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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: **A 358/2019**

REPORTABLE NO

OF INTEREST TO OTHER JUDGES NO

REVISED

In the matter between

LF B[....]

Appellant

and

THE STATE

Respondent

JUDGMENT

MATSEMELA AJ,

INTRODUCTION

1. The appellant was charged and convicted in the Regional Court sitting at Sebokeng on one count of rape of an adult woman. The appellant was legally

represented and pleaded not guilty to the charge. At the completion of the trial the appellant was found guilty as charged. On 12 December 2018 the appellant was sentenced to ten (10) years' imprisonment. On 27 February 2019 an application for leave to appeal against the conviction and sentence was argued on behalf of the appellant. Leave was granted to appeal against the conviction only.

LEGAL ARGUMENTS

2. It was argued on behalf of the appellant that the state failed to prove that the complainant was raped in light of the following:

- (a) It is reasonably possible that the appellant and the complainant had consensual intercourse.
- (b) The medical evidence does not support rape.
- (c) Although the complainant denied that she was in a relationship with the appellant, several witnesses confirmed that they were aware of such relationship.

3. It was further argued that the presiding magistrate erred in rejecting the evidence of the appellant in light of the fact that the complainant was a single witness.

4. The appellant further argued that the sentence imposed is shockingly inappropriate.

SUMMARY OF FACTS

5. The complainant, N N[...], testified that on 21 February 2017 she was coming from a friend's place where she wanted to borrow money for a taxi to go and collect her child from the child's father. On her way home she met the appellant. She explained to him that she needed money to go and collect her child. She testified that it was raining at the time. The appellant told her that he would give her the

money and that she must accompany him to his home to fetch the money. She followed him to his house where she remained outside whilst he went inside to fetch money.

6. When the appellant returned, he gave money to the children at the house and instructed them to go and buy a cigarette so that he could use the change to give the complainant R20.00. The appellant told the complainant to go inside the house but she preferred to remain outside. At some stage the appellant, according to her, came and pushed her into the house. He then locked the burglar door. The complainant questioned the appellant for locking the door but he replied that he was waiting for the children. The complainant remained standing at the burglar door. When the children returned, the appellant collected the money from them and the cigarette. He placed the money on top of the kitchen unit. When the appellant did not give the money to the complainant, she suspected that he was planning something. She asked him to open the burglar door so that she could leave.

7. The appellant told her not to be in such a hurry. The complainant started to push and kick the burglar door and managed to kick the door open. She ran outside and reached the gate but the appellant followed her and dragged her back into the house. He locked the door again. The complainant and appellant were struggling with each other during which the appellant made the complainant fall to the ground. He started to strangle her. The appellant managed to undress her from the waist downward and then pushed her into the bedroom where he raped her. During this incident the complainant continued to resist the appellant and he had to use force to rape her. The complainant noticed sperm on her thighs. She went to the bathroom to wipe herself clean. The complainant was swearing at the appellant. Soon afterwards the appellant opened the door for her and she left the appellant's home.

8. The complainant testified that she then went to her friend and, whilst crying, she told her friend what happened. The police were phoned where after she went home waiting for the police. When the police arrived at her home, she was taken to the police station for a statement and to the clinic to be examined by a medical

practitioner. She went with the police to the appellant's work place and house but he was nowhere to be found. A trap was set for the appellant to come to the complainant's house where he was then arrested. During her evidence and cross-examination, the complainant denied that she had a love relationship with the appellant and insisted that she hardly knew him.

9. P P[...] testified that she is a friend of the complainant. She confirmed that on 21 February 2017 at approximately 17:00 in the afternoon, the complainant arrived at her home. The complainant asked for petrol or paraffin because she wanted to burn down the house of the appellant. The complainant explained to her that the appellant had raped her.

10. Ms P[...] testified that she knew the appellant. He would visit her uncle sometimes. She confirmed that the complainant would occasionally visit her when the appellant was there with her uncle. One day during December 2016 the appellant visited her uncle. The appellant gave his cell phone number to the uncle for the uncle to hand it to the complainant.

11. O P P[...] confirmed that he is the uncle of P P[...] and that he is also known as "R[...]". During December 2016 he was at a tavern with the appellant. The complainant was also there and the appellant was trying to speak with the complainant but she was not interested in the appellant. Mr P[...] reprimanded the appellant. That evening the appellant gave his cell phone number to Mr P[...] and asked him to give it to the complainant. Mr P[...] gave the number to his niece, P P[...], to hand over to the complainant.

12. The appellant told Mr P[...] during December 2016 that he was in a love relationship with the complainant. During cross-examination Mr P[...] confirmed that he was told by the appellant during January 2017 that he spent the night with the complainant.

13. Dora Meme Chisane testified that she is a registered nurse working at Thuthuzela Care Centre which is mainly assisting rape victims. Ms Chisane testified that on 22 February 2017 she medically examined the complainant at the clinic. She completed a J88 form with her observations during the medical examination of the complainant. Her clinical findings were:

(a) Bruise on the right shoulder of approximately one centimetre.

(b) Bruise on the left arm of approximately two centimetres.

14. Ms Chisane found no other injuries. There was no physical sign of the penetration or injuries found during gynaecological examination. The complainant was calm and co-operative. Ms Chisane added, however, that the absence of injuries does not exclude penetration.

15. Nelson Organy Mohale testified that he is a constable in the Police Service. He testified that on 22 February 2017 he received a complaint of a rape that was committed on 21 February 2017. He visited the workplace and the home of the appellant but could not find him. The appellant was only arrested on 24 February 2017 after the complainant told him to come to her home to sign a withdrawal statement. The appellant was arrested at the house of the complainant and taken to the police station where a warning statement was taken from the appellant. The appellant denied that he had raped the complainant but told the officer that he was in a love relationship with the complainant.

16. The appellant testified that he met the complainant at Nozi's Tavern in the beginning of December 2016. He wanted to talk to her, but she said that it was not possible because she was with her boyfriend. The following day he managed to speak to the complainant and he proposed love to her which turned out very favourable and they started a love relationship. Both the complainant and the appellant were involved in other relationships as well. Several people were aware of the relationship he had with the complainant.

17. The appellant confirmed that he met the complainant on 21 February 2017. They went to his home where they watched television and later had consensual intercourse. During the time that the complainant was with him, she received text messages from her boyfriend asking where she was. The appellant denied that he raped or assaulted her.

18. M P[...] testified that he is a friend of the appellant. He knew the complainant as they were neighbours. There are no ill feelings between him and the complainant. Mr P[...] testified that the appellant and the complainant started a love relationship during December 2016. He was aware that the appellant would give the complainant money whenever he visited her.

19. B G T[...] testified that the appellant is her partner. Ms T[...] testified that one day, the complainant came into their home and wanted to see the appellant. The appellant went out with the complainant and later explained to her that he owed the complainant's boyfriend money and that the complainant came to collect this money from him.

20. During cross-examination Ms T[...] testified that she became aware of the relationship between the appellant and the complainant after she found the number of the complainant on the appellant's phone. She would then phone the complainant and tell her to stop seeing the appellant. When she confronted the appellant about the relationship with the complainant, he told her they were no longer involved.

21. S M M[...] testified that she knows the appellant. She testified that she is self-employed and sell vegetables outside of her house. On a certain day she saw the appellant and the complainant together. Her children told her that the two are involved in a love relationship. When the appellant came to buy vegetables from her, she reprimanded him because he was married to Ms T[...].

AD COVICTION

22. In criminal proceedings, it is trite that the State bears the onus to prove the accused's guilt beyond a reasonable doubt. The accused's version cannot be rejected merely on the basis that it is improbable, but only once the trial court has found, on credible evidence, that the explanation is false beyond a reasonable doubt. The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. Equally trite is that the appellant's conviction can only be sustained if, after consideration of all the evidence, his version of events is found to be false. See also *S v Shackvell* 2001 (2) SACR 185 (SCA) at 194G-I where Brand AJA cautioned against the rejection of an accused's version solely on the ground that it is improbable.

23. Section 208 of the Criminal Procedures Act¹, provides that 'an accused may be convicted of any offence on the single evidence of any competent witness.' The *lit-mus* test of a single witness was laid down in *R v Mokoena* 1956 3 ALL SA 208(A) at 212 and succinctly set out in *S v Sauls and Others* [1981] 4 ALL SA 182 AD as follows:

'The absence of the word "credible" is of no significance; the single witness must still be credible, but there are. . . "indefinite degrees in this character we call credibility. . . There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. . . 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.'

24. The trial court should have been mindful that it can only convict on such evidence if it is satisfactory in all respects. At the same time, this Court, as a court of

¹ Act 51 of 1977

appeal, is reticent to interfere with the credibility findings of the trial court as well as the evaluation of the oral evidence, unless there is a material misdirection. The objective evidence tendered by the State witnesses is, at best for the state, neutral or, at worst, exculpatory. The appellant was convicted on the evidence of the complainant which the magistrate said was corroborated by the first report witness. What the magistrate failed to take into account was the fact that the complainant was a single witness insofar as the rape is concerned.

25. An assessment of the complainant's evidence shows that her evidence was not clear and satisfactory. I am of the view that the magistrate misdirected himself in evaluating her evidence. Although it was found that the complainant was a truthful witness, we hold the view that the complainant was not truthful and that her testimony was not coherent. The first report witness also did not support the complainant on crucial aspects of her evidence. I will now turn to the reasons for my conclusion.

26. According to the complainant she met the appellant on the street and that it was raining at the time. She explained to the appellant that she needed money to fetch her child. The appellant offered to give her money which was at his home. It appears from the complainant's evidence that appellant was kind and tried to help her by offering to give her money so that she can collect her child. It is therefore not clear what the reason was why the complainant would refuse to go inside of the house to wait for the money but elected to stand outside in the rain. According to her version there was no reason to fear the appellant at this stage.

27. The complainant testified that, after she ran outside, the appellant apprehended her at the gate. She was then dragged back to the house where the appellant locked the burglar door and threw the keys outside. This does not make sense particularly in light of the fact that they both later exited through the burglar door.

28. The complainant testified that after the rape, the appellant got dressed in his uniform and that he opened the door of the house where after they left. There is no ex-

planation as to how the appellant retrieved the keys from outside to open the burglar door. Her evidence in this regard is, in my view, highly improbable.

29. The complainant testified that there was a huge struggle between the complainant and the appellant. According to the complainant she was dragged, tripped, made to fall on the ground and strangled. She also testified that the appellant repeatedly forced open her thighs whilst she was fighting him. Finally, the appellant managed to penetrate her. However, according to the J88 and evidence of Ms Chisane, the complainant sustained two small bruises on her arm and shoulder. The bruises were one centimetre and two centimetres when measured. The minimal injuries found by the medical practitioner does not, in our view, support the extent of the struggle and violence as described by the complainant. The complainant clearly lied about an alleged struggle.

30. During cross-examination it was put to the complainant that she received text messages during the time she was with the appellant. The complainant responded that, at some stage, her phone was misplaced or that the appellant threw it somewhere or that the appellant hid it. The evidence of the cell phone and text messages was not part of her evidence in chief. In all other respects her evidence was detailed yet it is strange that she would not add that the appellant took her phone and hid, threw or misplaced it. I agree with the submission by counsel on behalf of the appellant that the complainant was adjusting her version during cross-examination. The complainant also does not explain how she got the phone back. It is improbable that the appellant would allow the complainant to read text messages during the ordeal that she had described to the court in her evidence. It is, in my view, clear that she was lying about the cell phone.

31. The evidence of Ms P[...], who testified as the first report witness, is almost a word for word repetition of the complainant's evidence and should have been treated with caution. The one aspect on which Ms P[...] does not corroborate the evidence of the complainant was her evidence that the complainant's trousers and shoes were covered in mud. According to Ms P[...] she only saw dust on her trousers. The

magistrate, in my view, misdirected himself in finding that Ms P[...] testified that the complainant's jeans and boots were soiled and muddy and that she was hysterical.

32. Ms P[...] testified that the complainant's voice was shaking and the complainant was shaking. There was no mention made that the complainant was hysterical. The complainant testified that her voice was hoarse from crying when she arrived at her friend's home. The magistrate appeared to have placed high value on this evidence of Ms P[...].

33. The learned magistrate dismissed the evidence of the appellant and his witnesses that there was a love relationship between the appellant and the complainant. He further held that, even if there was such relationship, it would not have made a difference. Moreover, the magistrate chose to ignore the fact that the State witness, O P P[...] confirmed that the appellant told him about this relationship prior to the incident. The defence witnesses confirmed the relationship as well. The court *a quo* gave no reason why their evidence was dismissed.

34. In my view, the magistrate misdirected himself in dismissing the core defence advanced by the appellant and that is that there was a relationship between the appellant and the complainant and that intercourse was with consent. By lightly dismissing this defence the magistrate did not properly evaluate the evidence and therefore misdirected himself.

35. For these reasons, I conclude that the court *a quo* erred by convicting the accused on evidence that was unsatisfactory in so many respects and ultimately unreliable.

I therefore make the following order:

1. The appeal is upheld.

2. The appellant's conviction and sentence are set aside and the trial court's orders in those respects are substituted with an order that the appellant is acquitted and discharged.

M. MATSEMELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA
Electronically submitted therefore unsigned

I agree

A.C. BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA
Electronically submitted therefore unsigned

Delivered: This judgment 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.

Case number : A358/2019

Matter heard on : 4 February 2021

APPEARANCES:

FOR THE STATE:

ADV WKK MPHAHLELE

INSTRUCTED BY:

NATIONAL PROSECUTING AUTHORITY

FOR THE APPLICANT:

ADV L AUGUSTYN

INSTRUCTED BY:

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