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

CASE NO: A143/2019

In the matter between:

J[…] N[…] **APPELLANT**

and

THE STATE **RESPONDENT**

Sekhula AJ:

A. INTRODUCTION

1. J[…] N[…] (**"Appellant"**) lodged an appeal against the conviction and sentence imposed on him by the Ga-Rankuwa Magistrate's Court on 28 August 2014 after having been found guilty of contravening Section 126(b), Firearms Control Act, 60 of 2000 and contravening Section 3, Sexual Offences Act, 32 of 2007. The former charge concerns pointing an object which is likely to lead a person to believe it is a firearm, while the latter charge concerns violent sexual violation (rape).

2. The trial court sentenced the Appellant to three years and 10 years respectively and ordered that the sentences were to run concurrently. The application for leave to appeal was rejected by the trial court but Appellant was granted special leave to appeal both his conviction and sentence on 14 August 2018.

3. Appellant also applied to this Court for leave to adduce further evidence, alleging that the Prosecutor willfully withheld evidence that would have exonerated

him from the crime of rape. On or about 29 September 2019, this Court dismissed that application on the basis that the material sought to be adduced would not have the effect of changing the outcome.[1]

4. Undeterred, Appellant approached the Supreme Court of Appeal (**"SCA"**). However, on the 18th March 2020, the same fate befell him with the SCA ruling that "*there are no special circumstances meriting further appeal to this court"*.[2] Appellant can now only rely on the judgment of the court a quo without references to any other evidence that may bolster his case.

B. GROUNDS OF APPEAL

5. Appellant submits that the court *a quo* materially misdirected itself in the acceptance of the facts of this matter in circumstances where the evidence was so weak and contradictory in material respects that it could not have led to Appellant's guilt being proven beyond a reasonable doubt[3]

6. This submission is buttressed by an assertion that there were material contradictions between the evidence of the complainant and that of her corroborating witness, I[…] M[…], the police statements and the testimony of the investigating officer. As a result, the submission is that the trial court misdirected itself to the extent that the misdirection "vitiated proceedings".[4]

7. The contradictions and improbabilities related to, *inter alia*, the relationship between the complainant and appellant, the time they arrived at the venue, the extent of lighting at the venue and crime scene, the number of people that approached them on their way home, who noticed the toy gun and identified it later, who picked the cellphone at crime scene, the incorrect testimony of Officer Masilo about the whereabouts of the complainant's panty, the intoxication levels of the complainant, and whether Appellant was taken to hospital or fled into the van.[5]

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[1] Vide, Appeal Record, at page 07-2.
[2] Vide, Appeal Record, page 08-2.
[3] Vide, Appeal Record at page 02-17.
[4] Ibid.
[5] Vide, Appeal Record at page 02-21.

8. It was submitted that these contradictions in the evidence of the state witnesses "*severely affected the reliability and probative value of their evidence*" and were completely disregarded by the Learned Magistrate. Further, the Leaned Magistrate drew inferences which were "irrational and inconsistent with the proven facts." [6] However, it is not clear what the proven facts were.

9. The Respondent disagreed with the Appellant's submissions and submitted that the *court a quo* did not misdirect itself on the facts presented. The argument was that when reaching the decision to convict, the Learned Magistrate weighed all the evidence which illustrated the culpability of the accused against those indicative of his innocence and concluded that the State has discharged the onus.[7]

C. **LEGAL PRINCIPLES ON APPEAL**

10. The findings of the trial court are presumed to be correct and "in the absence of demonstrable and material misdirection by the trial court" these conclusions and findings will only be disregarded if the recorded evidence shows them to be clearly wrong".[8] (*own emphasis*).

11. This well settled principle derives from the acknowledgement that the trial court, being steeped in the arena of trial, is best suited to make findings on the credibility of the witnesses by closely observing their demeanor to determine propensity to the truth, or to lie, as the case may be.[9] Hence, the finding that the State has discharged its onus to prove the guilt of an accused beyond a shadow of doubt follows a positive finding and acceptance of the State's evidence.[10]

12. It is an onus that lies on the State to prove the guilt of an accused beyond reasonable. To that end, all reasonable possibilities other than the one pointing out

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[6] Ibid, at page 02-23.
[7] Ibid at 01-8.
[8] Vide, S v Monyane and Others, 2008 (1) SACR 543 (SCA) at 15.
[9] R v Dhlumayo & Another 1948 (2) SA 677 (A).
[10] Masuku and Another v S (A402/2019) (2021) ZAGPPHC 6 (12 JANUARY 2021) (Where the State's evidence is accepted, the multiplicity of contradictions inherent and unexplained improbabilities in the accused's version only lead to the conclusion that the Accused's version cannot be reasonably true)

to the guilt of the accused must be excluded……"[11] On the other hand, *"a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a Court does not have to be convinced that every detail of an accused's is true. If the accused's version reasonably possibly true in substance, the Court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the 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 so improbable that it cannot reasonably possibly be true*"[12]

13. A material misdirection will obviously lead to a wrong conclusion of guilty verdict. But such is a result of an exercise of appreciation that the trial court, after weighing all the elements which points towards the guilt of the accused against those that are exculpatory, and taking the inherent improbabilities, failed to exclude that the accused version may be reasonably possible true."[13] In **S v Radebe,** the Court expounded on this formulation of the onus: *"Whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him. It is enough that he contradicts other acceptable evidence. I am bound to acquit him if there exists a reasonable possibility that that his evidence may be true. Such is the nature of the onus on the State*"[14]

14. Moreover, an *ex post facto* determination that one aspect of the evidence was decisive should not tempt the trial court to latch onto that "*aspect without assessing it in the context of the full picture presented in the evidence".*[15]

15. The Court will interfere where the sentence under review:

15.1 is not one that a reasonable trier of facts can impose, or

15.2 that it is totally out of proportion to the gravity or magnitude of the offence, or

15.3 that it evokes a feeling of shock or outrage or

15.4 that it is grossly excessive or insufficient, or

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[11] R v Difford1937 AD 370

[12] S V Shakell 2001 (2) SACR 185 (SCA)

[13] S v Tshabalala 2003 (1) SA SACR (A), S v Mdiniso (2010) ZAECGHC 18 (18 March 2010)

[14] 1991 (2) SACR 166 (T).

[15] Ibid.

15.5 that it was in the interest of justice to alter it.[16]

16. There lies a burden on the State to prove the case against accused beyond a reasonable doubt. The accused does not bear any burden to convince the Court that his explanation is true[17]. The explanation given by the accused, even if improbable, must be considered and the Court must be satisfied that not only is it improbable, but false beyond any reasonable doubt. *"If there is a reasonable possibility of his explanation being true, then he is entitled to an acquittal*."[18]

D. THE PRESENTED EVIDENCE

17. It was New Year's Day when complainant, accompanied by her brother/cousin I[…] M[…] M[…] ("I[…]") and a friend N[…] B[…], went to Slovo Park in Winterveld to attend a social event. They went there at around 20h00 (her version) or 23h00 (I[...]'s version). While enjoying music, they had some drinks. She drank two or three Red Square. I[…] was moving around the Park socializing with his acquittances.

18. At around 02h15 on the 2nd January, the trio decided to head home. While walking in the Park area, a group of eight men passed them. Three men turned around and pointed firearms. They ran, scattering in different directions. One of the men grabbed complainant and pointed an object, she perceived as a firearm at her. He pulled her into the bush. It was dark in that area.

19. Still pointing the gun at her, he ordered to undress and when she refused, he forcibly undressed her by removing her jacket, short pants and underwear. He then instructed her to lie down, pulled his trousers to his knees, placed the gun on the ground and then proceeded to rape her.

20. After a while, she heard someone calling her name. It turned out to be N[…], who was with I[…]. The appellant instructed her to get up and walked behind her. He pointed his gun to the approaching persons and shouted that he will shoot them.

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[16] Sv Mothibe 1977 (1) SA 823 (A); S v Masilela 2000(1)SACR 571(W)
[17] R v Difford 1937 AD 370 at 373.
[18] Ibid. see also, R v Ndlovu 1945 AD 369 at 386, R v Britz 1949 (3) SA 293 at 302.

While he was pointing the firearm at the approaching persons, she managed to grab her pants. She also shouted hat he was holding a toy gun.

21. At this point she manage to escape and run in the opposite direction. The approaching persons came for the appellant, and he ran into the bush. The group of people led by I[…] caught up with and dragged him to a community member's house in the vicinity. He was assaulted during this period.

22. The Police arrived, and he ran into the police van. Thereafter, he was taken to Loate Police Station. Where the complainant saw him being escorted into the building.

23. I[…] testified that when they left for home at around 02h20, a person pointed a firearm at them shouting "*voetsek, voetsek*". They all scattered into different directions. When he realized that his cousin was missing, he went home, took a golf club, and went to look for her. He met N[…] and they went back to the Park. They mobilized other people to assist in the search. They called complainant's number and saw the cell phone illuminating on the ground in the bushes. They were shouting her name when they saw two people next to a tree in the bushes.

24. He heard someone shouting that it is a toy gun. They saw a person running away and set after him. They caught him when he fell while running away. Complainant told him he took her panties. The toy gun fell where the appellant had tripped and fallen in the bush. Complainant told I[…] he had her panties. I[...] searched him and found the panty and a screwdriver in his possession.

25. They then dragged him to the house. One member of the group called him by name and exclaimed "*J[…], you the one who did this*?" The other group members started assaulting him, dragged him to the Community member's house and called the police.

26. The Police arrived at the Community member's house and found the appellant lying on the ground injured and bleeding. The complainant told them he raped her. He was then taken to the Police station.

27. The State's submitted the J88 by agreement, after adjourning the Court for a few days to have the Doctor testified to its authenticity. According to this, there was evidence of penetration as indicated by the 0.2 cm in diameter tear of posterior fourchette.

28. The Appellant testified in his defense. He stated that he was at the Park on that day. At around 23h00, he decided to go urinate about 100 meters from the Park. While there, he was accosted by people wielding guns. They wanted his possessions but declined his phone because it was an archaic model. They then pistol whipped him and ordered him to disappear.

29. While he was walking home, he heard a group of people coming up behind him. They were shouting "*it is him*". He did not run, because he was just robbed a few minutes prior. He felt a sharp object hit at the back. He fell down and lost consciousness.

30. During his evidence-in-chief, his Counsel put a version that he fell into a coma and woke up in hospital some 8 days later. Appellant was taken to hospital after being assaulted, a version that is irreconcilable with the version of the Complainant.[19]

31. Officer Masilo testified that he found the Appellant lying on the ground injured and took him to the Police station and an ambulance was called.

E. EVALUATING THE EVIDENCE

32. The Appellant attacks the conclusions reached by the court *a quo* and submitted that the Learned Magistrate misdirected himself by *"glossing over"* material discrepancies and inconsistencies in the presented evidence. Counsel for Appellant submitted the witnesses were inconsistent to the extent of contradicting

[19] Ibid at page 02-21.

themselves in material ways. The evidence they presented in Court differed in material aspects from the contents of the statements they made in court.

33. The differences and inconsistencies related to the time they arrived at the Park, the amount of liquor they consumed, the number of people who pointed firearms at them when they were on their way home, the illumination at that time, how the rape actually occurred, how the identified the Appellant, and the articles I[…] retrieved from the Appellant.

34. What became clear from Counsel's submissions was that the witnesses testified that it was so dark in that area where they were accosted that they could hardly recognize a person who was 2 meters away. The fact that the witnesses contradicted each other on how many persons pointed a firearm at them bears testimony of that.

35. Complainant said three men turned on them, pointing firearms while I[...] said one person pointed a gun at them. Secondly, the lack of illumination made it impossible for complainant to make out the features and identity of Appellant. Thirdly, it would have been impossible to see two people at the tree when the search party was in the bushes. Fourthly, it is improbable that complainant would have beckoned to the search party when they were looking for her. Hence, the identity of the Appellant is put in question.

36. Crucial to the state case were the articles that were allegedly retrieved from the Appellant: a screwdriver, a toy gun and a panty. Only the screwdriver and the toy gun were presented as evidence during the trial. The Police Officer who attended to the scene could not remember how the items were captured in the SAP 13. He did not even remember if he saw the panty or the screwdriver on the scene.

37. I[…] had testified that he took a panty, a toy and screwdriver, after complainant had told him that the person also took her panty. The complainant had testified that the toy gun had a sellotape on the butt. But the toy gun which was introduced an exhibit, did not have sellotape. No fingerprints were lifted from these items. Counsel for Appellant submitted that the erratic chain of custody could not be

established during the trial and that admitting such evidence amounted to a misdirection by the trial court.

38. This Court was concerned about the chain of events relating to the whereabouts of the assaulted person who was detained by the mob led by I[…]. The complainant testified that she saw him run into the Police van fearing further attacks. The Police Officer testified that an ambulance was called to the scene as he found an injured person lying on the ground at the scene. He said he treated. He does not recall when he was taken to hospital.

39. Complainant further testified that she saw him at the Police Station building. On the other hand, Appellant testified that he was badly injured and had fainted at the scene. He was taken to the hospital from there. His Counsel at trial put this version to the complainant, but she insisted she saw him run into the Police van. There was no evidence adduced that he was at the Police Station or at the hospital that early morning after the assault.

40. The State Counsel could not shed clarity on the inconsistencies raised except to submit that it "*was a moving scene*" and there was sufficient illumination for complainant to see the Appellant. Yet even the Learned Magistrate stated in the judgement that "*the place was dark, so much that she would not be able to identify someone close to her, more so if that person was a stranger*".[20] Moreover, complainant could not remember the clothes Appellant was wearing. She was dragged for a distance of 100 meters to the scene of rape, hence, she could only see him from the side. But this cannot be her only view as he would have had to be on top of her during the course of the rape.

41. The Learned Magistrate further stated that I[…] could only identify the appellant because he found him with the complainant in the bush. When the appellant started running, he was only seven paces away and there was nothing to obscure his view as the area was *only infested with small shrubs*.. He had the appellant in his sight while giving chase. The evidence indicated that it was bush,

[20] Appeal Record at page 03-129.

though. If the Learned Magistrate was correct, the rape would have taken place within view of people at the park.

42. The Learned Magistrate phrased the problem as one of identity. He quoted **S v Mthethwa**[21] on the need for a proper approach to be adopted when evaluating identity evidence based *"upon a witness recollection of a person's appearance*" and that it is *"dangerously unreliable unless approached with caution*".[22]

43. He went on to state that *"unfortunately this incident unfolded in the wee hours of the morning when visibility was not at its best. The Complainant was dragged into the bush where I think things did not improve. For these reasons she could not give us specific identifying features of her assailant save for him being coffee-coloured, tall and slender with a protruding head and small eyes".*[23] No identification parade was held. The Leaned Magistrate found *not* much reliance cannot be placed on her identification of the Assailant because she seen him Assailant I Court on many occasions.

44. The Learned Magistrate states that despite certain shortcomings in the State case, he has determined that there are *"issues that are important in deciding whether probabilities lead to towards a finding of guilt rather than of innocence*"[24]. First, both complainant and I[...] refer to a panty which was found in the possession of the accused which she identified as hers, a fact that was not disputed in cross-examination or during appellant's evidence-in-chief.

45. Secondly, they both talk about the Appellant stating that the complainant was his girlfriend. Thirdly, "*the fact that some items of her evidence are not included in her police statement should be understood in light of the fact that police statements are not always taken in detail and in response to questions and answers like in the*

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[21] 1972 (3) SA 766 (A)(***Because of the fallibility of human observation, evidence of identification is approached by the Court with some caution. It is enough for the identifying witness to be honest. The reliability of his observation must also be tested".***)

[22] Appeal Record at page 03-140.

[23] Ibid at page 03-142.

[24] Ibid at page 03-143.

courtroom…"[25] More often than not, important information or facts are excluded while minor information is included.

46. Fourthly, it is very probable that improper handling police of exhibits by police could have led to a toy gun that did not have a sellotape. This could also explain why no one seems to know what happened to the panty that both Complainant and I[...] referred to and why it was not part of the exhibits. This improper handling of exhibits explains why Officer Masilo could not even remember the screwdriver that was found with the toy gun.

47. Fifth, I[...] had the assailant in his sight when he was chasing, and only alerted others so that they could lend him a hand. Lastly, it seems highly improbable that the Appellant just walked casually when someone shouted "*there is one of them*" after having been robbed earlier.

48. The Learned Magistrate lamented the level of professionalism exhibited by police, especially given the lack of DNA evidence in this matter. He then went on to state that *"courts should guard against throwing out the baby with the bath water where there is no other, or where there is other evidence available that points towards the guilt of the accused given the high incidents of abuse of women*."[26]

49. In light of the above, presumably the incompetence of and lack of professional handling of exhibits, the Learned Magistrate stated he *"accept as a proven fact that, one, the complainant panty was found in the accused's possession after he was arrested. The fact that it was NOT handed in as an exhibit or the fact that no one can account for what happened to it does not detract from the fact that the two witnesses corroborate each other*". Secondly, *"the toy gun that was found in possession of the Accused was the same as the one that he had earlier pointed at the Complainant and her companions before dragging her into the bushes, despite the fact that the sellotape, which is not a permanent feature of the toy gun, was*

[25] Ibib.
[26] Ibid at page 03-145.

removed under unexplained circumstances."[27] (own emphasis). And thirdly, her jacket was found at the same spot where I[...] apprehended him.

50. The Learned Magistrate concluded that in his opinion, "*all of the above prove beyond a reasonable doubt that he is the person who pointed at the complainant with an object that resembles a firearm before dragging her further into the bush where he had sexual intercourse with her against her will."*

F. APPLICATION OF LAW

51. The conclusions reached by the Learned Magistrate and the basis on which he concludes that there were three proven facts, are not supported by the evidence adduced during the trial. First, there is no supporting proof that the panty was found in the possession of the Appellant. This proof should have been the recollection of Officer Masilo and subsequent entry in the SAP 13.

52. The Officer who entered the exhibits in the SAP 13, Mathoka, should have been called to testify as to what evidence he logged into the SAP 13, especially after Officer Masilo testified that he does not remember a panty being handled at the scene or anytime thereafter. A mere statement by a witness that a piece of evidence exists without its production or reasonable explanation of its non-production in Court is not acceptable as conclusive proof of its existence.

53. Secondly, complainant described the toy gun as having a sellotape on its butt. The toy gun that was produced in Court did not have that sellotape. The Learned Magistrate takes a leap of faith to conclude that it is because of the incompetent handling exhibits by the Police and whilst that may well be so, no evidence was led in respect of how the Police handled this exhibit, let alone how it became to be an exhibit to start with.

54. Thirdly, the complainant testified that she went to the scene and retrieved her jacket the following day. This jacket was not entered into evidence. Its relevance to

[27] Ibid at page 03-146

the Magistrate's finding is incomprehensible. I[...] found a cellphone in the dark, searched the Appellant on the scene and found a screwdriver, a toy gun and a panty, but could not see and retrieve the jacket – this was never explained.

55. The Learned Magistrate considered the State's evidence and found it wanting in material respects. He was well aware that the evidence did not conclusively establish the veracity of the witness's versions. He recognized the dangers of relying on relying on the evidence of the complainant in regard to the identification of a stranger under the circumstances where illumination was non-existent.

56. Both the complainant and the corroborating witness, I[...], could not give a satisfactory account on the material facts surrounding the events of the night. What the Court is faced with is that they only agreed on one thing: it was dark and hard to see even the person next to you. What follows thereafter is conjecture and speculation.

57. We agree with the submission by Appellants' Counsel that the *ratio decidendi* in **Carneiro v The State**[28] is on all fours with the matter i*n casu*: the Learned Magistrate, well aware of the material discrepancies in the evidence of the Complainant and I[...], proceeded to hold that the evidence could be relied upon to discharge the State's onus to prove the guilt of the accused beyond a reasonable doubt. As Mathopo AJ (as he then was) stated in **Carneiro** (supra), where a trier of facts glosses over material differences in the testimony of witnesses, the result is a misdirection which necessitates the Appeal Court to interfere.

58. The Learned Magistrate misdirected himself when he ignored his own finding that it was so dark that identification was impossible. He further misdirected when he held that I[...] had a clear view of the running assailant because it he was running in a shrub as opposed to a bush. He further misdirected himself when he found that police incompetence justifies the introduction and acceptance of exhibits where their admissibility is questionable and no proper evidence was led as to the chain of evidence.

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[28] (A125/2010) [2018] ZAGPJHC 66 (28 March 2018)

59. The trial court was ultimately confronted with at least three versions: from the complainant, the witness and the accused himself. Properly viewed, all three versions were destructive of the other. All could not be true at the same. Logic would dictate at least one must be true.:[29] In *Doorewaard*, the Court stated that *"In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and in the process measured against the probabilities. In the final analysis, the Court must determine whether the State has mustered the requisite threshold, in this instance, proof beyond reasonable doubt".*[30]

60. When confronted with contradictions the trier of fact must evaluate the probative value of such evidence taking into account various factors such as "*the nature of the contradiction, their numbers and importance, and their bearing on other parts of the witness's evidence and their bearing on other parts of the witness's evidence.*"[31]

61. The factors that affected the State's witnesses' credibility and made their evidence unreliable have been alluded earlier, but they include, ***inter alia***, the timeline of events from the time they were confronted by an assailant or assailants, the illumination at the venue and scene of crime, the mutually destructive versions of the witness and the accused on the confrontation, as well the chain of custody in respect to the exhibits and their admissibility in Court.

62. The Learned Magistrate failed to appreciate the need for independent and verifiable evidence linking the Appellant to the crime, given the discrepancies and inconsistencies in the complainant's and other State witness's testimony.[32] By simply "glossing over" discrepancies, he misdirected himself and reached wrong conclusions in fact and law.[33]

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[29] Doorewaard and Another v The Sate (case No. 908/2019) [2020] ZASCA 155 (27 NOVEMBER 2020)
[30] Ibid
[31] S v Mokhose 1990 (1) SACR 95 (A)
[32] Dooreward and Another v State, ***supra.***
[33] Carneiro, supra.

63. One must also bear in mind that there is no *onus* on an accused and a court even though it may have misgivings about the totality of an accused's version, must not then simply ignore it. If there is any possibility that it may be reasonably possibly true, then he is entitled to an acquittal.[34]

64. In conclusion, after a careful analysis of the totality of evidence, I am of the view that the Appellant's version is reasonably possibly true and that, as a result, the Court *a quo* committed a serious misdirection in finding that the State proved its case beyond a reasonable doubt.

65. Consequently, the following order is made:

(a) The appeal is upheld.

(b) The conviction and sentence is set aside and replaced with the following order:
The accused is found not guilty and discharged

SEKHULA AJ
Acting Judge of the High
Court Gauteng Division,
Pretoria

I agree

NEUKIRCHER J
Judge of the High Court
Gauteng Division, Pretoria

Date of bearing: 22 February 2021

[34] R v Difford 1937 AD 370 at 373

Judgement 5_March 2021

Hearing conducted via videoconferencing

Delivered: This judgement 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 for hand-down is deemed to be ___5___March 2021.

For appellant: Adv Louw and with him Adv Hewitt

Instructed by: Legal-Aid SA

For respondent: L Williams

Instructed by: NDPP