



Reportable:	Yes/No
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Circulate to Magistrates:	Yes/No
Circulate to Regional Magistrates:	Yes/No

## IN THE HIGH COURT OF SOUTH AFRICA (NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO.: CA&R 35/2020

Date heard: 02-11-2020  
Date delivered: 16-04-2021

In the matter between:

**KAGISHO GODFREY TSAMAI SI**

Appellant

and

**THE STATE**

Respondent

*Coram: Williams J et Mofokeng AJ*

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### JUDGMENT ON APPEAL

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Mofokeng AJ

#### **INTRODUCTION:**

1. This appeal comes before us pursuant to a successful petition granted on 30 June 2020 against the appellant's conviction. He was convicted by Magistrate MS KGOPA in the Regional Court, held at Galeshewe, on one count of contravening Section 3 of the Sexual Offences Act 32 of 2007,

read with the provisions of Section 51 (2) of the Criminal Law Amendment Act 105 of 1997, and sentenced to a term of 15 years imprisonment.

2. What has been placed in issue is whether the trial court erred in accepting the evidence of the Complainant in relation to the identity of the perpetrator; and whether the trial court erred in rejecting the evidence of the appellant.

### **The Facts**

3. The Complainant was raped at the age of 67 on 18 June 2017 at her home. At the time of the incident she resided with three minor children aged 4, 1 and a baby. She shared a double bed with them. On the night of the incident she slept at around 12 midnight only to be woken up by cold and a heavy weight on top of her holding her tightly and painfully. It dawned on her that she was being raped when she felt the intruder's penis inside her vagina. Her bedroom lights were not switched on, the bathroom light and streetlight illuminated her bedroom. The intruder stood in the middle of the bedroom door to dress up after the attack.
4. The Complainant identified the intruder as the Appellant when he looked at her as he was dressing up. The Appellant ran off and using the front door after he was identified. In pain and unable to move, the Complainant laid in for a while. She woke up one of the children named Shawn to check the front door, he found it open. Shawn assisted her to sit up. She was bleeding with her womb hanging in between her legs. Her

daughter Lorraine Mabina passed by on her way to work, the Complainant informed that the Appellant raped her.

5. With the baby on her back she walked to the police station to report the crime, she was uncomfortable to take a taxi in her condition. She left the other two children in the care of her neighbour Nellie Douland (“Nellie”). She received medical care and was referred to Kimberley hospital where she was admitted for 3 days; thereafter she was referred to a hospital in Bloemfontein and was admitted for 7 days.
6. Medical evidence is consistent with the rape, it was not challenged by the Appellant either. Lorraine Mabina and Nellie in their evidence confirmed the Complainant related the rape incident to them and identified the Appellant as the rapist.
7. An inspection *in loco* was held at the residence of the Complainant at the behest of the prosecutor to ascertain the extent of illumination in the house from the streetlight and bathroom light. It was held at 19:00 on 6 June 2019. Present was the presiding officer, the investigating officer, the interpreter, the prosecutor, the complainant, the Appellant and his legal representative.
8. The streetlight was not operational on arrival; the inspection proceeded with just the bathroom light on with the rest of house lights switched off. The factual findings as reported by the presiding officer and confirmed

by both the legal representatives in the matter, were that the distance where the Complainant was lying on the double bed was one pace, literally one step from the bed to the doorframe. The distance from where the perpetrator was standing when the identification was made is 40 centimetres from the doorframe. The bathroom light with the door open reflected into the adjacent door, which is the bedroom, and it reflected almost halfway through the living room. The Appellant stood where the perpetrator stood when he was identified.

9. The Appellant's legal representative conceded, *"the light from the bathroom illuminates clearly the side of the face as you are standing on the door. So you can see clearly on the left hand side of the face, it is illuminated. You can see clearly that the whole face is illuminated. Part of it is clearly illuminated by the light. As you are looking at the person standing there, you can clearly see the face, the part of the face that is illuminated by the light, it is on the left of that person"*. Further note was that the Complainant was wearing spectacles during the inspection.
10. The Appellant did not dispute the rape incident; he denied his identification as the rapist. He raised the defence of an *alibi*; who is his wife. His evidence was that he went to bed at 22h00 as he normally does on the night of the incident. He left for work at 4h00. Oblivious of the rape incident the night before, he was shocked to be accosted by the complainant standing at her burglar door as he passed her home. She

accused him of rape. He waived his hand backward at her and proceeded to walk to work. On arrival at work he requested leave to report the matter at the South African Police and to request an escort to the Complainant's home to address the accusation. He was granted leave at 15h00 He went to the police station and was escorted as per his request. The Complainant was not home. He then went to his house and placed his bag inside, thereafter he stood outside the tuck-shop at his home to smoke.

11. Nellie walked passed his house and he approached her and walked along with her. He asked her what was happening with the Complainant. Nellie told him the Complainant is injured and she does not want to get involved. On the same Monday he visited his brother, on his return his wife told him a detective came looking for him. He was instructed to report at the police station the following day, he instead went on Wednesday. On arrival he was arrested.
12. The Appellant's wife, Estelle Nonceba Tsamaisi was called as his *alibi*. She testified that the Appellant was sleeping in the same bed with her. He woke up at 3h30 in the morning to get ready for work. He left at 4h00 and told her to lock the door as he lost his key to the door. On her way to work a young child informed her that the Appellant raped someone. The Appellant confirmed the rape accusation when he returned from work. On Tuesday she and the Appellant attended Thlokomelang. A detective came looking for the Appellant and left instructions that he

must report at the police station the Wednesday. He was arrested on Wednesday. She denied the Appellant could have raped the Complainant.

13. The trial court found that the State proved the rape and the identity of the Appellant as the rapist, beyond reasonable doubt.

### **Grounds Of Appeal**

14. The Appellant contends that there cannot be certainty beyond a reasonable doubt that the Complainant's evidence is reliable. As both a single and identifying witness her evidence ought to be treated with caution. Cognizant of the fact that an accused person can be convicted of any offence on the single evidence of any competent witness in terms of section 208 of the Criminal Procedure Act 51 of 1977, he correctly submits that such evidence must be substantially satisfactory in every material respect, or if there is corroboration, as held in *S v Mahlangu And Another* 2011 (2) SACR 164 (SCA). Further requirement is that the evidence must be honest and reliable if it pertains to identification of the perpetrator<sup>1</sup>.

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<sup>1</sup> *S v Charzen And Another* 2006 (2) SACR 143 (SCA) at paragraph 10-11:

“[10] What is more, as the magistrate pointed out in his judgement, and the High Court emphasised on appeal, the complainant was a good witness: clear, coherent, specific and verbally expressive.

[11] But, as our courts have emphasised again and again, in matter of identification, honesty and sincerity and subjective assurance are simply not enough. There must

15. Following the reliability test or guidelines set out in *S V Mthetwa* 1972 (3) SA 766 (A), the Appellant challenges the reliability of the complainant's evidence on the basis of the complainant's eyesight in that she was not wearing her spectacles at the time of the incident. The Appellant contends there was poor lighting and visibility given that the incident took place at night and only the bathroom light illuminated a part of the complainant's bedroom. He points out that the trial court noted during the findings of the inspection *in loco* that only the left part of a person's face is illuminated by the light when standing where the perpetrator was standing. The complainant's opportunity for observation is also questioned for the contradictory versions in her police statements. A point is taken that she was only able to identify the Appellant when he looked at her for the second time and she saw his face without describing any specific identifying feature. The pain the Complainant suffered, the Appellant submits hindered her senses.
16. It is trite law that an appeal court will not lightly interfere with the findings of the trial court especially as the latter was steeped in the atmosphere of the trial and had the benefit of observing witnesses. The trial court is in the best position to make credibility and reliability findings of witnesses.

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in addition be certainty beyond reasonable doubt that the identification is reliable, and it is generally recognised in this regard that evidence of identification based upon a witness's recollection of a person's appearance can be 'dangerously unreliable', and must be approached with caution."

17. Following the fundamental rule and principles as set out in *S v Leve* 2011

(1) SACR 87<sup>2</sup> we now turn to consider the grounds of appeal against the evidence and to determine if there is any irregularity or misdirection committed by the trial court.

18. Despite the inspection *in loco*, and the concessions made by his legal representative, the Appellant contends the complainant's identification evidence is not reliable. We defer to the findings and report of the inspection *in loco* in this regard. The trial court had an advantage of reliving the experience of the Complainant. The common observations of the trial court and legal representatives are of such a nature that we cannot, under the circumstances, interfere with the findings of the trial court in respect of the identification evidence.

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<sup>2</sup> 8. "The fundamental rule to be applied by an appeal court is that it is not at liberty to depart from the trial court's findings of fact and credibility unless they are vitiated by irregularity, or an examination of the evidence reveals that those findings are patently wrong. The trial court's findings of fact and credibility are presumed to be correct because that court has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies.

These principles are no less applicable in cases involving the application of the cautionary rule. If the trial court does not misdirect itself on the facts or the law in relation to the application of the cautionary rule, but, instead, demonstrably subjects the evidence to careful scrutiny, a court of appeal will not readily depart from that court's conclusions."



19. Noting that the inspection *in loco* was held with only the bathroom light on, it is not unreasonable to infer that coupled with the streetlight, the lighting and visibility were optimal for identification around the time of the rape.
20. On the issue of the spectacles, a case was not made out that the Complainant had prescribed eyeglasses. She was consistent that the glasses were reading glasses. Her daughter confirmed that the Complainant used the glasses for reading small letters. During court she used them to read her Bible.
21. In respect of the contradictory police statements, it cannot be ignored that they were taken in Afrikaans and written in English. They were not read back to the Complainant and she disputed a number of entries therein. What is consistent in all the statements and in her evidence is the identification of the Appellant as the rapist. Even with the discrepancies of various statements, the trial court found the Complainant to be satisfactory as a single witness. The trial court also considered the inconsistencies in her evidence and found that they are not material.
22. There is accordingly no misdirection committed by the trial court that warrants the interference by the appeal court. No legal basis exists to disturb the credibility finding of the Complainant by the trial court, she

was found to be a good witness. The trial court observed that she was quite certain as to the identification she made of the Appellant, who was someone known to her prior to the incident. Her evidence was consistent and corroborated by the medical evidence. It is reliable considered against the report of the inspection *in loco*, concessions made by the Appellant's legal representative, and the totality of the evidence before court.

23. The Appellant's second ground of appeal is that the trial court erred in rejecting his evidence; he contends his wife, his alibi, corroborated his evidence. The trial court rejected the testimony of his alibi in so far it is in conflict with the State's version. The trial court noted that:

*When she (Appellant's wife") testified, one initially got the impression that what she testified, she observed, only to find that there were certain things that the Accused reported to her as to which he testified. Her testimony is shaky in that regard. One can understand since her husband is charged with a very serious offence and she has to corroborate him. She was observed giving details, only to adjust her testimony when the Prosecution tells her what her husband said. What also comes out of her testimony is that the Accused was around and awake within the short period of time and from the time this offence had occurred.*

24. We share the same sentiment with the trial court in respect of the Appellant's wife's evidence, and we uphold her observations, which are

apparent from the record<sup>3</sup>. For instance she gave more than four contradictory versions relating to her house keys. She initially testified that when the Appellant left for work at 04h00 she woke up to lock the door because the Appellant lost the house key. Under cross-examination she repeated the lost key evidence, but she changed her version when she was asked how the Appellant gained entry to the house in her absence. Her response was that she was at home when he came back from the police station. She was then reminded that she testified that she locked the door when he left for work. Her answer was that she could not recall if she opened the door or not. Confronted with the testimony of the Appellant in respect of the time he arrived home, that she was not at home and the bag he placed inside the house, her response was “ he is the person who said that and that was the correct version of what he said”. She then repeated what the Appellant told her which is consistent with his evidence. This prompted the prosecutor to extract a concession from her that it meant

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<sup>3</sup> The alibi evidence stands to be rejected on consideration of the entirety of the evidence before court, following the approach stipulated in *R v Hlongwane* 1959 (3) SA 337 at 340H-341B:

‘The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted. *R v Biya* 1952 (4) SA 514 (AD). But it is important to point out that in applying this test, the alibi does not have to be considered in isolation. I do not consider that in *R v Masemang* 1950 (2) SA 488 (AD) Van den Heever, JA had this in mind when he said at pp 494 and 495 that the trial Court had not rejected the accused’s alibi evidence “independently”. In my view he merely intended to point out that it is wrong for a trial Court to reason thus: “I believe the Crown witnesses. Ergo, the alibi must be rejected.” See also *R v Tusini and Another*, 1953 (4) SA 406 (AD) at p 414. The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the court’s impressions of the witnesses.’

the Appellant had his own set of house keys, and there was no reason for her to lock the door when he left.

25. Overall, the evidence of the Appellant's wife is riddled with numerous contradictions and inconsistencies. She was not honest in many respects. She went to extreme lengths to corroborate the Appellant's evidence. She miserably failed to give evidence consistent with what the Appellant ascribed to her and directly contradicted it. In the result her evidence was of no assistance to the Appellant.<sup>4</sup>.

26. The desperate attempt to protect her husband complicates the defence conundrum further. She has cast doubt to the Appellant's version. If her initial testimony is accepted, that the Appellant lost his house key and when he returned she was home, it would rule out the possibility of the timing of his encounter with Nellie in the afternoon. It would confirm Nellie's evidence that her discussion with the Appellant was in the morning. The evidence of Nellie would then be preferred and accepted over that of the Appellant. This time factor extends to improbability of the

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<sup>4</sup> On application of the dicta at paragraph 30 in the matter S V Schackell 2001 (4) SA 1 (SCA)

"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 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.

Complainant standing at the burglar door at 04h00 as per the Appellant's version.

27. The trial court therefore rejected the evidence of the Appellant and his *alibi* for valid reasons, the totality of the evidence justifies the finding that the State proved beyond reasonable doubt that the Appellant raped the complainant. There is no misdirection that requires the intervention of the Appeal Court.

In the result the following order is made:

The appeal against the conviction of the Appellant is dismissed.

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**A MOFOKENG AJ**

**NORTHERN CAPE DIVISION**

I agree

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**C WILLIAMS**

**JUDGE OF THE HIGH COURT**

**NORTHERN CAPE DIVISION**

**Appearances:**

On behalf of the Appellant:

**Mr A Van Tonder (Legal Aid SA)**

On behalf of the State:

**Adv J Rosenberg (DPP)**