IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA
CASE NO: A98/15
DATE: 15 MARCH 2016

In the matter between:

ADDIE NKOSINGIPHILE SHABANGU **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

NKOSI AJ:

[1] This is an appeal against conviction and sentence by the Benoni Regional Magistrate Court.

[2] The appellant was charged with an offence of contravening the provisions of Section 3 read with Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 read with Section 256, 257 and 281 of the Criminal Procedure Act 51 of 1977, provisions of Section 51 and 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended as well as Section 92(2) and 94 of the Criminal Procedure Act 5 of 1977.

[3] The appellant was legally represented during the trial and subsequently found guilty and sentenced to 25 years imprisonment. Leave to appeal was granted by the Regional Magistrate Court and the appellant was later released on bail of R20 000.00 pending the outcome of his appeal.

BRIEF BACKGROUND

[4] The appellant was charged with the rape of one [S…….] [B……] [N……] (07 years old) by inserting his penis into her vagina on more than one occasion without her consent of which the exact dates are unknown to the complainant.

[5] There are two main issues to be decided in this appeal, namely, whether the identity of the appellant was proved beyond reasonable doubt and whether there was penetration of the complainant.

[6] It is common cause that the State bore the onus to prove its case beyond reasonable doubt. In discharge of its onus the State called several witnesses which amongst them were as follows:

a) [S……] [B……] [N……], the complainant

b) [J…….] [M……...], a community caregiver

c) [P……] [L…….], complainant's aunt

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d) [C……] [M…….], complainant's teacher

e) [N…….] [M…….], medical personnel

f) [M…….] [N……], police officer

[7] The appellant also testified in his own defence and called one witness, his employer, who gave evidence on his behalf regarding his alibi which was raised on his plea explanation.

[8] The allegations were that the Complainant was raped in broad day light by the appellant whom she claims to have known him on four different occasions. It was further not disputed that the appellant was her neighbour and as such she identified a person well known to her.

[9] She testified that the appellant or the perpetrator told her to say that it is one Thabo who sexually violated her. She also testified that she attended the identity parade where she was advised as to who to point out.

[10] Her aunt [P…….] [L……] testified that she always left home after the complainant had gone to school and that the complainant did not have access to the house until she returned from church. She further confirmed that the appellant had left the place sometime ago and later came back.

[11] The appellant raised a defence of alibi and alleged that he was at work at the time of the alleged incidents. One [M……] [M……] [R……..], his employer, testified and confirmed that on the date in question the appellant was at work for the whole week. She made use of clock card receipts to prove this.

[12] The other issue was whether there was penetration or not. The State called the nursing sister [N……] [M……..] who examined the complainant at the behest of the caregiver who observed a scar on the complainant's posterior fourchette and concluded that there was no penetration beyond the hymen. She speculated on the possibility of an attempted penetration but her findings were that she could not find anything wrong with the child.

[13] Based on the nurse's testimony the court will accept that an attempted penetration up to the posterior fourchette which is part of the vagina has been proven. The question remains as to who did that on the face of the appellant's denial and his alibi on the date in question.

[14] There is undeniable evidence that the complainant suffered an unusual behaviour of wetting herself which was confirmed by the 2nd and 3rd witness for the state.

[15] The appellant's evidence was further that he only heard, for the first time, in the community meeting that he had raped the complainant and that during the alleged time of the incident he was at work and he produced clock card receipts to corroborate same and denied ever having ad any sexual intercourse with the complainant.

[16] The appellant relied on Ms. Rossouw's evidence as proof of his alibi and the defence closed its case thereafter.

[17] The presiding Magistrate concluded that the State had proven its case beyond any reasonable doubt by saying that:

a) Why would the State witnesses come and fabricate their evidence against the Appellant;

b) The evidence of the complainant was reliable and he accepts it;

c) He rejected the appellant's evidence in its entirety;

d) He rejected the evidence of the alibi of the appellant as not being reliable despite it being confirmed by Ms. Rossouw, the employer.

[18] The general rule of proof, in criminal proceedings, is that the State bears the onus to

prove each and every element of the offence allegedly committed beyond any reasonable doubt and the trial court is expected to take the totality of the evidence presented to it by all witnesses.

[19] In the case of ***S v T*** 2005 (2) SACR 318 ECD at para 37, Plasket J said:

"The principle of proof beyond reasonable doubt was quoted with approval from Constitutional Court judgement of S v Zuma and Others 1995 (1) SACR 568 (CC) where Kentridge J held that "the standard of proof beyond reasonable doubt, as an aspect of the right to a fair trial, could be traced back to the "centuries-old principle of English Law " that a person is presumed to be innocent until his or her guilt is proved, a principle which has been forcefully restated" throughout our law to this date (mv own words) in concurrence with our current laws. "

fCouldn't find this portion in para 37 of the judgment]

[20] The above principle was clearly spelt out in the case of ***State*** v ***Ipeleng*** 1993 (2) SACR 185 (T) where the then Honourable Mohamed J held as follows at 189 c-d:

"It is dangerous to convict an accused person on the basis that he cannot advance any reasons why the State witnesses will falsely implicate him. The accused has no onus *to provide any such explanation. The true reason why a State witness seeks to give the testimony he does is often unknown the accused and sometimes unknowable. Many factors influence prosecution witnesses in insidious ways. They often seek to carry favour with their supervisors; they sometimes need to placate and impress police officers, and on other occasions they nurse secret ambitions and grudges unknown to the accused. It is for these reasons that the Courts have repeatedly warned against the danger of the approach which asks: 'Why should the State witnesses have falsely implicated the accused?* ". This could have been properly addressed during the trial.

[21] It was submitted on behalf of the appellant that based on the above case law, it was unfair for presiding learned Regional Magistrate to base his finding of guilt on the question: " *Why would the State witnesses lie against him.* "

[22] In the very same case of Ipeleng the Court held as follows at 189 b-c:

"Even if the court believes the State witnesses, it does not automatically follow that the appellant must be convicted. What still needs to be examined is whether there is a reasonable possibility that the evidence of the appellant might be true. Even if the evidence of the State is not rejected, the accused is entitled to an acquittal if the version of the accused is not proved to be false beyond reasonable doubt"

[23] In this particular case the learned Regional Magistrate did not take into account the probabilities and improbabilities inherent in the evidence of the State witnesses and more particularly that of a nursing sister who testified that according to her there was never any penetration whereas the complainant alleges that this happened four times.

[24] In the case of ***Shackell* v *The State* 2001 (4) SA 1 (SCA)** where Brandt, AJA at page 12 to be particular paragraph J and at page 13 paragraph A.

"A Court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably, possibly true in substance the Court must decide the matter on the acceptance of that version of course it is to test the accused's version against inherent probabilities but it cannot be rejected merely because it is improbable. It can only be rejected on the basis of inherent probabilities if it can be said to be improbable that it cannot be reasonable possibly be true"

[25] In the present case it was submitted on behalf of the appellant that the learned Regional Magistrate rejected the version of the appellant without considering whether his version could have been reasonably possibly true. The Regional Magistrate relied only on the ground that the clock card receipts were not reliable, despite them being corroborated by the employer who had nothing to lose or benefit anything from the

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outcome of the case. It was submitted that had the Regional Magistrate took into account all factors mentioned herein he could have arrived at a different conclusion.

CONSIDERATION OF THE TRIAL COURTS FINDING

[26] The Honourable Magistrate erred in finding that the State had proven its case beyond reasonable doubt by disregarding the nursing sister's evidence that there was no penetration. He further failed to take into account that the nurse's testimony was one of an expert in her field and needed expert testimony to countenance her findings. Doubt was created.

[27] A further problem is the reference to one Thabo, who according to the complainant was involved in the violation of the complainant. The State without explanation, did not take this issue of Thabo any further by investigating the possibility of Thabo being involved in the commissioning of the crime. One can safely state that this matter was not fully investigated before it was referred for trial.

[28] The evidence of the Appellant's employer was simply rejected as unreliable without justification for such rejection. The appellant should not have been expected to prove his defence of an alibi beyond a reasonable doubt. The case of **Shackell** v **The State,** quoted above, re-emphasized the point that the Court need not be convinced on whether the accused's version was true or not. The acceptable test is that the version is reasonably possibly true or not.

[29] The issue of the identification parade was not adequately addressed by the State, whether a fair process was followed or not. This left the court in limbo in regard to this evidence.

[30] The Court fully agree with the views expressed in the cases of ***S v T, Jpeleng*** and ***Shackell*** referred to *supra.* In the premises, the trial court's finding stands to be set aside.

ORDER

Consequently, I propose the following order:
The appeal against conviction is upheld.

VRNS NKOSI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

I agree.

N JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

It is so ordered.

Appearances:

Counsel for the Appellant	**Advocate M E Tshole**
Instructed by	**THABANG MASH I GO INC. BENONI**
Counsel for the state	**Advocate M M Mashuga**
Instructed by	**STATE ATTORNEY, PRETORIA**