IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: CA42/2019
CASE NUMBER *A QUO:* RC4/2019
Reportable: **NO**
Circulate to Judges: **NO**
Circulate to Magistrates: **NO**
Circulate to Regional Magistrates: **NO**

In the matter between:-

JOHANNES GOITSEMODIMO PHUKUNTSI Appellant

and

THE STATE Respondent

CORAM: REID J *et* LAUBSCHER AJ

FMM REID J

[1] This matter is heard in terms of section 19(a) of the **Superior Court Act** 10 of 2013, by agreement between the parties on the documents filed in the court file without the presentation of oral argument. The State and the appellant filed comprehensive heads of argument.

[2] The appeal is against the conviction of rape and housebreaking handed down on 21 May 2018 by Magistrate Melodi. The appellant

was sentenced to twelve (12) years' imprisonment for the rape and five (5) years imprisonment for the housebreaking charge. This appeal is with leave from the court *a quo.*

[3] The appellant appeals against the abovementioned two (2) charges carrying sentences of five (5) years and twelve (12) years respectively. The appellant was charged and found guilty on two (2) charges of rape invoking the minimum sentence legislation. For those two charges (being charges numbers 2 and 3) the sentences imposed on the appellant was that of life imprisonment on both charges, to be executed concurrently.

[4] The appellant was charged on five (5) different charges and pleaded not guilty to all five (5) charges. The appellant was found guilty on all five (5) charges. This appeal, however, lies against only two (2) of those five (5) charges that the appellant was found guilty on. It can be gleaned from the notice of appeal that the appellant requested leave from the court *a quo* to appeal against the convictions of charges 4 and 5 and not the other remaining charges.

[5] The appeal is against the following charges:

5.1. Charge 4: Housebreaking with the intent to commit an offence unknown to the prosecutor.

5.2. Charge 5: Unlawful and intentional act of sexual penetration with the complainant N[...] Z[...] W[...].

[6] The appellant seeks to have both convictions set aside, and consequently the sentences on both convictions.

[7] The grounds of appeal are summarised in the appellants practice note

as follows:

> *"5.5 The Court erred when it accepted the evidence of the complainant's grandchild that he saw the appellant during the commission of the crime. The court relied on the fact that the child grew up in front of him and knew the appellant and knew his face and his voice.*
>
> *5.6 The court ought to have considered that the complainant was in the same position as her grandchild in as far as knowing the appellant for a long time is concerned. The complainant should have, at least, recognised the voice and the silhouette of the appellant because she has also known him for a long time and when he committed the crime he spent a substantial amount of time."*

[8] In the notice of appeal, the grounds of appeal are set out as follows:

> ***´AD CONVICTION***
>
> *1. In convicting the appellant the court erred in making the following findings:*
>
> *1.1 That the State proved the guilt of the appellant beyond reasonable doubt;*
>
> *1.2 That there are no improbabilities in the State's version;*
>
> *1.3 That the State witnesses gave evidence in a satisfactory manner;*
>
> *1.4 That the evidence of the State witnesses were not contradictory in material respects;*

1.5 That the differences between the evidence of the appellant and the state witnesses were sufficient to reject the appellant's version;

2. In convicting the appellant, the court erred in failing to:

2.1 Properly analyse or evaluate the evidence of the state witnesses;

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

3. In convicting the appellant, the court further erred in the following respects"

3.1 Rejecting the evidence of the appellant as not being reasonable and possibly true;

3.2 Accepting the evidence of the state witnesses;

3.3 Failing to consider the version of the appellant that he was not present on the crime scene;

Failing to consider the fact that the state could not present DNA evidence positively implicating and linking the appellant with committal of the offence of rape."

[9] The court *a quo* gives a detailed judgment in which he/she sets out all the evidence in relation to each individual charge. In relation to the charges that the appellant appeals against, the court *a quo's* judgment is reflected in the transcribed record to read as follows:

"Regarding counts umber 4 and 5 it is not in dispute that the door of the complainant's house was broken down while she and her grandchildren were sleeping in it at night. And that a male perpetrator or assailant entered and robbed her of her belongings including her cellphone and cash before he raped her.

What is in dispute is the identification of the perpetrator or that of the accused that is the perpetrator.

The court in ***S v Mtetwa*** *1972 (3) AD 766 at 768 remarked as follows:*

> *"Because of the fallibility of human observation evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest, the reliability of his observation must also be tested.*
>
> *This depends on various factors such as lighting, visibility and eye sight. The proximity of the witness is opportunity for observation both as to time and situation, the extent of his prior knowledge of the accused, the mobility of the scene, corroboration, suggestibility, the accused's face, voice, build [indistinct] and dress. The result of identification parades if any and of course the evidence on behalf of the accused, the list is not exhaustive."*

And in ***R v Dladla and Others*** *1962(1) SA 307 (A) [indistinct] the court said:*

> *"One of the factors which is of great importance in the case of identification is the witness previous knowledge of the person sought to be identified. If the person knows the person well and has seen him frequently before the probability that his identification will be accurate is substantially increased.*
>
> *The questions of identification marks of facial characteristics and of clothing are of much less importance.*
>
> *What is important is to test the degree of previous knowledge and the opportunity for a correct identification regard being had to the circumstances in which it was made."*

In casu the complainant herself did not see the face of the perpetrator. It is her grandson S[...] that allegedly saw the face of the perpetrator.

According to S[...] he had known the accused for a very long time. They, he grew up before the accused, he stayed in the same street as him. On the day in question he recognised the accused' voice when he spoke, this was before he even saw his face. He only got to see the face after the accused removed his face cover.

According to him when the accused lit his grandmother with the cell phone torch the light fell on the accused' face as well after he removed his cover.

He started seeing his face at the time and at that time his

grandmother was looking for a wallet in the wardrobe and he continued to see the accused even when the accused was raping his grandmother.

When the complainant's son S[...] and the police arrived he told them immediately that is was the accused who had been in his grandmother's house.

The accused denies these allegations. He contended that he never went to the complainant's house before because the complainant was known to be a witch so he was scared of her. But later under cross examination he conceded that he did walk through the complainant's yard earlier in the day before the alleged rape incident. He said he only passed there because he was drunk and had snatched money from people who were playing a dice game. He further testified that one day he was walking through the same yard of the complainant when her son engaged him in an argument over passing there.

The accused tried to impress upon the court that the complainant probably disliked or bore a grudge against him because her son and him allegedly swore at each other mentioning their mother's private parts. But his claims in that regard are not supported by other evidence.

According to him the swearing incident happened in 2010 which is about three years before the rape incident. Since then there was nothing that the complainant did to show that she disliked or bore a grudge against him.

The complainant is not the one who testified that she saw and recognised the accused. She testified that she did not see the

perpetrator's face so she did not know who it was.

The person who testified that he saw and recognised the accused is her, her grandson S[...].

Even after she, she heard S[...] saying it was the accused Goitso Modimo the complainant, the complainant still maintained that she did not see or know who the perpetrator was because she did not see his face herself.

There was never a suggestion that S[...] disliked or bore a grudge against the accused. So it cannot be argued that he had reason to pick the accused out of all the other members of the community and falsely accuse him of the crimes that he never saw him commit.

It is quite interesting that when the complainant complained that someone had just raped her and run away, the accused was in the house next door to the complainant's house.

Mr Sohokolo who was the defence witness literally harboured the accused in his house. Both the accused and Mr Sohokolo were well aware that the police and people outside were looking for the accused in connection with a rape complainant next door.

He heard when the complainant's grandson S[...] came to ask if the accused was present in the house Mr Sohokolo was quick to dismiss him by telling him that he was not there even before he heard wat Mr S[...] had to say.

The defence witness did not even bother to go to the police to tell them that the accused was in his house. All he was eager to

do was to make sure that no one knew that the accused was in his house.

Moreover, the differences in the evidence of the accused and that f the defence witness cannot be ignored. There were serious discrepancies and differences in their evidence regarding the times the accused and other people who came to his place arrived and as to what actually transpired as they were sleeping in the house or the shack of the defence witness Mr Sohokolo.

In Mr Wittes' case it appears that it is the absence of DNA analysis results linking the accused to the crime that emboldened him to deny that he raped her.

Nevertheless, I find S[...] W[...] to be an honest and credible witness whose evidence can safely be relied upon. He was still a child of 13 years of age when the incident happened. He knew the accused very well as the accused was residing in the same street as him. He testified that he grew up before the accused. He knew his voice as well.

He first recognised him by his voice before he saw his face after he removed his cover.

Both the complainant and S[...] testified that the accused used a cell phone torch to light and that at some point when the accused was looking for a wallet in the wardrobe and the accused was searching the bag he removed his face cover.

According to S[...] it was at that point that he saw the accused' face. I have no reason therefore to doubt the veracity of the

evidence of this witness. He had no reason to think that the perpetrator was the accused if he had not seen or recognised him.

I do not think that the fact that the accused was in the house next door immediately after the alleged rape is a coincidence. It goes a long way in corroborating or confirming the fact that he just came from the house of the complainant. I am convinced that indeed it is the accused who broke into the house of the complainant and robbed her of her personal belongings before he raped her."

Legal position

[10] In appeal, this Court has to determine whether, on the evidence as a whole, the State has established the guilt of the appellant beyond reasonable doubt. In **S v Chabalala** 2003 (1) SACR 134 (SCA) at para 15, Heher AJA stated the approach as follows:

"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 strength 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."

[11] In the matter of **R v Dhlumayo and Another** 1948 (2) SA 677 (A) at 705, the Appeal Court (as it was then known) stated:

"*The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness being steeped in the atmosphere of the trial. Not only has*

the trial court the opportunity of observing the demeanor, but also their appearances and whole personality. This should not be overlooked".

[12] The advantages of the trial court in observing the witnesses, were confirmed by the Supreme Court of Appeal in a similar vein in the matter of **S v Kebana** [2010] 1 All SA 310 (SCA) para [12] as follows:

> "*It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testify in his presence in court. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings".*

[13] It is trite that a trial court has the benefit of witnessing the demeanor of each witness, which the court of appeal does not have in reading the transcript. When it comes to the conviction of an accused, it is the duty of the court of appeal to analyse whether the court *a quo* was patently wrong in his assessment of the evidence presented to it. The common law position is clear: Absent any positive finding that the court *a quo* was patently wrong, the court of appeal is not at liberty to interfere with the findings of the court *a quo*.

[14] In **Khoza v S** (A222/2022) [2023] ZAGPPHC 1122 (8 September 2023) at para [16] it was confirmed that:

> *"… a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong."*

[15] This Court has carefully perused the record and I find that the court *a quo* did not err in the evaluation of the evidence presented to it. Having consideration of the evidence presented before the court *a quo*, I am satisfied that the court *a quo* did not err in convicting the appellant on the charges of housebreaking and rape. The State has proven beyond reasonable doubt that the complainant was raped by the appellant in the house of the appellant.

[16] The finding of the court *a quo* namely guilty on both counts 4 and 5 are confirmed as procedurally and substantively just and fair.

[17] The appeal against the conviction is subsequently dismissed and the sentences of the court *a quo* is confirmed.

Order:

[18] In the premises I make the following order:

i) The appeal is dismissed.

ii) The sentences of the appellant remains in place as ordered by the court *a quo.*

FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

I agree

NG LAUBSCHER
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

DATE OF HEARING : 30 NOVEMBER 2023
DATE OF JUDGMENT : 25 APRIL 2024

APPEARANCES

ON BEHALF OF THE APPELLANT:	**ADV MOLETE**
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