REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A963/2013
DATE:12/5/2014

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

_____ _____
DATE **JUDGE: AC BASSON**

In the matter between:

WISEMAN BONGANI DUBA Appellant

vs

THE STATE Respondent

JUDGMENT

BASSON, J:

[1] The appellant was convicted in the Regional Court of Carolina, Mpumalanga on one count of housebreaking with the intent to rape and rape, one count of robbery and one count of theft. He pleaded not guilty on all charges. He was convicted and sentenced on 1 October 2012 and sent to thirteen years imprisonment on count one, and one year imprisonment on count 2 and 3, The court ordered that the sentenced in respect of count 2 and 3 run concurrently with the sentenced imposed in respect of count 1. The presiding magistrate granted leave to appeal against conviction and sentence.

[2] I do not in tend to summarise the facts giving rise to the conviction in detail and will suffice with a brief summary of the evidence. The complainant was a 43 year old female at the time of the incident. She lived with her children and grandchildren at home. She testified that she was sleeping in one room with her daughter and two small children. Her other son, A, was sleeping elsewhere in the house. She testified that they heard a noise in the house. During the night the complainant woke her daughter (B) to enquiry whether she had closed the kitchen door. The complainant testified that she then called her son A (who was in a room in the house). A did not answer the phone but they could hear A's cell phone vibrate outside the room. The complainant thereafter phoned M M (the complainant's stepson who resided elsewhere) for help. The bedroom door opened and the appellant entered the room. B tried to hide under the bed. The complainant was taken to the kitchen where she was raped. B had in the interim fled to the neighbours for help. The complainant testified that the appellant told her that she must tell her children to keep quiet otherwise he was going to shoot all of them. When M arrived he chased the appellant but was unable to catch him. M confirmed in his evidence that the complainant had phoned him and that she

had told him there was a noise in the house. He testified that he got up and ran to the house with a stick. He heard a noise in the kitchen and saw a person running out of the kitchen. He testified that he chased this person and tried to hit him with a stick but the person had a knife in his hand.

[3] It was not in dispute that the appellant had sexual intercourse with the complainant in the kitchen. It was also not in dispute the appellant had the two cell phones that he had taken from the complainants' house and that the two cell phones were returned the next day. It is further common cause that the complainant had sustained injuries to her head.

[4] The appellant's version was that he and the complainant had a relationship and that sexual intercourse was consensual. He testified that because the complainant was much older than him they had to keep the relationship a secret as it was taboo in their culture. He testified that he often went to her place. This was vehemently denied by the complainant who testified that she has never seen the appellant before this evening and that she did not have a relationship with someone who was the same age of some of her children.

[5] The appellant, however, had different and contradictory versions about the events of the evening and about his relationship with the complainant. He gave, *inter alia* different versions about the arrangements that were allegedly made earlier the day. At first he stated that he walked past the complainant's house earlier the day and that he told the complainant that he would come to her place in the evening. Then he stated it was the complainant who had invited him to come over the evening. However, in cross-examination it was put to the

complainant that she was the one that contacted him and invited him over. He also testified that the complainant had told him that when he comes over he will find the door unlocked as usual. He then found the door opened and walked to her bedroom. However, in his plea explanation the version is that it was the complainant who opened the door for him when he arrived. The appellant also had a farfetched version that the complainant had told him that she was pregnant. This evidence was not only denied by the complainant but also supported by other state witnesses who testified that this was untrue.

Evaluation of the merits of the appeal

[6] It is trite that the onus rests on the State to prove the guilt of an accused beyond reasonable doubt. If the version of the accused is reasonably possibly true, the accused is entitled to an acquittal. It is also trite that the mere fact that an accused lie in Court or gives contradictory evidence, it does not follow that the accused is guilty or that the evidence of the complainant is necessarily reliable and true.[1]

---

[1] See also *S v MBULI* 2003 (1) SACR 97 (SCA):*"[57] It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent (R v Difford 1937 AD 370 at 373, 383). In S v Van der Meyden 1999 (2) SA 79 (W), which was adopted and affirmed by this Court in S v Van Aswegen 2001 (2) SACR 97 (SCA), I had occasion to reiterate that in whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. In similar vein the following was said in Moshephi and Others v R LAC (1980 - 1984) 57 at 59F - H, which was cited with approval in S v Hadebe and Others1998 (1) SACR 422 (SCA) at 426f - h:*

> *'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is*

[7] The Court has also taken into account that the complainant was a single witness in respect of the rape incident. However, although the complainant was a single witness in respect of the incident, important corroborative evidence was led by two of the complainant's children and her stepson as to the events prior and after the rape which supports the contention of the complainant that she was raped and which cast serious doubt on the version of the accused that he had a consensual sexual relationship with the complainant.

[8] What is required of a Court is to properly evaluate all the evidence bearing in mind the fact that the complainant was a single witness (cautionary rule)[2]: I am also mindful of what the Appellate Division (as it then was) said about the application of the cautionary rule: *S v Saults* 1981(3) SA 172 (A):

> *"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of RUMPFF JA in S v Webber1971 (3) SA 754 (A) at 758). 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 may be a guide to a right decision but it does not mean "that the*

---

necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'"

[2] See *S v Jackson* 1998 (1) SACR 470 (SCA at 476E – F where the Court held that the cautionary rule does not have general application in sexual assault cases: *"In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt - no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule"*

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 Bellingham1955 (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."

[9] It is clear from the judgment that the magistrate has evaluated the evidence carefully as is evidenced by the detailed summary of the evidence. The presiding officer was also acutely alive to the need to approach the evidence of the complainant with the requisite caution in circumstances where she was a single witness in a rape allegation.

[10] The magistrate also made significant credibility findings in favour of the complainant. I am of the view that these credibility findings were justified despite some contradictions and inconsistencies in her evidence. Furthermore in respect of the events before and prior to the rape incident, the complainant's evidence was corroborated in material aspects by her children. In respect of the appellant the magistrate stated in her judgment that the appellant made a "*besondere swak indruk op die hof as 'n getuie*". In this regard the magistrate specifically referred to the various contradictions in his evidence. The magistrate also concluded that the appellant's version was highly unlikely and that could not be reconciled with any form of logic, I am of the view that this credibility finding are not only justified but borne out by the record. Furthermore, in the absence of demonstrable and material misdirection by the trial court, its finding of fact are presumed to be

correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.[3]

[11] I can therefore find no reason to interfere with the conclusion reached by the magistrate in respect of conviction.

[12] In respect of sentence I can equally find no reason to interfere with the sentence imposed on the appellant. The magistrate took into account the fact that the complainant was assaulted and that she had sustained injuries. The appellant raped the complainant was she was in her home and whilst her children was present. He also showed no remorse but instead tried to embarrass her by averring that they had a secret love affair. The appellant also has a precious conviction of theft. More importantly, this Court cannot ignore the fact that the complainant was raped. It is trite that this is a serious offence. In this regard I am in full agreement with the sentiments expressed by the Supreme Court of Appeals in *S v Chapman:*[4]

> *"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution* and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have*

[3] *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645G - H: *" ….. the credibility findings and findings of fact of the trial Court cannot be disturbed unless the recorded evidence shows them to be clearly wrong.*

[4] 1997 (3) SA 341 (SCA) at 354C – D.

a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

[13] Although an effective sentence of 13 years' imprisonment is undoubtedly a severe sentence, I am not persuaded that the magistrate misdirect himself in any relevant respect in imposing that sentence. In this regard I am also in agreement with the sentiments expressed in *S v Chapman*[5]

"The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights."

[14] In the event the appeal against conviction and sentence is dismissed.

_____
AC BASSON
JUDGE OF THE HIGH COURT

I agree

_____
W HUGHES
JUDGE OF THE HIGH COURT

[5] Ibid at 345C – D.