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

CASE NO: A181/2019

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED:

23 September 2022

In the matter between:

KGOMOTSO RAMOKOKA

Appellant

and

THE STATE

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 23 September 2022.

JUDGMENT

MALINDI J:

Introduction

[1] On 19 August 2014, the appellant; Kgomotso Ramokoka, was found guilty on two counts by the Protea Magistrate Court (court a *quo*). The first was Kidnapping and the other was rape in terms section 3 of Act 32 of 2007 (Rape). He was sentenced to 5 years' imprisonment. The sentencing Court found compelling and substantial circumstances to be present, allowing for a deviation from the prescribed minimum sentence of 15 years in respect of the count of Rape. The court a *quo* further ordered that the sentences imposed on both counts be served concurrently.

[2] The appellant applied for leave to appeal against conviction. Leave to this Court was granted by the court a *quo* on 28 November 2014. Bail pending the appeal was set at four thousand rand (R4 000.00) on 11 December 2014.

Factual Background

[3] It is common cause that on 7 March 2011, the complainant (referred to as "L" and her female friend (referred to as "Z") were in each other's company at a shopping venue in Pimville, Soweto. They met one Petros whom they knew prior to that day. Petros was with the appellant at the same venue. L and Z requested Petros to buy them alcoholic drinks and he acceded to their request.

[4] Eventually the appellant, Petros, L and Z went to the appellant's place of residence where they sat. As the wind was dusty and blowing, L requested the appellant permission to bath. The appellant acceded to the request and, as a result, proceeded to pour water for L to bath. After L had taken the bath, the group went to Alexandra where they ate and consumed alcohol. They left after midnight.

[5] L and Z testified that upon their arrival in Soweto at approximately 1 am the appellant dropped Petros at his place of residence. They further testified that they drove with the appellant because he had compelled them to enter his vehicle. They also testified that he was very aggressive. They testified that the appellant chased L down as L was trying to flee prior to him forcing them into the vehicle.

[6] The appellant drove with both ladies (L and Z) to his place of residence and upon arrival he parked his car, opened the garage and released his big dogs. Neither

of the two ladies tried to flee because they feared the appellant. They then followed the appellant to his room where they sat. Z managed to make contact with her male friend, A [...], whom she requested to come and fetch her. The friend arrived and left with Z and L was left behind. The appellant refused L to leave with Z and her male friend.

[7] Subsequent to her leaving, Z managed to report to the police that the appellant is keeping L in his room against L's will. The police responded and went to the appellant's place of residence with Z. Upon arrival, L was found seated on the bed of the appellant. She was wearing a T-shirt and was crying. When asked if she was fine, L reported to the police officer that she was raped by the appellant. The report was made in the presence of the appellant to which he did not respond.

[8] Both L and the appellant were then taken to the Kliptown Police Station. L was later examined by a medical practitioner. The medical report recorded no injuries on her body. However, according to L's testimony, the appellant had forced sexual intercourse with her after she co-operated by undressing herself and not resisting or trying to flee. She attributed her cooperation to her fear of the appellant.

[9] The appellant disputed L's testimony and testified that the sexual intercourse between himself and L was consensual. He justified consent on the grounds now forming part of the grounds for leave to appeal.

[10] The court a quo made a finding against the appellant. This resulted in the appellant being convicted and sentenced to an effective term of five (5) years of imprisonment. It is worth repeating that the appeal is against the conviction only.

Grounds of appeal

[11] The grounds of appeal are set out in the appellant's notice of appeal. In a nutshell, the appellant alleges the following:

[11.1] The court *a quo* erred in finding that the testimony of L was reliable and satisfactory in all respects and that insufficient weight was attached to the following improbabilities in her evidence:

- a) L voluntarily undressed and put on a t-shirt belonging to the appellant prior to having sexual intercourse with the appellant.
- b) L seemingly voluntarily remained behind at the appellant's room when her friend left with her male friend, A [....].
- c) That L never resisted and opened up her legs and co-operated when the appellant wanted to have sex with her.
- d) That L did not scream to alert the persons in the adjacent rooms.
- e) That L and Z eventually went voluntarily with the appellant back to his room.
- f) That L never attempted to run away from the appellant's room, either when Z left or after having sexual intercourse, while the Appellant dozed off.
- g) That L never tried to escape from the appellant's vehicle.

[11.2] The court *a quo* erred in finding that L and Z were reliable witnesses.

[11.3] The court *a quo* erred in finding that the evidence of the appellant was false and not being reasonably possibly true, especially in light of the fact that the court *a quo* finding that there were no contradictions in the evidence of the appellant.

[11.4] The court *a quo* erred in finding that the medical evidence or report was irrelevant because forensic sister at the clinic did not observe any physical injuries.

Condonation for the late filing of the appellant's heads of argument

[12] I would like to dispose of one preliminary issue which relate to the late filing of the appellant's heads of argument. The application for condonation was signed on 11 January 2021 and uploaded to Case Lines the following day. The affidavit in support of the condonation application was deposed to by Mr Guarneri, Unit Manager at the Johannesburg Legal Aid Office. Mr Guarneri stated that he noticed that this matter was placed on the provisional appeal roll which he received on 5 November 2021. Upon being invited to the matter on Case Lines, he then noted that the appellant appeared to have been given bail. However, their paralegal was unable to find the appellant at the address provided. It was only in late November that their paralegal established that the appellant is incarcerated in a different case with case number 214 291 425. The paralegal then managed to trace the appellant at the Johannesburg Prison and obtained power of attorney from the appellant confirming that he wanted legal aid assistance from their office.

[13] Thereafter, on 10 December 2021, Advocate Milubi was appointed to prepare heads of argument on urgent basis. The heads of argument were settled by Advocate Milubi and were uploaded to Case Lines on 20 December 2021. Mr Guarneri stated that their office was closed for the December holidays at that time. He says he was also on annual leave and returned to work on 11 January 2022 which happens to be the date on which the condonation application papers were prepared. He submits that the delay was not as a result of the appellant's doing but factors which were beyond the appellant's control who was not on bail as they thought but incarcerated. It took time to make contact with him in the circumstances.

[14] In order to obtain condonation, several factors come into play. As Ponnar JA stated in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others*,¹ such factors:

“...include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice (per Holmes JA in

¹ [2013] ZASCA 5; [2013] JOL 30158 (SCA); [2013] 2 All SA 251 (SCA) para 11.

Federated Employers Fire & General Insurance Co Ltd & another v McKenzie 1969 (3) SA 360 (A) at 362F-G.”

[15] In my view, the explanation of the delay by Mr Guarneri is satisfactory. Further, it is in the interest of justice that condonation be granted to avoid unnecessary delay in finalising this appeal. The appeal touches on issues which are emotive and therefore it would be in the interest of justice to ensure that it reaches finality. It is in the interest of justice for all parties to reach such finality. In any event, it is clear that the appellant cannot be blamed for the delay.

Merits

[16] As stated above, the appellant argues that the court *a quo* erred in finding that the testimony of L was reliable and satisfactory in all respects and that insufficient weight was attached to some improbabilities in her evidence. To this end, the appellant submits that the court *a quo* failed to apply the cautionary rule when dealing with the evidence of the complainant. Furthermore, he submits that the learned magistrate erred when he found that the version of the complainant in respect of what happened inside the room of the appellant to be only ‘slightly worrying’. The State argues that the court *a quo* correctly applied the cautionary rule when dealing with the evidence of L.

[17] 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 L occurred without the latter’s consent. In *S v Van Der Meyden*² it was stated that 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 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

² 1999 (2) SA 79 (W)

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. In other words, the doubt must be one that is based on proven facts or inferences that are drawn from such proven facts which casts reasonable doubt as to the accused's guilt.

Cautionary rule

[18] The danger of relying exclusively on the sincerity and perceptive powers of a single witness has evoked a judicial practice that such evidence be treated with the utmost care. This practice seems to have originated in the following remarks made by De Villiers JP in *R v Mokoena*³:

“Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by [the section], but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc.”

[19] The Appellate Court in *S v Teixeira*⁴ stressed that, in evaluating the evidence of a single witness, 'a final evaluation can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities'.

[20] In *S v Pitsa*⁵, where Teixeira was relied upon, the evidence of a complainant in a rape case was rejected as most improbable given the numerous intrinsic

³ 1932 OPD 79 at 80

⁴ 1980 (3) SA 755 (A) at 761.

probabilities, the omissions and contradictions in her testimony, and the lack of corroboration by other witnesses. In *S v Ganiel*⁶, Leon J stated the following with regard to evidence of a single:

"A Court should approach the evidence of a single witness with caution and should not easily convict upon such evidence unless it is substantially satisfactory in all material respects or unless it is corroborated."

[21] The Appellate Court in *S v Webber*⁷, after examining the case law, concluded as follows (per Rumpff JA:

"Dis natuurlik onmoontlik om 'n formule te skep waarvolgens elke enkele getuie se geloofwaardigheid vasgestel kan word, maar dit is noodsaaklik om met versigtigheid die getuienis van 'n enkele getuie te benader en om die goeie eienskappe van so 'n getuie te oorweeg tesame met al die faktore wat aan die geloofwaardigheid van die getuie kan afdoen."

[22] The Appellate Court took the view that De Villiers JP did not purport to lay down a rule of law, and held that the mere fact that a single witness has 'an interest or bias adverse to the accused' does not necessarily mean that he should not be considered a credible witness.⁸

[23] In *S v Leve*⁹ Jones J pointed out that, if a trial judge does not misdirect himself on the facts or the law in relation to the application of a cautionary rule, but, instead, demonstrably subjects the evidence to careful scrutiny, a court of appeal will not readily depart from his conclusions. This observation was accepted as correct by the Supreme Court of Appeal in *S v Prinsloo & Others*¹⁰ at paragraph 183 where it stated the following:

⁵ (unreported, GSJ case no A253/2012, 8 November 2013)

⁶ 1967 (4) SA 203 (N)

⁷ 1971 (3) SA 754 (A) at 758G–H)

⁸ Id at 757.

⁹ 2011 (1) SACR 87 (ECG) at para 8.

¹⁰ 2016 (2) SACR 25 (SCA).

“... . The approach to factual findings in an appeal was correctly set out by Jones J in *S v Leve* 2011 (1) SACR 87 (ECG) at 90g – i where he explained:

'The trial court's findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies. See the well-known cases of *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 and the passages which follow; *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645; and *S v Francis* 1991 (1) SACR 198 (A) at 204c – f. These principles are no less applicable in cases involving the application of a cautionary rule. If the trial judge does not misdirect himself on the facts or the law in relation to the application of a cautionary rule, but, instead, demonstrably subjects the evidence to careful scrutiny, a court of appeal will not readily depart from his conclusions.”

[24] The fact that a court has not expressly used the words “cautionary rule” or identified the class of evidence in question that requires caution, is not necessarily fatal. As long as it has considered the conspectus of the evidence, weighed the pros and cons, made a judiciously considered judgment and observed the rules regarding the onus of proof, there will be no reason to intervene.¹¹

[25] In *R v Dhlumayo & Another*¹² the court stated that 'appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial judge', and that 'it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered'.

[26] In *S v Matshevha*¹³, Van der Linde J referred to the decision of the Constitutional Court in *Makate v Vodacom Ltd*¹⁴, where the Constitutional Court restated the approach that should be employed by an appeal court in respect of

¹¹ *S v Mahlangu & Another* 2011 (2) SACR 164 (SCA) at [23]–[24]

¹² 1948 (2) SA 677 (A) at 678. See also *S v Mahlangu & Another* 2011 (2) SACR 164 (SCA)

¹³ [2016] ZAGPJHC 89 (29 April 2016) at para 11-12.

¹⁴ 2016 (4) SA 121 (CC) at para 37–41

findings of fact by a trial court. The Constitutional Court explained the reluctance of appeal courts to intervene in such cases because of these advantages enjoyed by the trial court: they are steeped in the matter; they are able to observe the witnesses; and they are able and required to assess probabilities as they manifest within the circumstances prevailing and as they apply to the testifying witnesses. Those findings should therefore not be overturned unless they are clearly wrong or the court has clearly misdirected itself.

[27] The brief survey of the law above reveals the following two principles:

[27.1] It is wrong to move from a premise that the evidence of a single witness inherently lacks a degree of credibility, and therefore requires corroboration automatically.

[27.2] A court of appeal, like in any situation where findings of fact bind it except in exceptional circumstances, cannot deviate from the findings of the court below when the court below has applied itself to assessing the evidence of a single witness and made its findings of fact or credibility.

[27.3] The cautionary rule in fact alerts the court to not being wooed into rejecting the evidence of a single witness merely because the other version is supported by more than one witness regardless of the quality of the single witness evidence.

[28] In my view, the court a quo was equally alive to the fact that the evidence of L, who was a single witness regarding the incident of rape and the pivotal question of consent, must be viewed with caution. In terms of section 208 of the Criminal Procedure Act, 51 of 1977, an accused can be convicted of any offence on the single witness evidence of any competent witness. As indicated, 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. The correct approach to the application of ‘cautionary rule’ was set out by Diemont JA in *S v Sauls and Others*¹⁵, 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.”

[29] The court *a quo* adopted a holistic approach in assessing all the evidence and found, correctly so in my view, that L’s account of the rape was reliable and sound. The complainant gave a trustworthy version despite rigorous cross-examination which yielded only immaterial defects.

[30] 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. This suggestion that L was coerced into laying rape charges were therefore without foundation. There were, no material contradictions or inconsistencies in L’s evidence on the essential aspect of consent, and her evidence regarding the commission of the rape was both consistent and clear.

¹⁵ 1981 (3) SA 172 (A) at 180E-G

[31] Furthermore, the court *a quo* found L 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 fact that she started to cry when she saw Constable Rakumba coming into the room. This court is not at large to reverse that credibility finding unless it is patently clear that it was wrongly made.

Drawing of inference

[32] The appellant argued that it cannot be said that the only reasonable inference to be drawn from the fact that the complainant started to cry when she saw Constable Rakumba coming into the room was that she was raped. Furthermore, he submitted that it is important to mention that the complainant was intoxicated and was found in another man's bed. On this basis, the appellant submitted that it is probable that she cried because she was guilt-ridden.

[33] In *R v Blom*¹⁶ it was held that the inference sought to be drawn must be consistent with the facts and must be the only inference to be made. Further, 'the proved 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 a doubt whether the inference sought to be drawn is correct.'¹⁷ Further, each and every case must be judged on its own peculiar circumstances.

[34] The appellant's reliance on the intoxication of L is misplaced. Intoxication was found not to be fatal in *S v Musipula*¹⁸, where—although the witness admitted that he was drunk on the night of the incident, and could not recall some of the facts—the thrust of his evidence was found to be coherent and without any inherent improbabilities, and was corroborated by the finding of real evidence.

¹⁶ 1939 AD 188 at 202

¹⁷ *Id* at 203.

¹⁸ Unreported, GNP case no A827/12 (14 June 2013).

[35] Furthermore, In *S v Naidoo*¹⁹, it was held that the fact that the complainant in a rape case was shown to have had a high level of inebriation at the time was not enough to render her evidence as a whole unreliable or untruthful, since 'a careful reading of her evidence portray[ed] a coherent, detailed and consistent narration of events' and 'not a single part of her version . . . warrant[ed] outright rejection'. Most contradictions were satisfactorily explained and those which were, not did 'not impact so adversely on the quality of her evidence' so as to render her testimony, as a whole, unreliable. The question to be answered is whether consent was granted or whether the complainant was so drunk as to have forgotten that they gave consent.

[36] In the current case, it was clear from the evidence before the trial court that L feared the appellant. This was corroborated by the evidence given by Z. Although both Z and L accepted that they were drinking alcohol and intoxicated on that night, that fact cannot be used to question the credibility and truthfulness of their evidence. The quality of the evidence has to be assessed in the context of the case and all other factors that give credit to it. In the totality of the accepted evidence, I am of the view that the trial court correctly found that the only reasonable inference to be drawn from the fact that the complainant started to cry when she saw Constable Rakumba coming into the room was that she was raped.

Credibility of the complainant

[37] The appellant also argued that the trial court ought to have found that the complainant was not a credible witness and rejected her evidence. The credibility of witnesses can be decisive to the outcome of a case. A wide variety of factors must be taken into account in assessing credibility:²⁰

“Included in the factors which a court would look at in examining the credibility or veracity of any witnesses, are matters such as the general quality of his testimony (which is often a relative condition to be compared with the quality of the evidence of the conflicting witnesses), his consistency

¹⁹ [2019] ZASCA 52 (unreported, SCA case no 333/2018, 1 April 2019) at [51]

²⁰ *Hees v Nel* 1994 1 PH F11 (T) 32.

both within the content and structure of his own evidence and with the objective facts, his integrity and candour, his age where this is relevant, his capacity and opportunities to be able to depose to the events he claims to have knowledge of, his personal interest in the outcome of the litigation, his temperament and personality, his intellect, his objectivity, his ability effectively to communicate what he intends to say, and the weight to be attached and the relevance of his version, against the background of the pleadings.”

[38] The court's rejection of the testimony of a witness does not necessarily establish the truth to the contrary. In *Rex v Weinberg*²¹ it was pointed out that the disbelief of the statement of a witness merely removes an obstacle to the acceptance of evidence tending to prove the contrary. This does not mean that unreliability is irrelevant.

[39] In *Goodrich v Goodrich*²² it was also emphasised that a court should carefully guard against the acceptance of the fallacious principle that a party should lose its case as a penalty for its perjury or lies under affirmation. It was pointed out that the specific circumstances of each case should be considered and that in each case the court should ask itself whether the fact that a party has attempted to strengthen or support its case with lies proves or tends to prove the belief of a party that its case is ill-founded: as a general rule a carefully considered and prepared false statement (and *a fortiori* a conspiracy with others that they should give false evidence in support of the case of the party concerned) would more likely be an indication of a party's awareness of the weakness of its case than a story contrived on the spur of the moment.

[40] Credibility goes more to a witness's lack of credit in that she/he is mendacious, lies in order to strengthen her/his case, lacks candour or there exists a factor, such as personal interest, that may affect the quality of their evidence. There was no suggestion that L's evidence was tainted by any of these factors.

²¹ 1939 AD 71 80. See also *S v M* 2006 (1) SACR 135 (SCA) at [281].

²² 1946 AD 390 at 396-7.

Medical Report

[41] Lastly, the appellant submitted that the court *a quo* erred in finding that the medical report was irrelevant because forensic sister at the clinic did not observe any physical injuries. He submitted that it is clear that the complainant's version that she was raped by the appellant was not corroborated by the medical report (J88). In other words, the appellant argued that the court *a quo* unjustifiably ignored the medical report to his detriment. This, submission, is unsustainable because penetration without consent in rape cases does not need to be followed by injuries especially if the victim gives in to the perpetrator's forced penetration due to fear.

[42] The court weighs or evaluates evidence to determine whether the required standard of proof has been attained. It is only after the evidence has been admitted and at the end of the trial that the court will have to assess the final weight of the evidence. It is not necessary for a court to deal with every minute detail of the evidence led at the trial, particularly if those details are immaterial to or have no bearing on its conclusions.

[43] The appellant's argument seems to question the weight given to the evidence relating to the medical report. Given the totality of the evidence which was at the disposal of the court *a quo* for evaluation and assessment, I am of the view that the evidence on the medical report was irrelevant to the extent that absence of evidence of forced penetration does not mean absence of rape. Accordingly, the appellant's argument on this ground is dismissed.

Conclusion

[44] Having regard to the foregoing, and for all the reasons given, I conclude that the court *a quo* correctly found that the State proved the appellant's guilt beyond reasonable doubt. It is evident that the appellant was correctly convicted and I propose that the appeal against conviction be dismissed.

[45] In the result, the following order is made:

The appeal is dismissed.

G MALINDI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

I AGREE

P.P
SENYATSI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

FOR THE APPELLANT:	Adv. EA Guarneri
INSTRUCTED BY:	Legal Aid South Africa
FOR THE RESPONDENT:	Adv. D. Van Wyk
INSTRUCTED BY:	Legal Aid South Africa
DATE OF THE HEARING:	20 January 2022
DATE OF JUDGMENT:	23 September 2022