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

CASE NO: A045/2021

Delete whichever is not applicable
(1) Reportable No
(2) Of interest to other Judges No
(3) Revised: Yes

Date: 23 /09/ 2021

Signature.....

In the matter between:

MDINI, THABO Appellant

and

THE STATE Respondent

J U D G M E N T

MAIER-FRAWLEY J (MIA J concurring):

1. The appellant was convicted in the regional court, presiding at Randfontein, on a charge of rape.[1] He was sentenced to ten years imprisonment and declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000. This appeal lies, with leave of the trial court, against conviction only.

2. The legal representatives of the parties agreed that the appeal could be adjudicated on the papers, including the heads of argument filed on behalf of the parties, as envisaged in section 19(a) of the Superior Courts Act, 10 of 2013.

3. The appellant was legally represented throughout the trial. He pleaded not guilty to the charge of rape, however, he admitted to having sexual intercourse with the complainant on 15 June 2020 at his residence in Elandsvlei, alleging that this occurred with her consent.

4. In the result, the trial turned primarily on the question of consent, it being common cause at the trial that:

    4.1. Sexual penetration occurred during the act of sexual intercourse between the complainant and the appellant on 15 June 2019;

    4.2. No condom was used by the appellant during the incident;

    4.3. The only persons physically present immediately prior to and during the occurrence of the incident were the appellant and the complainant;

    4.4. As at the date of the incident, the complainant had been and still was involved in a love relationship with her boyfriend, one Elias (the appellant's cousin) whilst the appellant had been and still was involved in a love relationship with the complainant's friend, one, Mamokethi, and thus the accused and the complainant were known to one another;

    4.5. The complainant presented with fresh injuries upon examination by a medical doctor on 16 June 2021, being the day following the incident, as recorded in the J88 medical report.

---

[1] The State alleged that on 15 June 2019, at Elandsvlei, the accused committed an act of sexual penetration by unlawfully and intentionally inserting his penis into the complainant's vagina without her consent.

5. The state led the evidence of three witnesses whilst the appellant testified in his defence without calling any further witnesses. The state witnesses included the complainant, the police officer to whom she reported the incident (Sergeant Setshele) and the medical practitioner who examined the complainant on 16 June 2019 and completed the J88 (Dr Olayiwola).

6. Briefly, the complainant's evidence was to the following effect: On the night of the incident she was visiting at her 'in-laws' house. She was sitting around the fire, socialising with friends (one 'Lebo' and two others) when the appellant arrived there looking for his girlfriend, Mamokethi. He asked the complainant if she knew where his girlfriend Mamokethi was. The complainant told him that she did not know of Mamokethi's whereabouts, where after the appellant left and went his own way. A short while later, the complainant left the house to go to the shop to buy cigarettes for her friend Lebo. *En* route to the shop, she encountered the appellant in the street 'at the corner of the shops' where he was standing with his friend, named 'Tefo'. Tefo called her over as he was selling shoes. An exchange took place about the shoes with the complainant indicating that she did not have money to buy shoes but that she would need to look for her boyfriend to see if he would buy them for her. The appellant then instructed Tefo to leave, indicating that he would catch up with Tefo further along the way.

7. An exchange occurred between the appellant and the complainant, with the appellant advocating that the complainant should 'sleep' with him and him attempting to persuade her to agree thereto. She refused, given that Mamokethi was her friend and because she was involved in an intimate relationship with the appellant's cousin. When the appellant's powers of persuasion proved ineffective, he grabbed the complainant by the hair and forcefully pulled her in the direction of the street in which he resides. The complainant resisted and screamed, and a shuffle ensued, with the appellant at one point pulling out a knife and holding it against her neck. The complainant tried to ward off this attack by grabbing the knife, injuring her fingers superficially in the process. During the shuffle, the appellant tightened his grip on her by compressing his arm around her neck and

pushed her in the direction of his house. During cross-examination the complainant indicated that at some point during the shuffle she fell to the ground whereupon the appellant kicked her in the ribs and dragged her for a distance.

8. Once at his house, the appellant instructed her to undress and threatened to kill her if she dared to scream. She tried unsuccessfully to resist his advances by trying to cover her private parts with her trousers but the appellant overpowered her by strangling her and pushing her arms away. The appellant then had sexual intercourse with her by inserting his penis into her vagina against her will and without her consent. After the incident, the complainant walked back home and the appellant threatened to come and fetch her the following day to have sexual intercourse again.

9. She reported the incident to her friend Lebo immediately upon her return home on the night of the incident and to the police the following day, after which she was examined by a medical practitioner (Dr Olayiwola) who completed the J88. The complainant's evidence at the trial corresponded in essential aspects with the complainant's account of the incident, as reported to Sergeant Setshele and Dr Olayiwola the day following the incident.

10. The appellant testified that he and the complainant had been involved in a clandestine 'part-time' sexual relationship for a period of two years prior to the incident in question. They had made a prior arrangement for him to come and collect her at the house under the pretence of looking for his girlfriend, so that they could be together. He went to the house to enquire about his girlfriend, as arranged, accompanied by his friend 'Tefo'. After leaving the house, he waited for the complainant in the street, a few houses away, still in the company of Tefo. The complainant came to meet him, as arranged. He then told Tefo to leave. The complainant accompanied him voluntarily to his residence without being threatened or assaulted by him and without being pushed or pulled to his residence, where they eventually enjoyed consensual sexual intercourse. He did not dispute that the complainant sustained the injuries depicted in the J88 but

denied having assaulted the complainant, stating that he did not know who had assaulted her.

11. It bears mentioning that the complainant vociferously denied making any arrangement with the appellant to come and collect her on the night in question or that she had been sexually involved with the appellant prior to the incident. She also denied that they had a clandestine love affair.

12. Dr Olayiwola confirmed the outcome of his examination of the complainant and the injuries sustained by her, as recorded in the J88, during his evidence at the trial. The gynaecological examination revealed abrasions and lacerations around the para-urethral folds, multiple abrasions around the labia minora, fresh tears to the hymen, with, *inter alia*, visible bruising, clefts and bumps and multiple abrasions around the perineum. A painful left forearm and abdomen were noted, with superficial cuts to two of the complainant's fingers, consistent with having been inflicted by a sharp object. Dr Olayiwola testified the gynaecological injuries were indicative of a struggle or a female not being sexually aroused or not being ready for sexual intercourse, but more pertinently, were consistent with the complainant's account of non-consensual intercourse. He confirmed that the complainant reported that the date and time of her last sexual intercourse - with consent - was on 15 June 2019 at approximately 22h30.[2] During cross-examination, Dr Olayiwola readily conceded the possibility that injuries of the nature suffered by the complainant (i.e., those detected by gynaecological examination) could occur even during consensual intercourse in circumstances where the female in question was not ready (sufficiently aroused or lubricated) at a time when sexual intercourse occurred.

[2] The time given indicates that this occurred after the incident involving the appellant.The complainant was cross-examined on this aspect during the trial. Her evidence was that she did consent to having sexual intercourse with her boyfriend as she did not initially want to reveal to him that she had been raped. During further questioning, she indicated that the act of sexual intercourse with her boyfriend was not completed because he had been alerted to the earlier incident. The issue was not pursued further through questioning by the appellant's legal representative or clarified during re-examination by the State.

13. The grounds of appeal, as gleaned from the record, were that:

13.1. The trial court misdirected itself in that it did not apply the necessary caution in analysing the evidence of the complainant which implicated the appellant in the commission of the crime of rape and by accepting the complainant's version when her evidence was 'entangled with ambiguity and inconsistencies';

13.2. The trial court erred in finding that the State had proved the appellant's guilt beyond reasonable doubt and in not finding that the appellant's version was reasonably possibly true, particularly in circumstances where the State failed to 'bring all evidence before the court for it to come to a fair decision in the matter.';

13.3. The trial court itself failed to exercise its judicial discretion to call witnesses (being the complainant's boyfriend, Lebo or Tefo) in terms of s186 of the CPA.[3]

14. The central issue for determination in this appeal is whether the trial court erred in finding that the State had proved beyond a reasonable doubt that sexual intercourse between the appellant and the complainant occurred without the latter's consent. In this regard, see *S v Van Der Meyden.*[4] The onus of proving its case rests upon the prosecution. The required standard is proof beyond a reasonable doubt. If an accused/ appellant's version is reasonably possibly true, he should be acquitted. Proof beyond reasonable doubt does not, however, equate to proof to an absolute degree of certainty. It means that there should be such proof

[3] Criminal Procedure Act 51 of 1977, as amended.

[4] *S v Van Der Meyden* 1999(1) SACR 447 (W) at 449J-450B, where the following was said: '*The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be 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.*'

as leaves no reasonable doubt in the mind of an ordinary man capable of sound judgment and of appreciating human motivations. It means a high degree of probability, not proof beyond a shadow of a doubt or proof beyond *all* doubt. The State does not have to close every avenue of escape, and fanciful or remote possibilities can be discounted as these do not lead to *reasonable* doubt. To be a reasonable doubt, the doubt must not be based on pure speculation but must be based upon a reasonable and solid foundation created either from the positive evidence or gathered from reasonable inferences not in conflict with or outweighed by the proved facts.[5]

15. In my view, the trial court evaluated the evidence on the basis set out in *Van Der Meyden* supra. The trial court took care to consider the totality of evidence and left none of the material evidence out of account. To this end, the learned magistrate, in a detailed judgment, carefully analysed the evidence of all the witnesses, including that of the appellant and the complainant and reached a decision based upon a consideration of the full conspectus of the evidence, including the merits and demerits in the countervailing versions of the appellant and complainant, whilst weighing the inherent improbabilities in each version against the undisputed facts. The trial court was alive to certain contradictions in the State's evidence that emerged during the trial. Indeed, the trial court specifically alluded to these in its judgment. In my view, these contradictions did not impact upon the veracity or reliability of the complainant's version apropos the issue of consent. They related to peripheral issues only, which, when objectively viewed, would have had no impact on the ultimate outcome of the trial court's assessment of the evidence on the only determinable issue at trial, namely whether sexual intercourse between the complainant and appellant was consensual.[6] As such, the state's failure to call

[5] See further *R v Mlambo,* quoted in fn 7 below.

[6] Pheripheral issues included: (i) whether the complainant's friend Lebo would corroborate the complainant's testimony that she first had reported the rape to her on the night in question. In this regard, the undisputed evidence was that Lebo was drunk (i.e., under the influence of alcohol) on the night in question. There was no suggestion by the defence that Lebo would nonetheless have been in a position to remember the events, let alone the impact of the events of 15 June 2019 upon the

witnesses who could not shed light on that pertinent issue, did not amount to any misdirection or failure in the exercise by the trial court of its discretion to arrive at a just result in the matter.

16. The trial court was equally alive to the fact that the evidence of the complainant, who was a single witness regarding the incident of rape and the pivotal question of consent, must be viewed with caution. In terms of s 208 of the Criminal Procedure Act, 51 of 1977, an accused can be convicted of any offence on the single evidence of any competent witness. It is well established in our law that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (see, for example, *S v Webber* 1971 (3) SA 754 (A) at 758G-H). The correct approach to the application of this so-called 'cautionary rule' was set out by Diemont JA in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G, as follows:

> 'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness... The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in *R v Mokoena* 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded" (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

---

complainant; (ii) whether the complainant's boyfriend would corroborate the appellant's counsel's speculative suggestion that he (the complainant's boyfriend) had assaulted the complainant after the rape – the appellant's evidence was, after all, that he had no idea who assaulted the complainant prior to 16 June 2019 and therefore the evidence by the complainant that she was *not* assaulted by her boyfriend remained undisputed; and (iii) whether Tefo had accompanied the appellant to the house of the complainant's in-laws, a factor that in my view was immaterial in the grand scheme of events. The complainant's evidence that she had a discussion with Tefo about certain Puma shoes that he was marketing for sale, and the outcome of such discussion. was likewise not in dispute. There was no suggestion by the appellant that Tefo knew of the alleged arrangement between himself and the complainant. Tefo's evidence would therefore not have assisted in a determination of whether or not sexual intercourse would have occurred by consent or not

17. The appellant's counsel argued that the complainant's evidence was 'entangled with ambiguity and inconsistencies' without, however, indicating in what respects her evidence was either ambiguous or inconsistent in material respects. The trial court found ambiguity or material inconsistencies which impacted on the court's ultimate findings such as to create a doubt regarding the veracity of the appellant's version.

18. The trial court adopted a holistic approach in assessing all the evidence and found, correctly so my view, that the complainant's account of the rape was reliable and sound, more particularly, in that she stood steadfast on the essential aspects of her evidence against the appellant regarding the occurrence of forceful, non-consensual sexual intercourse to which she had been subjected on the night in question. In my view, the complainant maintained her version despite rigorous cross-examination and despite the speculative suggestion by the appellant's counsel that she had been assaulted by her boyfriend after being caught out for cheating on him, a fact, I might point out, that was not established in evidence and which was in any event belied by the appellant's own testimony at the trial. The appellant's suggestion in his testimony that the complainant was giving false evidence or that she had a motive to falsely implicate him because she did not wish to be caught out by her boyfriend for cheating on him, was likewise belied by the undisputed and unrefuted evidence of the complainant that she had in fact disclosed the occurrence of the incident to her boyfriend on the night in question. There were, in my view, no material contradictions or inconsistencies in her evidence on the essential aspect of consent, and her evidence regarding the commission of the rape was both consistent and clear.

19. The trial court found the complainant to be a credible witness whose testimony appeared to be truthful. The undisputed evidence was that she was emotionally distressed and upset as a result of the rape, which condition was corroborated by the testimony of Sergeant Setshele and Dr Olayiwola, who both witnessed her emotional state and condition the day after the incident. Such a state of acute

upset and distress is in my view, incompatible with being in a loving relationship with a person, even if it were to have been conducted in secret. A further aspect of the complainant's testimony, which remained undisputed, was that the appellant was feared in the community as well as by the complainant, so much so that she reported the incident to the police because she feared that the appellant would make good on his threat to come and find her and repeat his unlawful conduct the following day.

20. As regards the credibility finding that was made in respect of the complainant as a single witness, the Supreme Court of Appeal held as follows in *S v Pistorius* 2014(2) SACR 315 (SCA), para 30:

> "It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706; *S v Kebana* [2010] 1 All SA 310 (SCA) para 12. 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."

21. I am not persuaded from a reading of the evidence or a consideration of the written arguments presented on behalf of the appellant that the trial court's credibility finding was clearly wrong.

22. The trial court also correctly considered the probabilities against the facts of the case in concluding that the state had proven the guilt of the appellant beyond a reasonable doubt. In this regard, see: *S v Chabalala* 2003 (1) SACR 134 (SCA) at para 15[7] and *S v Phallo & Others* 1999(2) SACR 558 (SCA) at 562, para 10.[8] The learned

---

[7] There the following was said: "*The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). 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*

magistrate considered the fact that that there was no evidence to show that the complainant had ever before needed to cover up her alleged sexual engagements with the appellant and if she had agreed to have consensual sexual intercourse with the appellant on the night of 15 June 2019, there is no plausible explanation for why she returned therefrom so emotionally disturbed, upset and distressed. Accepting the undisputed evidence that she was in a loving and intimate relationship with her boyfriend (Elias), with whom she lived at the time, and accepting her undisputed evidence that such relationship with her boyfriend had never been abusive or threatening in the sense that he had never once assaulted her, the only inference, consistent with the proven facts,[9] is that the injuries sustained by her were due to the fact that sexual intercourse with the appellant was uninvited, non-consensual and forcefully imposed upon her at a time when she was not aroused in circumstances where it was non-consensual.

23. Having regard to the aforegoing, and for all the reasons given, I conclude that the trial court correctly found that the State proved the appellant's guilt beyond reasonable doubt. It is evident that the appellant was correctly convicted and I would propose that the appeal against conviction be dismissed.

(apparently) obvious aspect without assessing it in the context of the full picture presented in evidence..."

[8] There the following was said: "...In our law, the classic decision is that of Malan JA in *R v Mlambo* 1957 (4) SA 727 (A). The learned Judge dealt, at 737F-H, with the argument that proof beyond reasonable doubt requires the prosecution to eliminate every hypothesis which is inconsistent with the accused's guilt or which, as it is also expressed, is consistent with his innocence. Malan JA rejected this approach, preferring to adhere to the approach which 'at one time found almost universal favour and which has served the purpose so successfully for generations' (at 738A). This approach was then formulated by the learned Judge as follows (at 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.'*..."

[9] The approach to be adopted in dealing with circumstantial evidence in criminal cases was formulated by Watermeyer JA *R V Blom* 1939 AD 288 at 302-3 as follows: "(a) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn. (b) The true facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct."

24. In the result, the following order is granted:

ORDER:

1. The appeal is dismissed.

A. MAIER-FRAWLEY

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

I agree:

S. MIA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and uploaded to CaseLines and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 23 September 2021.)

Date of hearing:	7 August 2021
Judgment delivered	23 September 2021

APPEARANCES:

Counsel for Appellant:	Adv. L Mosoang c/o Legal Aid South Africa Johannesburg Local Office..
Counsel for Respondent:	Adv. R.M Kau c/o Office of the Director of Public Prosecutions