IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A114/2019

DPP REF NO: 10/2/5/1-(2019/094)

1. Reportable: No
2. Of interest to other judges: No
3. Revised: 22 June 2020

(Signature)

In the matter between:

SIBANDA, JOSEPH **Appellant**

and

THE STATE **Respondent**

JUDGMENT

DE VILLIERS, AJ:

[1] The appellant appeals with leave of the court *a quo* his conviction on two charges of rape (as set out in the Criminal Law Amendment Act, 32 of 2007, and as read with the Criminal Procedure Act, 51 of 1977) and one of kidnapping pertaining to events that took place on 4 October 2016. He was convicted on 29 June 2017 in the Johannesburg Regional Court by magistrate Graf. Mr Ngxumza represented the appellant throughout the hearing. The state called four witnesses: The complainant, her ex-boyfriend (Mr Malatji), a close friend (Ms Moshile), and a forensic nurse (Ms Maseko). The appellant also testified.

[2] On 3 October 2016 the complainant commenced to rent a shack[1] in an informal settlement from the appellant, and paid her first rent. Until then the complainant and Mr Malatji were in a relationship and had occupied a shack in an informal settlement. It is common cause that the relationship did not end well. According to the complainant, the relationship involved domestic violence. Mr Malatji alleged that he had no knowledge of a so-called protection order that the appellant obtained against him, and elected not to answer questions about his alleged violent conduct towards the complainant. Tellingly, Mr Malatji kept the two telephones of the complainant when she left the common home. As will appear below, it was to Mr Malatji that the complainant turned for help.

[3] The appellant stayed in the adjacent shack to the one rented by the complainant. The appellant testified that the complainant had been in occupation of the shack rented from him for some days before 4 October 2016, and once even had a meal with him after she had moved into her shack. This version had not been put to the complainant or to Mr Malatji for comment.

[4] After the complainant had left, Mr Malatji found the number of the appellant on the one phone belonging to the complainant, phoned the appellant, and demanded that he must evict the complainant. Mr Malatji confirmed such a request. The impression left in his evidence is that he made several calls to the appellant. On the appellant's version, Mr Malatji in order to ensure the

[1] The use of the term is not intended as disrespectful, but to illustrate graphically the environment where the complainant found herself.

eviction of the complainant, threatened to burn down his shack, and not only phoned him, but visited him as well too to make the demand. This version of a visit had not been put to the complainant or to Mr Malatji for comment. Mr Malatji denied the threat, but admitted the telephonic request. After the demand by Mr Malati, the appellant returned the complainant's rent, and sought to evict her. At her insistence, the complainant, Ms Moshile and the appellant went to the police. The police advised the appellant that he could not evict the complainant as intended. At the risk of repetition, as will appear below, it was to Mr Malatji that the complainant turned for help.

[5] That night between 20H00 to 21H00 the appellant called the complainant into his shack, supposedly to discuss the renting of the shack. Whilst she was there the appellant (on the complainant's version) received a call from Mr Malatji at about 22H00. Nothing really turns on the time of the call, or whether the specific call was made by the appellant or not, as the conversation is common cause. The appellant told Mr Malatji to fetch the complainant. During this discussion, the advice by the police was conveyed, namely that the appellant had to give the complainant three months' notice to evict her. The complainant, on her version, knew of the call as she was in the appellant's shack at the time. No other explanation why she would have known of the call was pursued in the evidence and in the cross-examination.

[6] Against this background of a woman, living in poverty, without a place to stay if evicted, whose means of communication had been taken from her, the rest of the story unfolded. On the complainant's version, the appellant in his shack asked the complainant to enter into a sexual (called a "*love*") relationship with him. They hardly knew each other. He also knew that she had just ended a relationship, evidently on bad terms. She refused. This angered the appellant, who saw her refusal as a sign of disrespect. The appellant then he locked the door to his shack with a chain and padlock, before he strangled the complainant, and raped her. The complainant was so afraid during the strangling that she wet herself and the bed. After this ordeal, the appellant threatened the complainant. He said that he would kill her and dump her body at a railway or railway station. He even looked for his phone to contact his friends who would assist him in such an undertaking, and spoke (or pretended

to speak) to someone. The complainant begged for her life and promised to tell no one of what had happened. The appellant then raped her again.

[7] The appellant denied this evidence. The logical consequence of his denial is that the accusations of the rapes and kidnapping were fabricated. It was common cause that he and the complainant hardly knew each other before she rented the shack from him.

[8] On the complainant's version, the next day, on 5 October 2016, very early that morning the complainant begged to go to work. The appellant allowed the complainant to collect toiletries from her shack, before she had to return to wash in his shack. The appellant added *muti* to the water to ward off Mr Malatji. On the complainant's version, the appellant was reluctant to allow her to go to work, as he said she would go to the police and report the matter. He decided to escort her to work, and demanded that she had to inform him when she was ready to return, as he wanted to pick her up. To this end, just before they arrived at her work, he gave her a cellphone to phone him. It is common cause that the appellant had accompanied the complainant to work, but the appellant had a different version how this came about.

[9] On the appellant's version, the complainant called him throughout the night to accompany her to work, as she was scared of Mr Malatji. She made such a nuisance of herself, that he gave the phone to his wife to answer. It was not clarified when and where the complainant obtained such a phone. One must bear in mind the context of (on the appellant's version) that this alleged plea for help took place immediately after his attempted eviction of the complainant. His case was that within hours of seeking to evict her and asking her ex-boyfriend to fetch her, she turned to him for help and in fact pestered him.

[10] The complainant worked as a domestic worker, and her employers had left home before her arrival for work, and had not arrived by the time she left again. Whilst at work, the appellant could not phone Ms Moshile, who did not have a phone. When the appellant collected the complainant from work, he was accompanied by Mr Malatji. On the complainant's version she phoned a number she knew, her own on one of her two cellphones, seeking help from the person in possession of her phone, Mr Malatji. She told him that she had

something to tell him. Mr Malatji testified that the complainant had called him, asking not to come to her place of work with the appellant. He also testified that the appellant had called him after he had sent him a "please-call-me" message. The intent was that they would "*confront*" the complainant. The appellant's version was that the complainant called him to collect her, and that he called Mr Malatji in order for the complainant and Mr Malatji to resolve their differences. It is common cause that the three walked home.

[11] Whilst the three walked home, and the appellant was a distance away, the complainant told Mr Malatji that the appellant strangled her, threatened to kill her, and to dump her body at a railway station. She did not mention the rapes. Upon arriving at the informal settlement, Mr Malatji conveyed the facts known to him to Ms Moshile. Ms Moshile fetched the complainant from her shack. At Ms Moshile's shack, the complainant confirmed the strangling, and started crying. Upon inquiry, she told Ms Moshile and (later) Mr Malatji of the rapes as well. The complainant and Mr Malatji went to the police station to lay charges. In other words, the complainant lodged a complaint with the police on the first evening after the rapes, 5 October 2016. She underwent a medical examination the next day by a forensic nurse, Ms Maseko. The gynaecological examination revealed signs of vaginal bruising, consistent with vaginal penetration.

[12] Ordinarily one would look at the appellant's heads of argument to determine the issues on appeal. In this case, one could not do so. Apart from quotations from cases, and innocuous references to a very brief chronology of the trial, the court of appeal was asked to overturn a conviction on these terse submissions:

> "*Disputed facts:*
>
> *8. Was the complainant kidnapped and raped by the appellant.*
>
> *9. Whether the version of the appellant can be accepted as being reasonably possibly true.*
>
> *…*
>
> *12 The appellant testified and denied the allegations.*
>
> ***Record page 125 lines 22 to 24**.*

…

22 It is submitted that the version of the appellant can be accepted as being ***reasonably possibly true***."

[13] The first court of appeal clearly was upset by this standard of work. When the matter came before the Honourable Coppin J and McAfferty AJ on 21 November 2019, they postponed the matter and ordered:

"*The appellant is ordered to deliver supplementary heads no later than 28 November 2019, dealing with the grounds in the notice of application for leave to appeal dated 28 November 2018*."

[14] Only one-and-half pages of supplementary heads of argument followed. These additional heads first made one point, namely that there was no clinical evidence to support the complainant's version that she had been strangled. Then followed only these two submissions were made:

"*4. The complainant did not escape or alarmed anyone of being raped.*

5. The complainant failed to inform Maleka[2] *of the rape*."

[15] This judgment is not limited to the three grounds set out in the heads of argument, but also addresses the grounds set out in the application for leave to appeal to consider if the appellant's guilt has been established beyond reasonable doubt:

[15.1] The complainant did not scream for help.

(This criticism was not put to the complainant for comment. It would be unfair to ask a court to disbelieve her on this basis. See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 61-63. I add, who would have screamed after having been strangled, locked in a room with one's assailant, and having been threatened with death? The complainant was petrified);

[2] The reference to Maleka is wrong, it is the name of the witness, his surname is Malatji.

[15.2] The complainant was briefly on her own during the early morning of 5 October 2016 to collect toiletries, and did not then run away, but instead returned to the shack.

> (This criticism was not put to the complainant for comment. I add, the evidence was that the two shacks were a unit, secured from the street with a gate. There was no evidence that escape was even possible. The complainant had been through a night of terror of physical and emotional violence. Who could blame a traumatised person for being submissive? On her version, she did not want to cause problems for herself, as the appellant was suspicious of her);

[15.3] The complainant did not leave her place of employment to go to the police on 5 October 2016.

> (The complainant is not on trial for how quickly she reacted in reporting the crimes to others and the police. Her ordeal must have been emotionally painful and frightening. Her conduct is consistent with what one would encounter when a frightened, raped woman, vulnerable to exploitation, would have reacted);

[15.4] The complainant did not immediately tell Mr Malatji of the rapes. The complainant only told Ms Moshile and Mr Malatji of the rapes after having been asked by Ms Moshile if she was only strangled (or if something else also happened).

> (The complainant's evidence was that she was ashamed. She waited to speak to Ms Moshile who would not judge her. Her language in describing these feelings, fills one with compassion. In considering the failure to tell Mr Malatji everything, immediately, one must consider that he is the man with whom her relationship had formally ended the previous day, the man who had sought to engineer her eviction from her newly acquired room, the man who had

kept her telephones, the man she said was violent towards her. The complainant turned to this man for help and then did not make a full disclosure immediately when the assailant was about a few metres away as they walked. Why does such conduct reflect a lying witness?)

[15.5] There was no physical evidence of strangulation.

(Ms Maseko testified that this would depend on the level of violence used. It is a non-issue.)

[15.6] The complainant was a single witness.

(It is trite that a conviction may follow on such evidence. The complainant's evidence was satisfactory in all material respects. See ***S v Sauls and Others*** 1981 (3) SA 172 (A) at 180C-H.)

[16] The appellant's version is that he was with his wife during the night in question. I must add, "alleged" wife, as the complainant had no knowledge of such a relationship. One would have expected the complainant to have knowledge of the status of the appellant, as his shack was next to the communal water tap where she collected water and met the appellant. According to her, the person worked for the appellant and resided elsewhere, in "*A Section*". The appellant's alleged wife did not testify. According to an objection by the state prosecutor evident from the appeal record, she attended the trial. There is no suggestion that she was not available to testify.

[17] The law on the evaluation of evidence is trite. I refer to some of the well-known cases. Regarding interfering in factual findings on appeal, I refer to two decisions by the Supreme Court of Appeal:

[17.1] ***S v Francis*** 1991 (1) SACR 198 (A) at 198J - 199A:

"*The powers of a court of appeal to interfere with the findings of facts of a trial court are limited. In the absence of any misdirection, the trial court's conclusion, including its acceptance of a witness's evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court on adequate grounds that the trial court was wrong in accepting the witness's evidence - a reasonable*

doubt will not suffice to interfere with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony".

[17.2] ***Naidoo v S*** [2019] ZASCA 52 para 46:

"*As an appellate court it is essential that we remain cognisant of the strictures on us as far as the trial court's factual findings are concerned. Absent demonstrable, material misdirections and clearly erroneous findings, we are bound by the trial court's factual findings.*[3] *It is not for an appellate court 'to second-guess the well-reasoned factual findings of the trial court'.*[4] *We are not the triers of fact at first instance. …";*

[18] Applying that law in this case, presented little difficulty. If the state's evidence is considered in the light of all the evidence (as one must do),[5] including:

[18.1] The fact that there were no contradictions in the complainant's evidence. The one or two instances of slight deviations between her evidence and that of Mr Malitji, does not reflect a reason to disbelieve her;

[18.2] There are no inherent improbabilities in the evidence of the complainant, whilst the same cannot be said of the appellant's version. The earlier comments herein pertaining to the probabilities, are not repeated;

[18.3] The appellant's version, where she interacted with third parties, was confirmed by those witnesses;

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[3] "11 *S v Hadebe & Others* 1997 (2) SACR 641 (SCA) at 645E-F; *S v Modiga* [2015] ZASCA 94; [2015] 4 All SA 13 (SCA) para 23."

[4] "12 *Mashongwa v PRASA* [2015] ZACC 36; 2016 (3) SA 528 (CC) para 45."

[5] *Shilakwe v S* [2011] ZASCA 104 para 11 and 14; *S v Van Der Meyden* 1999 (2) SA 79 (W) at 80H-82B. See too *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15:

"*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. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear*."

[18.4] The improbability that the complainant would have sought help from Mr Malatji of all people due to their recent past interaction, unless she had nowhere else to turn after truly traumatic events;

[18.5] The medical evidence of recent vaginal penetration, for which no explanation but the two rapes, has been suggested;

[18.6] The omission of the appellant to ensure that his full version was put to state witnesses;

[18.7] The appellant's omission to lead evidence from his alibi witness, his wife. The case against the appellant was too strong for him to advance an alleged alibi defence without calling his wife. A negative inference in this matter, when all the evidence is considered is appropriate. See ***Elgin Fireclays Limited v Webb*** 1947 (4) SA 744 (A) at 749-750.

[19] I have no doubt that the learned magistrate Graf correctly analysed the case. The judgment is properly reasoned and its outcome is correct. No demonstrable, material misdirections or clearly erroneous findings were made. To my mind the State evidence in this matter is so convincing as to exclude a reasonable possibility that the appellant might be innocent. See too ***R v Mlambo*** 1957 (4) SA 727 (A) 738A-C:

> "*In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.*"

[20] For the reasons above, I propose that the following order be made:

1. The appeal is dismissed

DP de Villiers AJ

I agree and it is so ordered

MMP Mdalana-Mayisela J

Heard on:	8 June 2020 (matter determined on written submission at the parties' request who elected not to make oral submissions due to Covid-19 restrictions)
Delivered on:	22 June 2020 electronically, by e-mail
On behalf of the Appellant:	Adv AH Lerm
On behalf of the Respondents:	Adv VH Mongwane