


IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: A784 / 13

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| DELETE WHICHEVER IS NOT APPLICABLE | |
| (1) REPORTABLE: YES / NO. | |
| (2) OF INTEREST TO OTHER JUDGES: YES / NO. | |
| (3) REVISED: | |
| 20/02/2014 DATE |  SIGNATURE |

20/2/2014

In the matter between:

MPHAPHULI

Appellant

V

THE STATE

Respondent

Coram: **TLHAPI J AND MALINDI AJ**

JUDGMENT

MALINDI AJ

INTRODUCTION

- [1.] The Appellant was convicted by the Regional Magistrate's Court of Vereeniging for rape of a minor. He was sentenced to 20 years imprisonment and it was ordered that his name be placed in the Registrar for Sexual Offenders.
- [2.] He applied for and was granted leave to appeal against his conviction by the Magistrate.
- [3.] When the grounds of appeal as set out in the application for leave to appeal are considered, it is apparent that the appeal is against the whole judgment and therefore no attempt will be made to deal with the grounds separately.
- [4.] It was common cause at the trial, or at least it was not disputed by the Appellant, that the minor child had been raped. The medical examiner had found multiple, partially healed injuries on both sides of the para-urethral folds of the vagina, measuring 0,5-10ml, compatible with recent forceful penetration. The only question was whether it was by the Appellant.

[5.] The Magistrate found the minor child's evidence reliable in the following respects.

5.1. She pointed the Appellant out in court. (She gave evidence through the intermediary room and was brought into court only for this purpose).

5.2. She testified that she had never been raped before.

5.3. She had never been driven to school by anyone else except the Appellant during the relevant period.

[6.] Regarding the mother's evidence the Magistrate took the following into account.

6.1. When the mother tried to give the child a bath the child "*got scared*". [p. 42, l 7-9]

6.2. The child was taken to school by the Appellant on that day. [p. 42, l 10-13]

- 6.3. On the day after school the child told the mother that the Appellant is the person who raped her. [p. 42, l 14-16]
- 6.4. The day on which the rape was reported to the police is inferred as being 26 August 2011 because the Medico-Legal Examination (J88) was done on 27 August 2011 at 4h30. [p. 42, l 17-22]
- 6.5. On a previous occasion the Appellant had delivered all the children except the complainant. When the mother called the Appellant his excuse was that he had to return to the school with the complainant and confirmed that she was still with him. He then dropped the child at the street corner and she had arrived home crying. [p. 43, l 7-16]
- 6.6. It was put to the mother that the laying of the rape charge was motivated by her being angry with the Appellant for demanding payment for the month of July. She denied this and stated that she did not owe the Appellant at the time as payment for August was not due. [p. 43, l 17-18]

[7.] In considering the Appellant's evidence the Magistrate pointed the following out:

7.1. He testified that he last transported the child on Wednesday, 3 August 2011 (because he had not been paid for July. [p. 43, l 22-24]

7.2. On 5 August 2011 the mother called him to collect his money but instead was refused entry into the house and then accused of touching the child. [p. 43 l 24-44, l 5]

7.3. He received a call from the mother a week before his arrest informing him that she was going to the police. [p. 44, l 6-10]

7.4. When he started transporting the child (in July) he was told to always drop her at the gate because she had been raped before. [p. 44, l 11-13]

[8.] The court then warned itself to the applicable legal principles, including that the State bears the onus of proof and that the evidence of the complainant needs to be approached with caution. [p. 45, l 17 - p. 46, l 3]See S v

Ambros 2005 (2) SACR 211 (C) at 215-216); S v Zuma 2006 (2) SACR 191 (W) at 210-211;

[9.] The Magistrate found the Appellant's version not to be reasonably possibly true for the reasons that:

9.1. The mother's motive could not have been about the money allegedly owed to him because according to him he never demanded to be paid after the confrontation of 5 August 2011. Therefore it is improbable that the issue could have led to a charge of rape being laid only on 26 August 2011. [p. 48, l 1-16]

9.2. The Appellant's argument that the mother is protecting the real rapist and using the rape that the Appellant was told about in order to get at him is highly improbable. [p. 47, l 16-23]

[10.] For the rejection of an accused's version as not reasonably possibly true Zulman JA, in S v V 2000 (1) SACR 453 (SCA) at 455A-C said the following:

'The accused's failure to convince the court is a further guarantee of the veracity of the evidence tendered by the State.'

It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true. I do not find it improbable (as the magistrate did) that the complainants would conspire to fabricate charges against the appellant. The magistrate is incorrect when he states in his judgment that 'no evidence was forthcoming to this effect'.

[11.] It is clear from the Magistrate's evaluation of the evidence above that he rejected the Appellant's evidence as false and therefore applying the legal principle correctly.

[12.] On the other hand, the complainant's and the mother's evidence was found to be truthful, reliable and credible. [p. 48, ¶ 17-25]

[13.] It must be added to the Magistrate's reasons, if this does not appear clearly therein, that the Appellant also lied about when he last transported the child. The mother testified that the Appellant had continued to transport the child up to 26 August 2011 whereas the Appellant says it was up to 3 August 2011. The mother's evidence is clear that the child refused her mother to touch her body while bathing her on the Friday and that on the same Friday about 22h30 the child told her that the Appellant raped her. [p. 19, l 9 - p.20] It was on the same Friday, 26 August 2011, that she reported the rape to the police on the same day. [p. 21, l 16-19] Therefore, if the mother and child's evidence is true, the Appellant lied on this aspect.

[14.] Although the mother had agreed under cross examination that the Appellant last transported the child on 3 August 2011 [p. 21, l 14-15] this was clearly a mistake.

[15.] The allegation that the mother owed transport money is improbable. The mother denied that she owed money for July and was adamant that as August had not ended, the August payment was not due and payable. [p. 25, l 19-22]; [p. 26, l 4-17]

[16.] The evidence of the complainant was the clearest that a 9 year old could give. Except for not being able to give the date or season of the year when the rape took place, except that it was on a hot day, she was clear that it was the Appellant who raped her. She denied under cross examination that she had ever been raped before and narrated the incident itself clearly. There can be no suggestion that she was coached to give this evidence. The criticism by the Appellant's counsel that there is a discrepancy in the child's evidence for having said that the Appellant only transported her once is unfounded. It is clear that this was merely a matter of misunderstanding the question. In any event it is not the Appellant's case that he transported the child only once.

[17.] A further criticism of her evidence was that the complainant says that she did not bleed and the mother did not notice any blood or strange movement or gait after a serious rape that led to the injuries reported in the medical examination report. I suppose counsel for the Appellant is submitting that the healed injuries are consistent with a rape that might have happened before the Appellant started transporting the

complainant. Otherwise if the rape had taken place on 25 August 2011 the mother would have noticed blood on the complainant's underwear. This argument cannot be taken far because the complainant says that she did not bleed.

[18.] After considering all the evidence and the submissions of the Appellant's counsel, both in his written submissions and oral submissions, I find that the Magistrate properly assessed the evidence and applied the legal principles correctly. His judgment cannot be seriously attacked.

[19.] The duty of this Court on appeal has been stated numerous times. In *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426A-J, Marais JA stated:

Before considering these submissions it would be as well as to recall yet again that there are well-established principles governing the hearing of appeals against findings of facts. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial Court are so well known that restatement is unnecessary.

One looks in vain for any such misdirection on the part of the Court a quo in this matter. The evidence given in the Court below was fairly and accurately summarized in the judgment. Attention was given to the detailed criticism of the evidence of the witnesses who testified for the State. They were evaluated in the context of the entire body of evidence before the Court and appropriate weight assigned to them in the light of all the evidence in the inherent probabilities and improbabilities of the case. Where caution was needed it was exercised and the Court not infrequently preferred to place no reliance upon evidence for the State which might possibly not be accurate. That being the case, the credibility findings and findings of fact of the trial Court cannot be disturbed unless the recorded evidence shown them to be clearly wrong. In assessing whether or not such is the case, the approach which commended itself in, *Moshephi and Others vs R* (1980-1984) LAC 57 at 59 F-H seems appropriate in the particular circumstances of the matter:

'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 the body of evidence into its component parts is obviously a useless aid to a proper understanding and evaluation of it. But, in doing so, one must guard against 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 the detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is 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. '

It is so that there are aspects of the evidence given by some of the police witnesses which are not satisfactory but they relate in the main to peripheral issues and matters of details. They are certainly not of a kind which point to the existence of a deliberate conspiracy to falsely implicate the appellants. Counsel for the appellants frankly and correctly acknowledge that, absent any reasonable possibility of such a conspiracy,

the appeal against the conviction has to fail. I consider that the recorded evidence amply justifies the finding of the trial Court that there is no reasonable possibility that such a conspiracy existed.

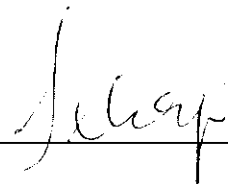
[20.] In the circumstances, the appeal is dismissed and the conviction is confirmed.

SIGNED AT PRETORIA ON THIS 20th DAY OF FEBRUARY 2014.


MALINDI AJ

Acting Judge of the High Court

I agree


TLHAPI J

~~Acting~~ Judge of the High Court