THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A29/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

23 February 2017 .....
DATE SIGNATURE

In the matter between:

M S P **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

RATSHIBVUMO AJ:

1. Mr. M, the appellant stood trial on several charges laid against him by his ex-wife at the Kempton Park Regional Court. He was convicted of two of these being a charge of contravening sec 3 of Act 32 of 2007 (rape) and another of housebreaking with the intent to rape and rape. The two counts were taken together as one for purposes of sentence and the appellant was sentenced to 10 years imprisonment. Leave to appeal the conviction and the sentence was refused by the trial court. The appellant was granted leave to appeal by this court on petition.

2. The approach to be adopted by a court of appeal when dealing with the factual findings of a trial court is guided by the collective principles laid down in *R v Dhlumayo*[1]. A court of appeal will not disturb the factual finding of a trial court unless the latter had committed 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.[2]

3. **The conviction.** The evidence that led to the conviction of the appellant is that on 29 March 2013, the complainant arrived at her residential flat from work only to find the appellant, her ex-husband hiding inside one of the bedrooms. She does not know how he gained entry since she had locked the doors and all the windows of the flat were closed before she left for work. On that day, she was the only occupant of her flat in that her brother and her cousin had gone away for the Easter holidays. The presence of the appellant was exposed when he peeped through the key-hole from inside

[1] 1948 (2) SA 677 (A)
[2] See also *DPP v S* 2000 (2) SA 711 (T); *S v Leve* 2011 (1) SACR 87 (ECG); and *Minister of Safety and Security and Others v Graig and Another NNO* 2011 (1) SACR 469 (SCA)

the room that the complainant faced as she walked upstairs. She spotted the eye starring at her which sent shivers down her spine. She panicked, walked back and started running downstairs. At that point the door, through which she spotted the peeping eye, opened and the appellant appeared and exited the room seemingly in pursuit of her.

4. She testified that the appellant chased her down the stairs and she missed a step and fell down. He caught up with her and assaulted her accusing her of being unforgiving to him, and that there was a man with whom she was sexually involved. He also expressed his displeasure that she had divorced him, the divorce decree of which was granted on 12 February 2013. He then forced her to suck his penis, after which he proceeded to have sexual intercourse with her against her will. This went on and only stopped when the police came knocking on the door.

5. The appellant's version is that he went to the complainant's flat at her invitation. She asked him to bring food and he did. They were happily in love and only divorced so that they could observe some rituals on introducing her to the ancestors, something they had failed to do when they got married. They planned to get married again observing this ritual and plans were underway. He admitted that she was injured and even bled, but he denied that he assaulted her. According to him, they had an argument when complainant asked for cash that he did not have. She accused him of not giving her the money and keeping it for his women. He became angry and approached her in rage, which caused her to flee down the stairs and she even fell. He did not have sexual intercourse with her that day.

6. In rejecting the appellant's version, the learned magistrate noted a number of discrepancies in his version as against the State's version which remained intact. His reasons for divorce were not in line with the Zulu cultural practice which he was trying to observe. He admitted that he knew "Imbeleko," a cultural practice through which his wife could have been introduced to the ancestors without resorting to divorce.

7. It is common cause that the police were called by her colleagues who reside on the same premises (fire brigade premises), after hearing the screams from her flat, something they had become accustomed to. When the door opened, the police observed the complainant storm out wearing just a vest on top, with her bottom naked. A male colleague testified that he gave her a blanket to cover herself before she was taken to the hospital. These events accords squarely with the complainant's version to the effect that the love between them was over, sealed with a divorce decree granted by the court. On 27 March 2013, just two days before the incident, the appellant and the complainant were at the Magistrates' Court where a protection order was granted against the appellant who was ordered not to visit the complainant's place of residence which happened to be her workplace too. This is in contrast to the picture painted by the appellant; of a couple enjoying love and romance, divorcing merely to deal with the cultural observance. The appellant's version does not offer any explanation on why the complainant sought a protection order against him.

8. Furthermore, the underwear that was found in the complainant's flat after the incident was taken to forensic examination for further examination. It was found to contain the appellant's DNA; something the appellant does not dispute. His explanation to the effect that he had some of his clothes in the complainant's flat was not put to the complainant during cross

examination, and was as such rejected as improbable by the court. The police officer testified that the appellant, who was well known to him from past complaints from the same parties, climbed the wall and escaped before he was arrested later that same day. This conduct does not accord with the appellant's version of innocence.

9. I am mindful of the fact that it is upon the State to prove the accused's guilt beyond a reasonable doubt. The accused does not have to prove his innocence. Where the accused's version has been proffered, if it is probable, the accused would be entitled to an acquittal. As Slomowitz AJ puts it, 'whether I subjectively disbelieve (the accused) is not the test. I need not even reject the State case in order to acquit him. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true.'[3]

10. The test of evaluating the probability of the accused's version is however not different from the test to have the case for the State proved beyond a reasonable doubt. It was held in *S v Van der Meyden*[4] that these are not separate and independent tests, but the expression of the same test (the proper test) when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence.[5]

[3] *S v Kubeka* 1982 (1) SA 534 (W).
[4] 1999 (1) SACR 447 (W).
[5] See *S v Combrink* 2012 (1) SACR 93 (SCA) para 15.

11. The trial court was satisfied that the case for the State was proved beyond a reasonable doubt and rejected the appellant's version as improbable and false. I do not find any misdirection on the part of the trial court in this regard.

12. **Duplication of charges**. Evidence that was led and accepted by the court was that there was only one sexual encounter which was interrupted by the arrival of the police. The trial court accepted that to convict the appellant of rape and housebreaking with the intent to rape and rape was a duplication of charges. On page 196 of the record, the magistrate said the following when handing down the judgment,

> *"As I have already stated, I am of the opinion that in respect of count 2, the State could charge the accused for rape and count 4 for housebreaking with the intent to rape and rape. I think it is a duplication of charges. It means the accused is being charged twice for the same offence. The court will actually find the accused guilty as charged on both counts, but I think I will actually take that effect into account when dealing with the sentence."*

13. This piece of the trial record reflects that the magistrate was fully aware that the appellant was charged twice for the single act of rape. He however proceeded to convict the appellant and thought that he would remedy that by taking the two duplicated convictions as one for sentence purposes. That was a misdirection on the part of the magistrate.[6] Taking offences as one for purposes of sentence is not a means to correct the duplicated convictions, but a means to deal with the cumulative effect of the sentence.[7] In *S v Young*[8], the court held that where multiple counts are closely connected or similar in point of time, nature, seriousness, or

[6] See *S v Marawu* [2005] JOL 16094 (Ck) on the test for duplication of charges.
[7] *S v Kruger* 2012 (1) SACR 369 (SCA) para 10.
[8] 1977 (1) SA 602 (A) at 610E-H

otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused. I am satisfied that the accepted practice of taking offences as one for purposes of sentence was adopted for wrong reasons and this has to be corrected. The appellant should have been convicted of one count of housebreaking with the intent to rape and rape as a single offence.[9]

14. **The sentence**.

A sentencing court does not always have an untrammelled discretion to determine sentence – a clean slate on which to work. In certain cases – and this applies to rape; a prescribed sentence is provided for by the Criminal Law Amendment Act 105 of 1997. Sec 51 (2) of the Criminal Law Amendment Act provides that upon convicting a first offender of the crime of rape, the court shall sentence him or her to a minimum of 10 years imprisonment. The minimum sentence in respect of a second or a third offender is 15 or 20 years imprisonment respectively. The maximum thereof would be 5 more years above the minimum meaning for a first offender it would be 15 years imprisonment. The court can only deviate from the prescribed sentences in case there are substantial and compelling circumstances that justify such.[10]

15. As a general rule, an appeal court may not interfere with a sentence unless there is a material misdirection by the trial court or unless the sentence is startlingly inappropriate or there being a striking disparity between it and the sentence the appeal court would have imposed.[11] The question therefore is whether the sentencing court properly exercised its

[9] See S v Cetwayo 2002 (2) SACR 319 (E) and S v Zamisa 1990 (1) SACR 22 (N).
[10] See S v Abrahams 2002 (1) SACR 116 (SCA).
[11] *S v Michele and Another* 2010 (1) SACR 131 (SCA)

discretion. In light of the prescribed sentences referred to above, the question would be whether in finding no substantial and compelling circumstances in the appellant, the trial court misdirected itself.

16. Counsel for the appellant submitted that for reasons that the appellant was married to the complainant and they had a troubled kind of relationship, that the appellant has been in custody and that he is a first offender should be enough to justify a deviation from the prescribed sentence. In my view, the circumstances advanced for the appellant cannot be elevated to a level of being substantial and compelling. In the circumstances of this case, they appear to be aggravating.

17. The appellant used sex to perpetuate the reign of terror through the masculine power over his ex-wife. Even on his own version, the appellant clearly bullied the complainant that she had to flee if he is not happy. It appears the crime the complainant committed was to fall in love with him. Not even the divorce decree would liberate her from him. Just two days after the court granted a protection order in favour of the complainant, he reduced the order to being a useless piece of paper that offers no protection against him. The appellant was not only disrespectful to the women, but also contemptuous to our courts and the laws of our country.

18. It is not true that the appellant was a first offender, for he boasts a previous conviction of assault with the intent to do grievous bodily harm. It is again not true that he was in custody for over a year since he was out on bail until the day it was cancelled for not respecting bail conditions to the effect that he should not have contact with the complainant. He was therefore in custody for less than 9 months. The

word should go out to the community that the courts would not tolerate the abuse of women and the subjecting of lovers to control and power using sex.

19. In the result I would make the following order:
    1. The appeal is upheld in respect of the conviction on count 2.
    2. The accused is found Not Guilty in respect of count 2 (rape).
    3. Appeal against the conviction and the sentence in respect of count 4 is dismissed.
    4. The conviction on a charge of housebreaking with the intent to rape and rape and the sentence of 10 years imprisonment is confirmed.
    5. No order is made in terms of sec 103 of Act 60 of 2000. The accused remains unfit to possess a firearm.

TV RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

LR ADAMS
JUDGE OF THE HIGH COURT

FOR THE APPELLANT : ADV PENTON

INSTRUCTED BY	**: JOHANNESBURG JUSTICE CENTRE JOHANNESBURG**
FOR THE RESPONDENT	**: ADV EN MAKUA**
INTRUSCTED BY	**: DIRECTOR OF PUBLIC PROSECUTIONS JOHANNESBURG**
DATE HEARD	**: 21 FEBRUARY 2017**
JUDGMENT DELIVERED	**: 23 FEBRUARY 2017**