IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR 659/2018

In the matter between:

M[…] J[…] S[…] **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

On appeal from: Ladysmith Regional Court (sitting as court of first instance):

The appeal against conviction is allowed and is set aside.

JUDGMENT

Mossop AJ:

Introduction

[1] This is an appeal against the appellant's conviction on a charge of the rape of his daughter. The appellant stood trial in the Ladysmith Regional Court and was convicted on a charge of rape, allegedly committed during February 2014 and June

2014 and was sentenced to 18 years' imprisonment. He sought leave to appeal against his conviction and sentence from the court a quo, but his application was refused. He then petitioned the Judge President of this division for leave to appeal against his conviction only, which was granted on 20 August 2019.

The basis of the appeal

[2] The appeal is predicated on two main criticisms of the proceedings in the regional court by the appellant. Firstly, the appellant contends that the trial court did not approach his evidence on an impartial basis and, secondly, he contends that the trial court failed to properly consider the inconsistencies and contradictions between the evidence of the complainant and the evidence of other witnesses called by the State. In due course, these contentions will be considered in some detail, but it is perhaps prudent at this juncture to briefly set out the evidence that led to the appellant's conviction.

The evidence

[3] The appellant has worked for the past 20 years in Johannesburg but has his home at Ekuvukeni in the Nazareth area near Ladysmith. He returns to his home on certain defined occasions, namely Good Friday, Christmas and when he takes his annual leave which, according to him, is in August of each year. He may also return for important ad hoc family events and emergencies. He is married and has three children, all of whom are girls, one of whom is the complainant. At the relevant time and according to the charge sheet, the complainant was 12 years old.

[4] The complainant testified that she resided with her grandmother but that when the appellant returned home, he would call for her and take her to his homestead which is situated near her grandmother's homestead. She alleged that during February 2014, the appellant had returned home and taken her from her grandmother's homestead to his homestead. She slept with him in a room and shared a bed with him. During an evening in February 2014, the precise date of which was never disclosed, whilst she was on his bed, the appellant turned her over, undressed her and climbed on top of her. He then inserted his penis into her vagina and had

intercourse with her. After he was finished, they both dressed, and the complainant went back to sleep. She did not report what had happened to anyone as she was afraid that if she disclosed it, that person would inform her father who might then hit her.

[5] The complainant testified that these events were repeated in June 2014 when the appellant again returned home. The exact date of the second offence was not mentioned either. She was taken from her grandmother's homestead to the appellant's homestead. When she realised that she was to accompany the appellant to his homestead, she cried as she thought that he would again have intercourse with her. Her fears were well-placed as the appellant again undressed her and inserted his penis into her vagina. The next day she returned to her grandmother's homestead and reported what had happened to her aunt, Ms P[…] S[…] (Ms S[…]). Her explanation for reporting what had happened to Ms S[…] and no-one else was that she knew her aunt was not on good terms with her father and believed therefore that her aunt would not inform her father of what she had been told by the complainant.

[6] Ms S[…] is the sister of the appellant. She testified that the complainant confided what had happened to her at the hands of the appellant in October 2014. This came about because Ms S[…] discerned that the complainant was reluctant to visit her at the place where she stays. When she tried to ascertain why this was the case, the complainant said that her father was at home and then revealed the rapes to her.

[7] Ms S[…] testified that she never had a problem with her brother, the appellant, but did concede that he had dismissed her from the family homestead. Under cross-examination, the witness conceded that she had waited several weeks before taking action after being informed of the rapes by the complainant. That action consisted of reporting the matter to certain social workers and not to the police. Her explanation for this was that she was still discussing the incident with her younger aunt. She also stated that she herself had been raped and knew that if there was a long gap between the rape and the date when it was reported, the police could not do much. In response

to a question from the appellant's legal representative as to whether the complainant told Ms S[…] how many times or occasions she was raped by her father, Ms S[…] answered as follows:

'I asked her, since from when and for how long. She said she cannot recall but she recalled that by the time that she was staying in the neighbour's house, which is 2011 and by that time I was at the college.'

[8] Under cross-examination, the following further exchange occurred:

'MR SHABANGU Okay, are there other occasions that she was raped other than 2011? --- She said to me, he started during that time. Every time when he had come back he used to take her from the grandmother's house and take her home.'

[9] Ms S[…] confirmed that the appellant only returned home during Easter and when he took his leave in August and in December. She denied that she had put the complainant up to laying false charges against the appellant, but she did admit the existence of a dispute between herself and the appellant and that at the time she gave her evidence, she was not speaking to the appellant.

[10] On 2 January 2015, the social workers to whom Ms S[…] had reported the matter, took action and the complainant was taken to a clinic where she was examined by a doctor, to whom she narrated what had happened. The complainant indicated in her oral evidence that she told the doctor that she had been raped by her father twice, in February 2014 and in June 2014.

[11] The doctor who examined the complainant was Dr Kranzi, who was employed at the Ladysmith Provincial Hospital. He found tears of the complainant's hymen at the three and nine o'clock positions (the positions being identified by reference to a clock face). The transverse opening of the vulva was found to be six millimetres wide and the vertical opening four millimetres wide, which the doctor found to be abnormal. He completed a J88 document and recorded the following under the heading 'Relevant medical history and medication':

'Abuse by father on February (2) times on June (3) times.'

[12] The doctor concluded the J88 with the following words:

'Sexually abuse by father on February and June 2014.'

[13] The appellant denied that he was guilty of what his daughter alleged and suggested that his estranged sister, Ms S[…], had prevailed upon the complainant to falsely accuse him. He testified that he would only return home on Good Friday, in August during his leave and in December. He indicated that he had gone home at Easter in 2014 but could not remember when Good Friday fell that year. He explained that Good Friday was usually in April or March. He testified that the complainant did not come to his homestead during Easter. He did take his leave in August 2014, as usual, and returned to his homestead. He ultimately testified that the complainant had come to his homestead in August 2014 and slept in the same room as him, but he indicated that on that occasion his erstwhile girlfriend was with him. The complainant slept at his homestead on two occasions in August 2014. In December 2014, he returned home for a family ceremony. The complainant was not present at the ceremony and was left in the care of her aunts at her grandmother's homestead. As to why his sister would use his daughter to falsely accuse him, the appellant alleged that his sister had apparently spent his money when she was not supposed to do so, disposed of some thatch belonging to the appellant, sold his bricks and spent the proceeds that she derived from such sale. He and his sister were not speaking to each other as a result, and this had been the situation since before 2014.

[14] On 28 December 2014, while at home for a family ceremony, he had been approached by social workers who had the complainant and various other family members with them. He was advised of the allegations that had been made against him. He then was permitted to ask the complainant a question. His evidence on this aspect was as follows:

'I asked her and said Asanda did I ever sleep with you, she responded in one word and said the aunt has said I should say I slept with you.'

He was later arrested on 2 January 2015.

[15] The appellant emphasised that his sister, Ms S[…], was not a truthful person and was not a good example to the people and the children in the area. He denied

that the complainant slept on his bed as she had testified and said that the children in his homestead sleep on sponge mattresses, a fact referred to by the complainant. He further testified that he continues to have an intimate relationship with the complainant's mother. He described himself as a good person with an unblemished employment record. The appellant was cross-examined by the prosecutor, and I shall revert to that cross-examination later in this judgment.

[16] The appellant called Ms D[…] S[…] S[…] (the grandmother) to testify on his behalf. The complainant resided with her. She described the appellant as being her husband's brother's son. According to her, the appellant came to fetch his daughter twice during August 2014. The complainant did not protest when she realised she had to go to her father's homestead, and nothing was disclosed to her on each occasion when she returned to her homestead. She confirmed further that Ms S[…] and the appellant were not on good terms. She also confirmed that the appellant came home at Easter, in December at Christmas and when he took his annual leave in August. She testified that the appellant had informed her that Ms S[…] had stolen his money and sold his thatch. It was put to her by the prosecutor that the appellant had testified that he had fetched the complainant from her homestead on Good Friday in 2014 and an attempt was made to get the grandmother to agree to this proposition. The witness was adamant that this had not occurred. In fact, what was put to the grandmother was totally incorrect: the appellant had not testified to that fact, his version being throughout that he did not call for the complainant at Easter 2014.

[17] I turn now to consider the two principal points raised by the defence as to why the appellant's conviction is unsound.

The trial court was not impartial

[18] The appellant contends that the regional magistrate improperly descended into the arena. In this regard, reference is made to the fact that the regional magistrate interacted with the appellant in isiZulu on a number of occasions. When this happened, what was said in isiZulu was not recorded or translated. An example of this interaction occurs at page 121 of the record:

'COURT Thank you . . . [speaking in isiZulu 01:29] no, no, no, that is not the issue. . . [speaking in IsiZulu]. Let us proceed, ma'am.'

[19] This is not the only instance of that type of exchange occurring. It occurred again at pages 126, 137 and 143 of the record. What was said on each occasion is unknown. It is difficult to conclude therefore that the regional magistrate entered the arena as alleged or said anything improper or irregular. There may be a quite innocent explanation for this type of conduct. Had anything improper been said, it is to be expected that the appellant's legal representative, Mr Shabangu, would have said something. He did not. However, it can be stated with some certainty that everything that is said in a trial should be capable of being considered by a court of higher authority, if necessary. It is perhaps stating the obvious that a record is of cardinal importance in appeal matters. The record forms the basis of the appeal court hearing. Where the record is inadequate or there are parts of it not capable of being transcribed it may have consequences. While the record need not be perfect, it must be adequate.[1] A judicial officer should ensure that when he or she addresses an accused person, that what is said is capable of being translated and transcribed and should ensure that both occur. The problem does not end there. Having recorded that the prosecutor, Mrs Singh, was not conversant in isiZulu, at page 126 of the record, the following interaction occurs:

'COURT Mr Prosecutor – Mr Interpreter, please, may I?
INTERPRETER Yes, Your Worship.
COURT Thank you. … [speaking in IsiZulu].
MR SHABANGU As the Court pleases, Your Worship.
COURT Is there anything you want to say?
MR SHABANGU As the Court pleases, Your Worship, nothing to add.
COURT Nothing to add? Thank you. Let us proceed. You were not in?
PROSECUTOR Yes Your Worship.
COURT Me and the accused were in on this.
PROSECUTOR As the Court pleases, Your Worship.'

[1] *S v Chabedi* 2005 (1) SACR 415 (SCA) para 5.

[20] Not only does this court not know and understand what was said to the appellant, but the prosecutor was also unaware of what the regional magistrate had said to him. There should never be an instance where only a judicial officer and the accused are '*in*' on any issue to the exclusion of the prosecutor.

[21] Reference is also made by the appellant to the fact that the regional magistrate demonstrated a loss of objectivity and decorum. This arose from a number of utterances made by the regional magistrate to the appellant. Such utterances included the following:

'*Mkhulu*, open eyes, eyes, eyes, no blindness here, open wide, wide open.'

[22] While these statements appear relatively innocuous, and may simply constitute colourful local vernacular, there is the possibility that the appellant viewed matters in a different light after hearing such types of admonishment. That this is a possibility is revealed by the following exchange between the court and the appellant:

'COURT Please? *Mkhulu*, let us not play the blind games here. --- If I can ask where have I done wrong now?'

[23] The impression created by this response from the appellant is that he felt that whatever he said was incorrect and was annoying the court. A witness, including an accused person giving evidence in his own trial, should not feel under attack from any one, let alone the court. A presiding officer is expected to display patience and tolerance, especially with people who are not familiar with how a court operates, and should refrain from making utterances that may cause a witness including, and especially, an accused person, to believe that his performance, demeanour and the value of his evidence has already been negatively determined. This impression may have been created in the mind of the appellant arising from the following exchange:

'PROSECUTOR Your Worship, I do not think the accused is understanding my questions.

COURT No, he does understand your questions.

PROSECUTOR He is just being evasive? As the Court pleases. Sir.'

The inference was that the court believed that the appellant was being evasive and was wilfully not answering questions put to him and said as much. That is certainly

how the prosecutor understood the court's comment and there is no reason not to think that the appellant also derived the same meaning from those comments.

[24] Witnesses should be spoken to respectfully and should not be spoken down to, as occurred in this instance. The appellant was a 48-year-old man and despite the use of the honorific title '*mkhulu*', he was spoke to as if he were a child. It was unbecoming of the regional magistrate. Finally, on this score, the regional magistrate made a most unfortunate comment, as follows:

'COURT *Mkhulu*, can I ask this of you? I have been observing you throughout your testimony. *Mkhulu*, at all times I actually get the feeling that you might actually even hurt the prosecutor, let us not get physical about this.'

[25] Such comments should not be made. Indeed, at the commencement of the trial the appellant's legal representative drew it to the court's attention that the appellant stuttered when he spoke, and when he stuttered, his habit was to raise his hand before he uttered any further words. His legal representative went on to say:

'If he is saying that he does not want to seem to be aggressive.'

There was no evidence that indicated that the comment passed by the regional magistrate was called for or justified. The statement cannot but have created the impression in the mind of the appellant that the court did not view him and his version in a favourable light.

[26] The further complaint of the appellant was the conduct of the regional magistrate when the appellant's legal representative attempted to prove the complainant's witness statement. I have considered that portion of the record and I can discern no impropriety in what occurred. It is the court's function to ensure that statements that are to be put to witnesses are properly proved. The appellant's legal representative was informed that he had not properly proved the statement and appears not to have attempted to prove it properly thereafter.

[27] There are unfortunate aspects to the manner in which proceedings were conducted by the regional magistrate. After anxious consideration, I am not prepared

to find that these on their own meant that the appellant was denied a fair trial, however unsatisfactory the regional magistrate's conduct was.

Contradictions not properly considered

[28] This is the second ground upon which the proceedings in the court a quo was criticised by the appellant. Certain differences in the evidence tendered on behalf of the State were highlighted. On the issue of the rape, in summary, the differences were:

(a) the complainant testified that she was raped once in February 2014 and once in June 2014;

(b) Dr Kranzi testified that the complainant informed him that she had been raped by her father twice in February 2014 and three times in June 2014; and

(c) Ms S[…] testified that the complainant informed her that the rapes had commenced in 2011.

[29] In addition, forming part of the record of proceedings, there are a number of charge sheets. At page two of the record, there is a typed charge sheet which is the charge sheet that the court a quo relied upon to convict the appellant. It mentions the months of February 2014 and June 2014 as the dates when the complainant was allegedly raped by the appellant. However, there are other charge sheets that form part of the record. There are three in all, each one being a charge of rape. These appear to be earlier iterations of the charge sheet. They are also typed, but do not appear to have been formally used to prosecute the appellant. They appear at page 25, 26 and 27 of the record respectively. The charge sheet at page 25 records the date of the rape as being during April 2014, the charge sheet at page 26 records the date of the rape as being February 2014 and the charge sheet at page 27 records the date of the rape as being February 2014. These charge sheets do not accord with the evidence led. There was no mention by the complainant of a double rape in February 2014, nor was there mention of a rape at all in April 2014. There must, however, have been some information that existed to warrant these charge sheets being drawn up. At one stage in his evidence, the appellant referred to three allegations of rape, indicating that they were alleged to have occurred in February 2014 (twice) and October 2014. He was incorrect about the October averment but he was correct that

the original charge sheets alleged three rapes. He was chastised by the prosecutor and later by the regional magistrate for saying so. But for the incorrect month, he was correct.

[30] These are disturbing differences when one considers that the liberty of the appellant is dependent on the court accepting the complainant's evidence as being correct.

[31] There were other notable discrepancies between the evidence of the complainant and Ms S[…]. Ms S[…], as pointed out by Ms Franklin who appeared for the appellant, stated that the complainant had informed her that she had not reported the occurrence of the rapes to any one as:

'Her father said if she ever reports to anyone about what is happening there, her father said he is going to kill her and leave her in that room and go back to Johannesburg, as no one stays in that house.'

This must be compared with the following extract from the cross-examination of the complainant:

'MR SHABANGU As the Court please, Your Worship. The Court's indulgence Your Worship? Impelandle, after your father did what you alleged he did to you, did he threaten you? --- No

MR SHABANGU Have you told anyone that your father threatened you? --- No.'

[32] A further inconsistency arose between the evidence of the complainant and Ms S[…] when the complainant testified that she informed Ms S[…] of her rape. She indicated that this had occurred in June 2014. Ms S[…] testified that this only occurred in October 2014.

[33] In my view, there is merit in the submission that the regional magistrate failed to consider these contradictions. It appears to me that the regional magistrate erred in concluding that the State proved its case beyond a reasonable doubt. The differences in the evidence between the witnesses called by the State throws a considerable shadow on the perceived strength of that case.

The alibi

[34] Even if I am incorrect in the conclusion made above, there is another basis upon which, in my view, the appeal must succeed. At the conclusion of her judgment, the regional magistrate stated the following:

'The Court rejects the version of the accused as not being reasonably, possibly true, more especially his, if I may call it an alibi, the story of the fabrication for reasons that have also been mentioned and the inherent improbabilities that are attached to it.'

[35] The regional magistrate recognised that the defence raised was an alibi, although it was not formally pleaded as such. But it was obvious to all the participants in the trial that the appellant's case was that he only returned from Johannesburg at Easter, when he took leave in August and in December and when there was an emergency that required his attendance back at home. If it was the State's case that the rape happened at a time or times outside those dates, then he could not be the rapist as he was in Johannesburg.

[36] It is trite that there is no onus on an accused to establish his alibi. If the alibi might reasonably be true, then the accused must be acquitted. Furthermore, the alibi does not have to be considered in isolation from other evidence. The correct approach is to consider the alibi in the light of the totality of the evidence presented before court. In *R v Hlongwane*, Holmes AJA stated as follows:

'At the conclusion of the whole case the issues were (a) whether the alibi might reasonably be true and (b) whether the denial of complicity might reasonably be true. An affirmative answer to either (a) or (b) would mean that the Crown failed to prove beyond reasonable doubt that the accused was one of the robbers.'[2]

[37] That would be true of the facts in this case. If it was established that the complainant was raped at a time when the appellant was not at home, he could not be the rapist and the State would have failed to prove its case beyond a reasonable doubt.

---

[2] *R v Hlongwane* 1959 (3) SA 337 (A) at 339C-D.

[38] In *S v Musiker,*[3] the Supreme Court of Appeal held that once an alibi has been raised, it has to be accepted, unless it can be proven that it is false beyond a reasonable doubt.

[39] Where the evidence demonstrates the existence of an alibi and there is a reasonable possibility that such evidence is true, it follows that the trial court should find that there is a reasonable possibility that the prosecution's evidence is mistaken or false. There cannot be a reasonable possibility that the two versions are both correct. This reasoning is consistent with the approach to alibi evidence laid down by the Appellate Division nearly 70 years ago in *R v Biya,*[4] where Greenberg JA said:

'If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.'[5]

[40] The rule of evidence that the late disclosure of an alibi affects the weight to be placed on the evidence supporting the alibi is one which is well recognized in our common law.[6] In considering the appellant's alibi, I am mindful of the fact that he did not plead the existence of such at the commencement of the trial. However, it emerged relatively early on in the proceedings that the appellant's version would be that he only returned to his home on certain defined occasions. It was put to the complainant that the appellant had been at home in December 2013 and had next come home on Good Friday in 2014. When Ms S[…] testified she said that:

'He comes back home during the Easter holidays, when he is on leave and in December and sometimes when there is something that is done at his homestead, he comes back.'

The appellant's version was thus ever present.

[41] The difficulty for the State is that the regional magistrate acknowledged the nature of the defence but then failed to take into account the fact that it was the State who bore the onus of negating the appellant's alibi. It does not appear that it made

---

[3] *S v Musiker* 2013 (1) SACR 517 (SCA) paras 15-16.
[4] *R v Biya* 1952 (4) SA 514 (A).
[5] Ibid at 521C-D.
[6] *R v Mashelele and another* 1944 AD 571.

any positive attempts to do so. It could have called the appellant's employer to disprove when he took his annual leave or to testify about any other occasion when he took time off. It chose not to do so. The prosecutor tried to cross-examine the appellant but, in truth, spent most of the time quarrelling with him. She tried to elicit an admission from him that he came home at a time other than at Easter 2014, during August 2014 when he habitually took his leave and at December 2014. No such admission was forthcoming from the appellant. The same was attempted with the grandmother, with the same result. In effect, therefore, the regional magistrate was faced with two mutually destructive versions. There was, in my view, sufficient reason to conclude that the appellant's version that he only came home at Easter, during August when he took his annual leave and during December was reasonably possibly true. Given the contradictions in the dates of the rape, I conclude that the magistrate had no sound reason to prefer the evidence of the complainant to that of the appellant.[7]

[42] Finally, there is the evidence of the appellant that the complainant confessed that she had been told by Ms S[…] to say that she had been raped by the appellant. Admittedly this was only revealed by the appellant when he testified and not earlier. But given the acknowledged feud between him and his sister, it is weighty evidence and worthy of consideration. The State could have requested leave to lead evidence in rebuttal of that statement but did not do so.

Conclusion

[43] On a general conspectus of the evidence, I am of the view that it would be unsafe to allow the conviction of the appellant to stand. I accordingly would propose that the appeal be allowed and that the appellant's conviction be set aside.

---

[7] *Petersen v S* [2006] JOL 16082 (SCA) para 8.

Mossop AJ

I agree and it is so ordered.

Madondo J

Deputy Judge President

APPEARANCES

Counsel for the appellant	:	Advocate D. Franklin Instructed by:
Counsel for the respondent	:	Advocate P. N. Ngcobo Instructed by: The Director of Public Prosecutions Pietermaritzburg
Date of Hearing	:	21 May 2021
Date of Judgment	:	21 May 2021