REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: A040/2019

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: YES/NO
OF INTEREST TO OTHERS JUDGES: YES/NO
REVISED

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DATE SIGNATURE

In the matter between:

MXOLISI LINDOKUHLE PHAKAMANI MKHIZE APPELLANT

And

THE STATE RESPONDENT

APPEAL JUDGMENT

MOGALE AJ,

INTRODUCTION

1. The appeal is before us with the leave of this court. The appeal is in respect of the conviction only. The appellant was charged in the Regional Court, Johannesburg on the following counts:
    - Count 1- Contravention of Section 3 read with Section 1, 55, 56(1), 57, 58, 60 of the Sexual Offences and Related Matters Act 32 of 2007.
    - Count 2- Contravention of the provisions of Section 51(1) read with section 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007.
    - Count 3- Kidnapping
2. The appellant was legally represented during trial. The trial court explained the nature of the charge and the possible sentence in terms of the provision of the Criminal Law Amendment Act, 105 of 1997.
3. On the 17th November 2017 the appellant was found guilty on all three counts and subsequently sentenced on the 30th May 2018. On count 1, effective 10 years imprisonment, count 2, 5 years imprisonment and count 3 to 3 years imprisonment. It was ordered that the sentences on count 2 and 3 would run concurrently with the sentence in count 1.
4. After sentencing, the appellant brought an application in terms of Section 309B (5) of the Act for leave to present further evidence which was not adduced during the trial.

THE BRIEF AND RELEVANT GROUNDS OF APPEAL

5. The Complainant, S M testified that on the 20th May 2016 she visited the offices of the Master of the High Court together with her friend M N where he was assisted by the appellant. She entered into an open plan where she was supposed to be assisted, but the appellant took her to a certain office, locked her therein and sexually violate her. The appellant started by touching her breasts and genitals, forced her to touch his genitals and inserted his finger into her vagina.
6. M N confirmed that she was together with the complainant on the abovementioned date and place. The complainant made a report to her that the appellant said she was going to be her girlfriend and he loved her. The complainant went back to the appellant's office after obtaining finger prints and came out after some time with a sad face. The complainant had some blood on her trousers but refused to talk about what happened inside the office until they were at KFC with J N.
7. J N confirmed that the complainant was reluctant to tell her what happened but M informed her that the complainant was nearly raped. She then encouraged the complainant to inform her mother about the incident.
8. J Z confirmed that she is the mother of the complainant, further that in the afternoon of the abovementioned date, the complainant came back home in a bad state. Her hair was mixed up, her jersey was in a bad condition and the trousers had blood stain. The complainant told her that the appellant wanted to rape her but because she was fighting, the appellant only managed to insert his finger inside her vagina. She reported the matter to the police and the following day took her for medical assistance.
9. Joyce Khumalo is a professional nursing sister who consulted with the complainant on 21 May 2016. Her findings were consistent with the recent vaginal penetration and the complainant confirmed consensual sexual intercourse in the last seven days before the examination.

10. The appellant conceded that he was on duty on that day assisting numerous members of public, further that he might have also assisted the complainant though he cannot remember but denied any misconduct whatsoever.

ISSUES TO BE DECIDED

11. This court has to determine, as a court of appeal, whether the appellant was correctly convicted.

THE PRINCIPLES APPLICABLE IN APPEALS

12. It is trite law that a court of appeal will not interfere with or temper with the trial court's judgment or decision regarding either conviction or sentence unless it (court of appeal) finds that the trial court misdirected itself as regards its findings of facts or the law). ***See R v Dhlumayo & Another 1948 (2) SA 677 (A)*.**

13. If the trial court misdirected itself either on the facts or the law, a court of appeal will be at large to interfere and deal with the matter as it deems fit, including substituting its own order or decision for that of the trial court, which may include an order for the setting aside of a conviction or the altering of the sentence. This was aptly amplified in the decision of ***Booi v State (14/2010) {210} ZAFSHC* 91** delivered on the 12th August 2014 as follows:

> *"…the ambit for the interference by the appeal court on a finding of fact and credibility is restricted to few instances. It is -only allowed in instances where there is a demonstrable and material misdirection by the trial court where the recorded evidence shows that the finding is clearly wrong.* ***See S v Hadebe and Others 1997 (2) SACR 641 (SCA) t 645 e- f.*** *Factual errors may be errors where the reasons which the trial judge provides are unsatisfactory or where*

he/she overlooks facts or improbabilities. Also, where the finding on fact is not dependent on the personal impression made by a witness' demeanor, but predominantly upon inferences and other facts, and upon probabilities. The appeal court is also in an equal position to the trial court."

14. When evaluating or assessing evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider. As Nugent J (as he then was) in ***S v Van der Meyden 1999 (1) SACR 447 (W)*** stated at 450:

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

15. The test in this matter is beyond reasonable doubt. In the assessment of evidence the court must look at the total body of evidence and not to break up the evidence into some compartments.

REPRESENTAION OF THE PARTIES AND SUBMISSIONS ON APPEAL

16. There was no appearance on behalf of the State due to the fact that Mr Mongwane from the Office of the Director of Public Prosecutions could not be traced for the submission of the heads of arguments nor oral submissions on the appeal.
17. As a result, this court decided that it will be in the Interest of Justice that the appellant's appeal be proceeded with.
18. Mr Du Plessis on behalf of the appellant in his heads of arguments and in his oral submission, submitted the following:

18.1. The magistrate failed to apply the necessary caution to the evidence of both complainants. Caution should have been applied due to the fact that the complainant was a young child, and the special circumstances of this case warranted that.

18.2. The magistrate was not impartial in the conduct of the trial. The magistrate erred in failing to draw a negative inference from the contradictions between the state witnesses' oral evidence in court.

18.3. The magistrate erred in failing to find that the version of the complainant was improbable.

18.4. The magistrate erred in failing to consider the evidence presented in terms of Section 309B (5) of the Act presented during the application for Leave to Appeal.

18.5. The complainants failed to report the alleged rape at the first available opportunity, and her explanation for the delay in reporting it, is unconvincing.

18.6. The magistrate erred in failing to consider that the State failed to call the person who came to take some papers in the office in order to corroborate her version that he found her naked with the appellant in the office.

18.7. The magistrate erred in failing to consider that it is improbable for the complainant not to scream and try to alert the people within the corridors of the office building as she indicated that she was physically resisting by kicking the appellant.

18.8. The magistrate erred in failing to consider that the State failed to present the photographs taken by the Police where the incident took place.

18.9. The findings by the Nurse, Sister Joyce Khumalo were not satisfactory.

18.10. The magistrate erred in finding that the state succeeded in proving its case beyond reasonable doubt, and that that the version of the appellant was not reasonably possibly true but false beyond reasonable doubt.

THE JUDGMENT BY THE MAGISTRATE AND HER REASONS

19. The court made a finding on the totality of the evidence as stated in ***S v Chabalala 2003 (1) SACR 134 (SCA)***, and having referred to the cautionary rules applicable to the evidence of young children, and further having recognized that there were a number of discrepancies or contradictions between the evidence of the state witnesses, the magistrate found that:
    19.1. The version of the complainant and her two witnesses, Ms N and Ms N corroborate each other with regard to the substantial parts of their evidence, and although there were contradictions or inconsistencies in their evidence, the said contradictions were minor and immaterial, and consequently not justifying any negative inference against any of the state witnesses.
    19.2. The version of the complainant was also corroborated by medical examination that revealed a fresh tear on posterior fourchette.
    19.3. The complainant had no motive to falsely implicate the appellant, and there were no improbabilities in her evidence.
20. On the other hand, the magistrate found that, with regards to the testimony of the appellant, the crux of his defense was that there was a conspiracy to falsely implicate him and denies any misconduct of whatsoever.
21. The magistrate concluded by finding that the state succeeded in proving its case beyond reasonable doubt.

APPLICATION OF THE PROVISIONS OF SECTION 208 OF THE CPA

22. The provisions of Section 208 of the CPA provides that an accused person may be convicted of any offence on the single witness of any competent witness. In ***Sauls and Others 1981 (3) SA 172 (A) 180*** it was held that that there is no rule-of-thumb test or

formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and should consider its merit and demerits and having done so, should decide whether it is satisfied that the truth has been told despite shortcomings or defects or contradictions in the evidence.

23. In ***S v Webber 1971 (3) SA 745 (A)*** it was decided that the evidence of a single witness should be approached with caution and such evidence should not necessarily be rejected merely because the single witness happens to have an interest or bias to the accused. The correct approach is to assess the intensity of the bias and to determine the importance thereof in the light of evidence as a whole.

BEYOND REASONABLE DOUBT

24. The onus of proof in a criminal case is discharged by the state if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that the accused is entitled to be acquitted if it is reasonably possible that he might be innocent.
25. Proof of the guilt of the appellant beyond reasonable doubt and the question of whether the appellant's version is reasonably possibly true is not separated and independently tested. As we held by Nugent J in ***S v Van der Meyden 1999 (1) SACR 447 (W)*** **at 488 f-I** the following was noted:

> "*These are not separate and independent tests, but the expression of the same test when viewed from the opposite perspectives. In order to convict, the evidence must be established the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same 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. A*

court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond a reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it is reasonably possible that it might be true.

26. It is trite law that the court does not have to believe the appellant's version nor does it need to reject the State's case in order to acquit him, instead a court is bound to acquit the appellant if there exists a reasonable possibility that his evidence may be true. A holistic approach to all the evidence is required as opposed to a fragmented and compartmentalized approached to the evidence.

EVALUATION OF EVIDENCE

27. We have been unable to find, from considering the evidence before us, the reasons why the trial court concluded that there were no improbabilities present in the version of the complainants. The only reasonable inference to draw from lack of the factual basis for the said finding is that the trial court failed to consider the probabilities or improbabilities.
28. This being so, this court is at large to consider the presence or otherwise of the inherent probabilities or improbabilities. It seems improbable that the appellant in front of his colleagues in an open plan office immediately professed his love to an 18 years old stranger instead of attending to her enquiries. It seems highly improbable that complainant who was physically resisting the appellant by kicking him would fail to shout, scream and tried to alert the people around the corridors of the busy office building which is forever full of people. It also seems improbable that while the complainant was still naked in the office, the appellant responded to a knock by unlocking the door and letting a colleague in and the same colleague not to react towards what was happening inside the office. It is further highly improbable that the accused would rape the complainant in broad daylight and within a hearing distance of

his co-workers who were in other offices and corridors. It is hard to imagine how the accused did not care that there were people who can come and knock in the office they were in.

29. There are several gaps in the evidence adduced by the state. The complainant went to the Offices of the Master with the police to effect the arrest. Photographs depicting the office where the incident took place were taken but the state opted not to present such evidence before the court. Photographs were only submitted when the evidence in terms of Section 309B (5) was presented by the defense. This issue creates confusion due to the fact that the complainant mentioned that she went inside an open plan but the appellant took her to a separate office inside an open plan. The witness (Ms N) also confirmed that the complainant went alone into an open plan but was taken to an office. They did not mention that the office, in which the complainant was taken to, is the same office she was directed to take fingerprints.
30. The complainant failed to inform the police about the co-worker who found her naked inside the office. The state also failed neither to investigate these allegations further nor to call him to testify.
31. The appellant's suggestion of a possible motive to falsely implicate him was found to be improbable and was rejected as false beyond reasonable doubt. A distinction should be drawn between a situation where an accused is proved by the totality of the evidence led to have lied on the facts – as distinct from being wrong on his suggestion or suspicion of a possible motive. Where the court finds that the accused is an incredible liar - in circumstances where the surrounding circumstances and probabilities excluded any reasonable possibility that someone other than the accused perpetrated the offence – it may find that such proof (of the accused as an incredible liar) constitutes support for the state's case. ***See Mudau v The State (764/12) [2012] ZASCA 56 (9 May 2013) and Thebus and another v S [2002] 3 All SA 782 (SCA).***

32. However, where the court finds that the motive suggested by the accused as the possible reason why the state witnesses could falsely implicate him, is implausible, it becomes a neutral point that does not disadvantage the accused or support the state's case. In this case, even a total rejection of the accused's suggestion of a possible motive (not evidence on the merits or the facts), does not entitle the trial court to draw an adverse inference which contributes to supporting the state's case against him.
33. In our view, the appellant's defense amounted to nothing more than a suggestion of a possible motive as to why the state witnesses would falsely implicate him in the commission of the offences. This being so, the trial court was not entitled to draw an adverse inference. The court a quo clearly placed a lot of reliance on the rejection of the appellant's suggestion of a possible motive to falsely implicate him in order to find that the state had succeeded to prove its case beyond reasonable doubt against the accused even if it found his suggestion of a possible motive to be implausible.
34. Although the magistrate referred to the cautionary rule, we are of the view that she did not apply sufficient caution in approaching the evidence of the complainant particularly in the light of the pliability of youthfulness and the improbabilities I have referred to above. Therefore, in our view, the trial court misdirected itself on this aspect.
35. The court *a quo* dismissed the possibilities that the tear of the medical report might have been caused by consensual sexual intercourse that occurred seven days before.
36. The trial court should have examined the manner in which the rape was reported. The court should have examined the kind and level of interrogation used to get her to make the said report but his was not done.
37. In our view, the misdirection of the trial court in respect of not considering the gaps in the state's case, coupled with the failure to consider the number, nature and extent of the improbabilities inherent in the circumstances of the case, and failure to exercise sufficient caution in approaching the evidence of the complainant, is such that they

justify interference by this court. This means that this court is at large to consider this matter as if it was a court of first instance, and substitute its own findings of fact and law.

ORDER

38. Accordingly the following order is made:

38.1 The appeal is upheld.

38.2 The judgment and sentence of court *a quo* is set aside.

38.3 It is ordered that the Appellant be released from custody with immediate effect.

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K MOGALE

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

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N P MNGQIBISA-THUSI

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

For Appellant:	Adv P Du Plessis,
Instructed by:	BDK Attorneys, Johannesburg.
For the State:	No appearance
Date of hearing:	18 June 2020
Date of judgment:	24 June 2020