled to interfere with the trial court's evaluation of oral evidence.

[7] It is acceptable in evaluating the evidence in totality to consider the inherent probabilities and the following *dictum* by **Heher AJA**, as he then was, in **S v Chabalala 2003 (1) SACR 134 (SCA) at para [15]** is apposite: *"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."*

[8] An accused's version cannot be rejected merely because it is improbable. It can only be rejected on the basis of the inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. See **S v Shackell 2001 (2) SACR 185 (SCA) at para [30]** which I quote:

"It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's 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 reasonably possibly be true."

See also **Olawale v The State [2010J 1 All SA 451 (SCA) at para [13].**

THE EVIDENCE:

AD THE STATE'S CASE:

[9] The State called six witnesses in its endeavour to establish the guilt of the Appellant beyond reasonable doubt. The first witness to testify was Morongwa Herminah Shoroma. She testified that she was a teacher at M[...] School. She just entered the Grade 5 class when the Complainant stood up and approached her and informed her that his grandmother said he must inform her that Uncle Chenchha has raped him. She testified that because they were in the classroom with other children present, she told the Complainant to remain quiet so that she could finish what she was busy with, with the other children and after she finished she took the Complainant with her to the staffroom. Upon arrival at the staffroom/office she asked the Complainant to tell her what he said in the classroom. The Complainant repeated what he told her and said that his grandmother told him to tell her that Uncle Chenchha raped him.

[10] Mrs. Shoroma testified that she then took her phone and called the Complainant's grandmother and asked her why she instructed the child to come and report to her this kind of issue. The child's grandmother responded by saying that she is just finishing bathing and then she will be on her way to school. Upon the grandmother's arrival at school, in the company of the Complainant's mother, she asked in the presence of Mrs. Shoroma and the School Social Worker to leave with the child. Mrs. Sharma testified that she asked the grandmother when he said did the incidents happen, whereupon she received a response that the Complainant's mother was informed the previous night and the incidents happened in January and February earlier that year.

[11] Mrs. Shoroma further testified that the Complainant was a troublesome child at school. This started at the beginning of the year. He was rude to his teacher, Mr. Nakedi. The Complainant's grandmother and mother were called to come to the school regarding the Complainant's behaviour. The Complainant would dispute that he was troublesome at school.

[12] The second state witness was M[...] H[...] S[...]. She testified that she is the mother of the Complainant in this matter and that the Complainant was born on 28 November 2006. She stated that she knew the Appellant since 1998. He was shooting photos and doing welding jobs.

[13] Mrs. S[...] testified that during March 2018, whilst she was watching a soap called Skeem Saam on television, the Complainant approached her and told her that Uncle Chenchu raped him. The Complainant told her that it happened on the 25th of January inside the house. She testified that Uncle Chenchu is in fact Johannes Ramodike.

[14] Mrs. S[...] testified that on that day it was raining and the Appellant was at her place of residence to erect or build a gate. The Appellant was doing welding jobs. The Appellant entered the house with the Complainant to fix a bicycle. The Appellant then instructed the Complainant to kick his legs because he was going to teach him karate. After that he instructed him to lie down on the bed, with his face downwards. After lying down, the Appellant undressed the Complainant's trousers and then raped him. The Complainant told her that after he was raped when he touched himself at the back, he found white water in his hand.

[15] After the first incident on the 25th of January, the Appellant came to their homestead again on the 27th of February. He wanted the Complainant to accompany him to Extension 71. After the Appellant shot some photo's there at Extension 71, on

their way from Extension 71, when they were busy travelling, the bicycle broke and they stopped. They wanted to fix the bicycle. She testified that the Complainant told her that they went to the bush. The Appellant once again instructed him to kick his legs and the Complainant complied as instructed. After that, the Appellant made him to go down on his knees. The Appellant undressed the Complainant and also undressed himself and raped him. The Complainant once again wiped himself and saw white water in his hand. After that, the Appellant threw a stone and instructed the Complainant to run to the stone. The Complainant did as instructed and then came back. They got back on the bicycle and travelled further, together on the bicycle.

[16] She testified that when the Complainant was busy making a report to her, her mother (the Complainant's grandmother) entered and said that the Complainant must go and tell the teacher at school. The next morning they took the Complainant to the Police Station to make a report. They were informed by the police that they couldn't report the incidents without evidence. They then left and went to the hospital. There was a strike at the hospital. The Complainant was taken to a Psychologist. He went twice. Mrs. S[...] also testified that she received several complaints from the Complainant's school that he hated male teachers. His behaviour changed after these incidents, both at school and at home. She testified that the Complainant went to school and she went to fetch him from school to take him to the police station.

[17] During cross-examination, Mrs. S[...] conceded that when the Complainant made a report to her, it was still visible outside. She conceded that what the Complainant told her was serious and it had to be reported to the police. She conceded that after the Complainant made a report to her and her mother, neither of them took the child to the police station and nothing prevented them from doing so.

[18] Mrs. S[...], under cross-examination, conceded that her evidence was

contradictory insofar as to what actually happened when the Complainant reported the matter to her and her mother. She further conceded that her police statement in respect of the incident of 25 January was contradictory to her evidence in court. She further conceded that the Appellant was employed to do wielding jobs at her house and that he was not working alone or alone at the house.

[19] The State's Third Witness was R[...] S[...] L[...]. She testified that she is the grandmother of the Complainant and that she knows the Appellant as Chenchu. During March 2018, she found the Complainant crying and the Complainant's mother told her that the Complainant has told her that Uncle Chenchu raped him. The Complainant told her personally that uncle Chenchu raped him on 25 January and 27 February. She testified that the Complainant made the report around 18h30 the evening and she told the Complainant that it was already late and the following day, the Complainant should report this to his teacher and she will come fetch him at school to go to the police station to report the matter.

[20] Mrs. L[...] testified further that whilst she was busy bathing, the Complainant's teacher called her and asked about the issue that the Complainant reported to her. She went to the school and reported to the teacher that the Complainant says he has been raped by Uncle Chenchu. She testified that she took the Complainant to the police station. They were informed at the police station that they cannot open a case without a hospital letter. They went to the hospital and found that there was a strike and they then only on the following day opened a case.

[21] Under cross-examination, she conceded that the police station was only a walking distance from their homestead. She proceeded to explain that they could not go to the police station because it was already late and there were other children at home who could not be left unattended. She however conceded that it was still light outside and that she didn't want the Complainant to go with his mother to make a report because she also wanted to be involved. She also testified that she couldn't

go alone with the Complainant to the police station, because the Complainant's mother also wanted to be involved.

[22] Mrs. L[...] contradicted herself in various aspects during cross-examination. She conceded that the Appellant was hired to do some work at her homestead and insisted that he was working alone, when confronted with the evidence of the first state witness that the Appellant was not working alone, she said she could not remember. She was also asked questions regarding her police statement and became evasive in answering questions emanating from her police statement.

[23] The fourth state witness to testify was Magdeline Mmata. She testified that she is a court intermediary and placed her qualifications and work experience on record. She further testified during cross-examination that she does not know the parties to the proceedings and that she does not have any personal interest in the matter. Her evidence was not disputed by the Appellant.

[24] The fifth witness to testify for the State, was the Complainant. He testified that on the 25th of January, he was at home playing with his siblings. Uncle Chenchu (the Appellant) was fixing the gate. It started raining and Uncle Chenchu asked his uncle to pick up the gate and put it inside. He testified that his uncle assisted the Appellant to pick up the gate and from there they went inside the house. After the rain subsided, the Appellant wanted to go to Extension 76 and requested the Complainant to go with him. When they were about to exit through the gate, his bicycle chain came off. The Appellant entered his uncle's bedroom, together with the Complainant, in order for him to fix the bicycle.

[25] The Complainant testified that the Appellant told him that the bicycle could not be fixed and they should rather play karate. The Appellant told him to make kicks with his legs and from there he must go down on his knees. Whilst he was on his knees the Appellant took off his clothing and undressed himself as well. The

Appellant went down on his knees and produced his penis and penetrated him anally. The Appellant pushed forward and backwards. He testified that he experienced pain and started to cry. The Appellant told him that he was going to beat him if he did not keep quiet.

[26] The Complainant further testified that after the Appellant was done, he left him there. He held his buttocks and noticed a white liquidish thing. He walked away and took his books and proceeded into the bedroom. He testified that whilst he was doing his homework, he wrote the date of the 25th of January 2018 inside his book. The reason to write the date down was to inform his parents if anything bad happened to him.

[27] The Complainant testified that he went to sleep and the Appellant took time without visiting his residential place. At some stage the Appellant came to erect the gate and requested the Complainant's grandmother if the Complainant can go with him to Winnie at Extension 71. The Complainant's grandmother gave permission for the Complainant to go with the Appellant. The Appellant wanted to go and collect money at Extension 71. They went to Winnie and she gave the Appellant money. They proceeded back home and on the way to his residential place, they went to a bushy area. The Appellant told the Complainant to get off the bicycle so that he could teach the Complainant karate. The Appellant told him to make some kicking moves and thereafter to go down on his knees.

[28] The Complainant further testified that the Appellant took off his clothing and undressed himself. The Appellant produced his penis and penetrated the Complainant anally. The Appellant made back and forwards movements. The Complainant stood up, held his buttocks and felt a white liquidish discharge. He testified further that the Appellant picked up a stone and threw it into the bush. He instructed the Complainant to run towards the stone. The Complainant complied and from there he came back and got on to the bicycle whereafter they preceded home.

[29] The Complainant testified that he experienced pain as he was riding the bicycle. Upon arrival at home, the Appellant told the Complainant's grandmother that they are back. The Complainant took his books and went to do his homework. The Complainant wrote the date 27 February 2018 as proof or evidence in his book to inform his family of the date.

[30] The Complainant testified that at some stage he informed his mother and he waited for his granny who had gone to the shops and when she came back, he informed her. The granny told him that he must inform his teacher the following day and she will come and fetch him to go to the police station. The Complainant informed his teacher the following day as instructed and his grandmother and mother came to fetch him to go to the police station. Upon arrival at the police station, they were informed that a letter from the hospital was needed.

[31] The Complainant further testified that the Appellant inserted his penis into his anus and he felt pain. He could not walk and sit properly for four to five days after the ordeal. He could not report the incidents as the Appellant threatened to kill him. The Complainant identified the Accused/Appellant as Uncle Chenchu in court.

[32] Under cross-examination, the Complainant conceded that the Appellant was hired to do some welding jobs at his home. The Complainant insisted that the Appellant was working alone. The Complainant confirmed that every member of his family had access into the room in which the Appellant raped him on the 25th of January 2018 and anyone could have walked in and caught the Appellant in the act of raping him. The Complainant further conceded that there was no threat whatsoever by the Appellant before raping him on the 25th of January and the Appellant could not have known how he was going to react before raping him.

[33] The Complainant testified under cross-examination that he could not tell

anyone about the first ordeal after the Appellant left as the Appellant threatened to kill him should he tell anyone. The Complainant further conceded under cross-examination that despite the fact that he was injured and could not walk or sit properly for several days, no one noticed any abnormality at home and/or at school. The Complainant conceded that he informed his mother about the incidents and his mother told him to tell his grandmother. He waited for his grandmother to come back and informed her as instructed by his mother. The grandmother informed him to tell the teacher at school the following day and he informed the teacher as instructed by the grandmother. The Complainant testified that when he informed his mother and grandmother about the incidents, they did not want to listen to him. He only told his mother and grandmother that the Appellant raped him and nothing else.

[34] The Complainant further conceded that his mother and grandmother fabricated their other evidence as he never informed them in detail as they did not want to listen to him. He further conceded that he informed his teacher in an open class in front of everyone regarding these incidents as he was instructed by his grandmother to inform his teacher at school.

[35] The State called a sixth witness, Ms. Thsipile Bessie Rampela. Nothing material turns on her evidence and will therefore not be summarised herein. The State closed its case.

AD DEFENCE CASE:

[36] The Defence called the Appellant as witness to the stand. He testified that he knows the S[...] Family. He also testified that he did some work for them at their homestead during January 2018 to 2 March 2018. He testified that he charged R10 000.00 for the particular work and was paid a deposit of R3000.00. He disputed the version of the witness for the State that he was paid in full. He disputed the version of the Complainant that he raped him on the 25th of January and 27th of

February, respectively.

[37] The Appellant testified that he received a call from the Complainant's aunt requesting him to deliver a CD he made of a graduation ceremony. He did not know where the aunt stayed. He went to the S[...]s residential place and informed them that the aunt said that he must bring the CD and that he did not know where she stayed and asked for directions. He testified that they said that he will get lost and that he should rather take the Complainant with him to show him where the aunt resides. According to the Appellant they went there, upon their arrival they inserted the CD in the DVD player and viewed it. He then gave it to the aunt and she paid him. The Complainant was playing outside. After the Appellant received the payment, they went back to the Complainant's home.

FINDINGS BY THE COURT A QUO AND APPLICATION OF THE LAW TO THE FACTS:

[38] In the matter of **S v Van Aswegen 2001 (2) SACR 97 (SCA) at 101e**, it was stated that:

"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some may 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."

[39] In the present matter the 2nd and 3rd State Witnesses were so unreliable that there evidence cannot be accepted as reasonably possibly true. The 2nd State Witness contradicted the 3rd State Witness as to why they didn't go to the police station to report the incident the very same day the Complainant informed them thereof.

[40] The 2nd and 3rd State Witnesses also contradicted each other as to how the Complainant reported the incident to them. There are several inconsistencies in the evidence of the 2nd and 3rd State Witnesses.

[41] The 2nd and 3rd State Witnesses failed to give a reasonable explanation as to why they wanted the Complainant to first go to school to report these incidents to his teacher before taking him to the police station, which was a mere walking distance from their home and in addition it was still daylight outside and not yet dark. It simply does not make any sense why the 2nd and 3rd State Witnesses will want the Complainant to specifically wait until the next day to go and report to his school teacher, who is not the relevant authority to report the incident to, before taking him to the police station.

[42] The 2nd and 3rd State Witnesses also gave contradictory and inconsistent explanations as to why they wanted the Complainant to go to report at the teacher at school first. The 2nd and 3rd State Witnesses versions and motivation why they did not take the Complainant to school to report to the teacher that he will not be at school, but are being taken to the police station, is also bizarre.

[43] The Complainant's version is also stranger than fiction. He testified that the Appellant raped him in the house whilst there were other people present in the house. Anybody had access to the room and could walk in to the room. This court finds it highly improbable that the Appellant raped the Complainant in a house full of people in an unlocked room, to which anybody had access to without anybody in the house hearing any sound or suspecting anything untoward going on in the room.

[44] The version of the Complainant as to how the Appellant made him to do karate kicks and thereafter raped him on both occasions is also extremely bizarre and to add to the strange facts, the fact that the Appellant made him to run after a

stone into the bush on the second occasion without any explanation. This court further finds it highly improbable that the Complainant would have gone with the Appellant for a second time if he was raped the first time without any resistance.

[45] The Complainant's mother also contradicted herself in her police statement in respect of where the first incident happened and also demonstrated inconsistency on the report that the complainant made to her as to where the first incident happened.

[46] The Complainant testified that he was injured to the extent that he had difficulty in walking and sitting properly for several days, yet nobody at home or at school noticed anything.

[47] In this court's view, had the court *a quo* properly evaluated the evidence, it could not have come to a conclusion that the State proved its case beyond reasonable doubt and in fact the evidence of the State Witnesses were so inconsistent and unreliable that it had to be rejected as false beyond reasonable doubt. The State's case was riddled with material contradictions, inconsistencies and improbabilities, to such an extent that the only reasonable inference that can be drawn is that the version of the Complainant, 2nd and 3rd State Witnesses were fabricated for some unknown reason. The Appeal therefore stands to succeed on conviction on both counts. In light thereof that the appeal stands to succeed, the sentences also stand to be set aside and is there no need to deal with the appeal against sentence in this judgment.

[48] Accordingly, this court therefore makes the following order:-

1. The appeal against both conviction and sentence in respect of both counts of rape, is upheld.

2. The convictions and sentences, on both counts, are set aside.

**M. NAUDÈ-ODENDAAL
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE**

I AGREE:

**K. PILLAY ACTING JUDGE
OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES:

HEARD ON: 21 JUNE 2024

JUDGMENT DELIVERED ON: 8 OCTOBER 2024

For the Appellant: Mrs. P.R. Scott

Instructed by: Legal Aid South Africa,
Polokwane Local Office,
Polokwane

For the Respondent: Adv. M. Maleka

Instructed by:

The Director of Public Prosecutions
Polokwane