REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A 18/2012

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

Date: Signature:

In the matter between:

AUBREY PHAKISO MOTSHEGWA APPELLANT

and

THE STATE RESPONDENT

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JUDGMENT

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**VAN DER SCHYFF, AJ**

**Introduction**

[1] The appellant was convicted on 1 October 2010 in the Regional Court, Brits, on a count of raping a 13 year old complainant and sentenced to life imprisonment. He launched an application for leave to appeal against his conviction and sentence. His application for leave to appeal the conviction was dismissed by the trial court. The court found that there were no prospects of success in the case of the conviction. The appellant appealed the sentence with leave of the trial court, but the appeal was dismissed on 7 February 2014.

[2] In the appeal before us, the applicant is basing his appeal against the conviction on his automatic right of appeal in terms of s 10 of the Judicial Matters Amendment Act, No. 42 of 2013 and s 309(1)(a) of the Criminal Procedure Act 51 of 1977, hereafter referred to as the CPA.

Some procedural aspects for consideration

[3] Two procedural aspects need to be dealt with before the appeal is considered on the merits.

*Ad* extent of the order granted on 7 February 2014

i. The appeal against the sentence was argued before a full bench of this Division on 27 January 2014. Although it is clearly indicated in the reasoning of the Honourable judges as contained in their written judgment dated 7 February 2014 that the appeal was solely brought, and considered in relation to the sentence, the order granted states that "The conviction and the sentence are confirmed". The state advocate handed us a copy of the judgment and both counsel requested the court to accept that the order erroneously referred to the conviction and is to be read as relating only to the sentence.

ii. Since both counsel were *ad idem* on this point, and the issue of *res judicata* was not raised or relied on by the State, and since it is apparent from the written judgment dated 7 February 2014 that the previous application for leave to appeal dealt solely with the aspect of

sentence, we are of the view that it is just and practical to hear the appeal on the conviction. We accordingly accept that the previous order was erroneously extended to include reference to the conviction and will consider the appeal against the conviction.

*Ad* piecemeal institution of the appeal against the conviction and the sentence

iii. Counsel on behalf of the State argued that although an appeal against a conviction and sentence is generally instituted simultaneously, the State wants the court to finalise the matter and to hear the appeal on the conviction.

iv. Since both counsel expressed the view that it would be in the interest of justice to deal with the appeal on the conviction, we are of the view that the appeal can be considered forthwith.

*Re:* Grounds for the appeal

[4] Counsel for the appellant indicated that he relied on the heads of argument filed of record. It is indicated in the heads of argument that the appellant is challenging his conviction on the rape charge on the basis that:

i. The complainant was a single child witness. It is asserted that the court *a quo* did not exercise caution when dealing with the evidence of the complainant.

ii. The complainant's evidence was not clear and satisfactory on all the material aspects and there were contradictions in her evidence. However, the court's attention was not drawn to any specific contradictions or aspects of uncertainty, save for stating that the incident occurred at night when the complainant was woken up and that the complainant could not see her assailant clearly in the light shining through the window.

iii. There was no basis for the court to reject the accused's alibi. The appellant stated that the legal position with regard to an alibi is that there is no onus on the accused to establish his alibi since the accused does not have to prove his innocence. It is only expected of an accused to provide the court with a version that is reasonably possibly true, and his version can only be rejected on the basis of inherent improbabilities.

iv. The court *a quo* erred in ruling that the appellant's version is not reasonably possibly true.

[5] The state advocate argued with reference to the heads of argument filed by the respondent that:

i. The respondent supports the credibility findings of the court *a quo.*

ii. The state witnesses testified truthfully and clearly and corroborated each other on material aspects even though there were minor contradictions.

iii. The appellant's version of the events is improbable;

iv. The appeal on the conviction should be dismissed.

The evidence before the court *a quo*

[6] The evidence presented by the State at the trial of this matter was to the effect that on 28 December 2005 at around 20h00 the complainant was at her father's home in the company of her father, B[….], his friend Phakiso, J[....] and her cousin K[....]. She was 13 years old at the time and still a virgin. She left their company and went to sleep.

[7] During the night she was woken up. Phakiso, the appellant, was undressing her. He has already taken off his trousers and underpants. There was no light switched on in the room, but the outside light lit the room through the curtain to such extent that the complainant could discern Phakiso's face and the yellow t-shirt he was wearing the previous evening. She was used to seeing Phakiso. She testified that his complexion is bright and he had pimples on his face. He also had very distinct hair and she asked to draw a picture to illustrate to the

court what she meant. (A sketch depicting the assailant's facial form was handed to the court and marked Exhibit A.)

[8] The complainant jumped up and tried to flee but fell on the ground. Her assailant grabbed her arms and despite her trying to push him away, "came full force towards her" and raped her. She was still struggling and managed to break loose. She escaped through the door while screaming and wearing only her t-shirt.

[9] Outside she was met by her cousin and his father. Her assailant fled. She testified that she ran to her cousin's father. She slept at her cousin's house. The next morning another cousin arrived. She used his phone to phone her mother who was sleeping at her grandmother's home. She informed her mother that she was attacked and her mother and dad arrived. They went to report the incident with the police. After she made a statement she was referred to the hospital where she was examined by a doctor.

[10] It was put to the complainant during cross-examination that the accused will deny that:

i. He was wearing a yellow t-shirt, since he was wearing a white t-shirt;
ii. He left her father's home in the company of other people who were drinking and never returned;
iii. He undressed or raped the complainant.

[11] The complainant was adamant that it was the appellant who raped her and that she was not mistaken.

[12] The complainant's cousin K[....] Z[….] testified that on 28 December 2005 he was with the complainant at her father's home. They were in the company of the complainant's father, Aubrey – also referred to as Phakiso, and Aubrey's friend. The other people left and he remained. The complainant was asleep by the time the men left.

[13] He remained and watched television. After a while the appellant returned. He informed the witness that the complainant's father said he must go and sleep at his paternal home. He had to leave the key to the door under the doormat. The

witness left and went to his home. He noted that the appellant was standing by the gate, watching him. He returned to the complainant's home and informed the appellant that he would sleep in the shack next to the main house since he was locked out of his home. He felt something was amiss because he was of the view that there was "no way this girl could sleep alone in the house". He watched the appellant through the window of the shack. He saw the appellant removing the key from underneath the doormat and opening the door. At that stage he went out to call his father. When his father opened the door they heard the complainant screaming. He saw the appellant exiting the house, running away and jumping over the fence. He testified that the complainant ran to another house next to his parental home. The complainant later went back to her house to get dressed. They locked her father's home and she went with him and his father to their home.

[14] During cross-examination he testified that the complainant's assailant was wearing a yellow t-shirt, blue trousers and blue All Star tekkies. He testified that the complainant was naked when she exited the house screaming.

[15] It was put to this witness during cross-examination that the accused will deny that he came back to the complainant's father's home after he left in the company with the other men.

[16] The third state witness was the complainant's mother, Ms M[….] N[….]. She testified that she was asleep at her parental home. She was woken by the complainant's father. He was intoxicated. He said that his friend Phakiso walked half-way with him to her parental home. This evidence was later confirmed by the complainant's father and also corroborated by the accused's own evidence. The complainant's father stayed over at her parental home. She received a telephone call in the early morning hours and was informed that her daughter, the complainant, was attacked.

[17] When she and the complainant's father arrived at their home they found the complainant crying. After the complainant told them what happened they went to the police. This witness was not cross-examined.

[18] The medical doctor who examined the witness, Dr Shakira Moosa, was then called to testify. The doctor testified that there was physical evidence of forceful

penetration. She was cross-examined regarding the content of the report but her evidence was essentially uncontested.

[19] The State closed its case and the defence called the accused. He denied that he raped the complainant. His evidence was that he visited the complainant's father's home. The men left to visit a tavern where they consumed alcohol. When they left the tavern the complainant's father indicated that he was going to the complainant's mother and the accused walked a distance with him. The accused's friend, GP (sic) walked with him to his own parental home.

[20] The accused testified that he was dressed in a white t-shirt, blue trousers and white All Star tekkies. He denied owning a yellow t-shirt and said the complainant's father wore a yellow t-shirt. He said that he sold a welding machine to the complainant's father and that the latter did not pay him. When he demanded the money the complainant's father denied being indebted to the accused. He then opened a case with the police against the complainant's father. At the police station he was told that he and the complainant's father must sort out their own dispute. It was agreed that the complainant's father would pay him the money, but he never did. The complainant pestered him about the money. The accused then took the welding machine back, whereafter the complainant's father opened the rape case against him. During cross examination the accused said that he laid the charge pertaining to the welding machine in December 2004 – a year before this incident occurred.

[21] He testified that he visited the complainant's father on the night in question at the insistence of his friend, GP, who informed him that the complainant would give him the money he owed him when they visit.

[22] The accused testified that blood samples were drawn for DNA testing. It was his evidence that he requested blood samples to be taken. He also requested that a blood sample be taken from the complainant's father, but that did not happen. He testified that the complainant's father was wearing a yellow t-shirt.

[23] The accused's mother, Ms Anastina Motshegwa, was thereafter called to testify. She said that she was home on the night in question when the accused arrived at home around 20h00. She never heard him exit during the evening.

She reluctantly conceded under cross examination that he would have been able to leave when she was asleep without her noticing it.

[24] The defence case was subsequently closed.[1]

[25] The court requested that the complainant's father, Mr Ben Seanego, be called as a witness. He confirmed that the men were visiting him but indicated that it was at GP's initiative. They then left for the tavern. He decided to visit his wife's parental homestead and was accompanied halfway by the accused. He slept over at his wife's parental homestead. The following morning they were telephonically informed that his daughter was attacked at home.

[26] He testified that his relationship with the accused was harmonious and denied the incident with the welding machine.

[27] When the court was addressed in closing argument by the accused's legal representative the argument was made that although blood samples were taken, the accused was not linked with DNA evidence to the rape. The presiding officer indicated that he was not presented with the results of the tests and did not hear any evidence in this regard. He questioned the prosecutor who read the laboratory report into the record. In this report it is stated that that no semen was detected from the vaginal swab taken from the complainant. Although male semen was detected from the sample taken from the complainant's underwear, it was not sufficient for a DNA comparison. The presiding officer then put it to the accused's legal representative that the reason why no DNA report was compiled and presented as evidence is because it would not take the matter any further.

[28] Based on the evaluation of the evidence before him, the regional magistrate found that the appellant's version was false and he rejected it.

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[1] It appears from p120 of the record that the case was adjourned on 13 July 2010 to enable the accused to call his friend, GP, as a witness. Page 121 of the record commences with the record of the proceedings of 1 October 2010 where the court confirmed that the defence case was closed. It is evident from the content of the prosecutor and the accused's legal representative's address, as well as the reasons provided by the court for its judgment that GP never testified. We nevertheless communicated via e-mail with the counsel of parties and asked them whether this should be regarded as a *lacuna* in the record rendering the record incomplete. Counsel for the State referred our attention to p4 of the record. It is evident that the matter was postponed on 13 July 2010 to 13 August 2010 for the defence witness. On 13 August 2010 the entry reflects that the matter is postponed due to the unavailability of an interpreter. The only witness warned to appear on 13 August 2010 is Ben Seanego. The matter was again postponed on 13 August 2010 due to the accused being ill to 1 October 2010. As a result both counsel confirmed that it was only the accused and his mother that testified. The record is thus complete.

Considerations on appeal

[29] It is evident from the reasons for the judgment that the learned regional magistrate approached the complainant's evidence with caution because she was a single witness and because the incident happened during the night in her parental home when the light was off. He found her evidence to be clear and satisfactory in every material aspect. He did not find any improbabilities and contradictions in her evidence and could not criticize her demeanour. The few contradictions between her evidence and that of her cousin were, rightly so, not found to be material, and did not detract from the convincing quality of her evidence. The regional magistrate found that the complainant's evidence that the accused was her assailant was materially corroborated by her cousin's evidence. The court found both the complainant and her cousin to be reliable and trustworthy witnesses. The court also accepted the evidence of the complainant's father who made a good impression as a witness.

[30] The court found that the accused's mother was clearly siding with him. She was reluctant to concede that the accused could have gone out without her hearing him. The regional magistrate did not believe this witness and found that the accused's alibi is false. He likewise did not believe the accused's attempt to show a motive for the laying of a false charge against him. The court was satisfied beyond a reasonable doubt that the accused was the rapist and found him guilty.

[31] It is trite that the trial court's findings of fact and credibility are presumed to be correct. The trial court had the advantage of observing the witnesses and is in the best position to determine where the truth lies (See *R v Dhlumayo and Another* 1948 (2) SA 677 (A) and *S v Francis* 1991 (1) SACR 198 A 204C-D). It is only in instances where a court of appeal finds that there was demonstrable and material misdirection on the part of the trial court in its findings of fact that it would have reason to interfere (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) 645E-F).

[32] When the regional magistrate's judgment is considered it shows that he carefully considered the evidence. He properly analysed and evaluated the evidence and was alive to where the onus rested.

[33] When the evidence is considered it is of paramount importance to note that the accused's legal representative did not put it to the complainant when she was cross examined that:

i. The accused was wearing a white t-shirt;
ii. Her father wore a yellow t-shirt;
iii. She confused him for her father;
iv. She instigated the complaint because her father had a quarrel with the accused

[34] The accused's version that the complainant's father raped the complainant was never put to the complainant's father by the accused's legal representative during cross examination, neither was it put to the witness that he instigated a false rape charge against the complainant as a result of the quarrel pertaining to a welding machine.

[35] As to the duty and or principle that a legal representative should put his client's case during cross-examination to the witness of the other side, Kirk-Cohen J stated the following in S v Van As 1991 (2) SACR 74 at 76J:

*"It is a cornerstone of the administration of justice in South Africa and elsewhere that counsel should put his case to the witnesses for the other side."*

[36] The evidence of the complainant's father that he went to the complainant's mother's parental homestead is corroborated not only by the evidence of the complainant's mother, but by the accused himself.

[37] The contradictions that the appellant refers to are inconsequential and immaterial (See *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) 593-594. The fact that the DNA report was not filed as evidence is of no consequence in light of the evidence tendered. I pause to mention that after the defence closed its case the existence of a DNA report came to the court's attention. The prosecutor read the report into the record and the accused's legal representative was given the opportunity to address the court. It is evident that

the results from the laboratory indicated that no semen was detected on any of the swabs taken from the complainant. The accused's legal representative argued that if there were penetration semen would have been present in large quantities. I am of the view that the court can take judicial cognisance of the distinction between penetration and ejaculation. The complainant's evidence was clearly that she succeeded to escape shortly after she was forcefully penetrated. In any event, the evidence of the doctor remains uncontested.

[38] As far as the alibi evidence is concerned, it is trite that In the case of *R v Hlongwane* 1959 (3) SA 337 (A) the Court stated the following:

> " *The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted. R v Biya* **1952 (4) SA 514** *(AD). But it is important to point out that in applying this test, the alibi does not have to be considered in isolation….*
>
> *The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses.*

[39] As stated above the regional magistrate rejected the evidence of the accused's mother after he considered it in the light of the totality of all the evidence presented.

[40] In the circumstances I find no misdirection by the regional magistrate either on fact or on the law. I am of the view that there will be no justification for this court to interfere with the court *a quo*'s finding that the appellant is guilty of raping the complainant.

As a result the following order is made:

[1] The appeal against the conviction is dismissed.

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**E VAN DER SCHYFF**

**Acting Judge of the High Court**

**I agree**

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**M Khumalo**

**Acting Judge of the High Court**

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| **Heard on:** | **5 August 2019** |
| **Date of Judgment:** | **3 September 2019** |
| **For the Appellant:** | **Mr MB Kgagara** |
| **Instructed by:** | **Pretoria Justice Centre** |
| **For the Respondent:** | **Adv Van Vuuren** |
| **Instructed by:** | **Director of Public Prosecutions** |