IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

(1) REPORTABLE: **NO/~~YES~~**

(2) OF INTEREST TO OTHER JUDGES**: NO/~~YES~~**

(3) REVISED.

CASE NO: A20/2019

In the matter between:

JOHN NKOMAPE MODIMOLLA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

NAUDE AJ:

[1] The Appellant was convicted in the Modimolle Regional Court on 9 March 2015 on two counts, the first count being attempted murder in that on 12 October 2013 at Phomolong, Limpopo, the Appellant unlawfully and intentionally attempted to kill the Complainant by stabbing her with broken glass, pouring paraffin over her body, breaking her hand and also by hitting her with a walking stick ("kierie"). The second count, being rape in that the Appellant on 12 October 2013 at Phomolong, Limpopo, unlawfully and intentionally committed an act of sexual penetration with the complainant by inserting his fingers inside her vagina.

[2] The Appellant was sentenced in the Regional Court Modimolle on 9 March 2015 as follows:

(i) Count 1 - Attempted Murder - sentenced to 7 years imprisonment;

(ii) Count 2 - Rape - sentenced to 5 years imprisonment.

(iii) 2 years imprisonment on Count 2, to run concurrently with the sentence on Count 1.

[3] This is an appeal against the conviction and sentences on both charges of attempted murder and rape read with the provisions of Section 51(1) of the General Amendment Act 105 of 1997 and the sentence of 10 years direct imprisonment imposed on the Appellant by the Regional Court Magistrate in the Regional Court Modimolle. This appeal is with leave of the High Court Polokwane.

[4] The charges arose from an incident that occurred on 12 October 2013. Mrs. R[….] M[….], the complainant in counts 1 and 2, and the Appellant at the time of the incident were in a relationship for approximately 2 years. The complainant was at home, after work. Around 18h30 on 12 October 2013 the complainant noticed the Appellant outside her house with a 5 liter empty bottle and a "kierie".

[5] After the complainant bathed, she heard a window breaking. She noticed the Appellant entering her house through the broken window. The complainant asked the Appellant what was wrong, where after he hit her with the "kierie" on her neck area, over her left shoulder. The Appellant wanted to know if there was anybody else with her in the house. Whilst the Appellant went through the house looking for somebody else the complainant opened the door and went outside. She ran to the house next door.

[6] The Appellant followed her with the "kierie" in his hands. At the neighbour's house the complainant managed with help of the neighbour to enter the house. She closed the door and locked it. The Appellant convinced the neighbour to open the door as he found the complainant with another person in her house. The neighbour opened the door whereafter the Appellant entered the house and started to hit the

complainant further and continuously. The Appellant hit the complainant all over her body, her hands and her head. The complainant attempted to flee from the Appellant, but the Appellant followed her and continued to hit her with the kierie. The Appellant attempted to strangle her with an object around her neck. The Appellant then proceeded to hit her with his fists. He pulled her to the outside of the neighbour's house and dragged her back to her house.

[7] Back at the complainant's house, the Appellant shoved her against the wall and her head hit the wall. The Appellant took a piece of the broken glass of the window and started to stab her head and her hands with it. He then dragged her over to the Appellant's erstwhlie co-accused's house by her nightwear around her neck. Her lower body was nakedly exposed.

[8] At the Appellant's erstwhile co-accused's house, the Appellant took another kierie which was in the co-accused's house and started to hit the complainant continuously again all over her body and her backside. The Appellant asked the erstwhile co- accused for petrol, but she did not have any petrol and only paraffin. The complaint asked for water to drink, whereafter she was given water to drink by the Appellant's erstwhile co-accused. The Appellant then took a bucket of water and told the complainant to drink the entire bucket. Whilst drinking water, the Appellant threw the water over the complainant and then proceeded to throw the paraffin over the complainant. The Appellant went looking for matches. He took out a match and lit it, but it didn't ignite as his hands were wet. The Appellant then continued to hit the complainant with the kierie. In the early hours of the morning the Appellant stopped hitting the complainant and then asked his erstwhile co-accused for a basin and started to wash her. The Appellant asked the erstwhile co-accused for blankets whereafter he wrapped the complainant's body with 2 blankets and took her outside to the gate. He left the complainant there and told her that they (the Appellant and erstwhile co-accused) were going to look for transport to take her to the hospital. They returned without transport.

[9] Allegedly the Appellant and his erstwhile co-accused accused the

complainant of having a sexual relationship with another man without a condom and then wanted to know if the complainant was pregnant. The Appellant allegedly penetrated the complainant's vagina with his hand, whereafter, together with the Appellant the erstwhile co-accused also inserted her hand into the complainant's vagina. They allegedly then stated that she was pregnant. Only after the complainant assured the Appellant that she would not tell the police that it was the Appellant that assaulted her, but other persons, the Appellant and his erstwhile co-accused went to the police. Shortly thereafter they returned with the police. An ambulance came and took the complainant to hospital. She lost consciousness. The complainant was admitted in FH Odendaal Hospital and was then transferred to Mankweng Hospital in Polokwane where she stayed for one month and three weeks.

[10] As stated here above, leave to appeal was granted in respect of the conviction and sentences on both counts. The Appellant's version is that he acted in self-defense. During the hearing of the Appeal, the Appellant's counsel conceded that the Appellant exceeded the bounds of self-defense. In this court's view, the trial court did not commit any misdirection in respect of the conviction or sentence imposed on Count 1.

[11] A court of appeal is hesitant to interfere with the factual findings and evaluation of the evidence by a trial court. **(R v Dhlumayo and Another 1948 (2) SA 677 (A)) In S v Francis 1991 (1) SACR 198 (A) at 198j to 199a** the approach of an appeal court to findings of fact by a trial court was crisply summarized as follows:

"The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of a witness' evidence, is presumed to be correct. In order to succeed on appeal, the applicant must therefore convince the Court of Appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence - reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has *seeing, hearing and appraising a witness, it is only in exceptional* cases *that the court of appeal will be*

entitled to interfere with a trial court's evaluation of oral testimony."

And in **S v Hadebe and Others 1997 (2) SACR 641 (SCA),** the court held:

".. *.the credibility findings and findings of fact of the trial court cannot be disturbed unless the recorded evidence shows them to be clearly wrong. In assessing whether or not such is the case, the approach which commended itself in* ***Moshephi and Others v R*** ***(1980-1984) LA C 57*** ***at 59 F - H*** *seems appropriate in the particular circumstances of the matter:*
"The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the Appellants was established beyond reasonable doubt. The breaking down of a *body of evidence into its component parts is obviously* a *useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all,* a *mosaic of proof Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that* a *broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic* as *a whole. If that is not done, one may fail to* see *the wood for the trees."*

[12] In respect of Count 2, the trial court committed material misdirections that justify interference by this court. The trial court found the Appellant guilty on the charge of rape. The rape count was not proved in this court's view, beyond reasonable doubt. The court only had the complainant's testimony in respect of the count of rape. The J88 submitted does not state any alleged sexual offence neither did Dr. Vincent Ramaroka who examined the complainant give evidence in respect of any sexual offence committed. Dr. Vincent Ramaroka in his evidence in chief confirmed that he did not

examine her private parts. In cross-examination Dr. Vincent Ramaroka testified that there was no complaints by the complainant that she was sexually assaulted. Dr. Vincent Ramaroka confirmed that his findings were that the injuries sustained by the complainant were in accordance to what the complainant explained to him. Dr. Vincent Ramaroka further confirmed that one would expect a woman to have sustained severe injuries to her private parts if a person's whole hand is inserted in her vagina. He further confirmed that if a person complained of injuries to her private parts, he would have examined it. As stated here above, the J88 is silent in respect of any sexual offence.

[13] The trial court rejected the evidence of the complainant that the appellant's erstwhile co-accused put her hand in the complainant's vagina and thereby giving the co-accused the benefit of the doubt, but found on the same facts and evidence that the appellant indeed put his hand in the complainant's vagina. In this regard the Magistrate erred and does the Magistrate's findings of fact construe a serious misdirection.

[14] The complainant was a single witness in the matter on both charges, and especially in a matter with a sexual nature. The cautionary rules are applicable and should have been applied. In terms of Section 208 of the Criminal Procedure Act, Act 51 of 1977, an accused may be convicted of any offence, on the single evidence of a competent witness. This evidence however should be approached with caution.

[15] In ***S v Sauls and Others*** **1981 (3) SA 170(A) Diemont JA** explained how the rule should be applied by trial courts. The learned Judge said **(at 180E):**

'There is no rule of thumb test or formula to apply when it comes to a *consideration of the credibility of the single witness (see the remarks of* ***Pumpff JA in S v Webber 1971 (3) SA 754(A) at 758).*** *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.*'

[16] This rule applies to evidence of single witnesses regardless of their gender. It is not the cautionary rule that was confined to sexual offences only and which was discarded by the Supreme Court of Appeal in ***S v Jackson*** **1998 (1) SACR 470 (SCA).** Having rejected the latter rule Olivier JA, however, acknowledged that in cases such as the present the evidence led may warrant a cautionary approach. The learned Judge said **(at 476F):**

'In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases *(overwhelmingly women)* as *particularly unreliable. In our* system *of law, the burden* is *on the State to prove the guilt of an accused beyond reasonable doubt - no more and no* Jess. *The evidence in* a *particular case may call for* a *cautionary approach, but that* is *a far cry from the application of* a *general cautionary rule.'*

[17] It is trite that there is no obligation upon an accused person, where the State bears the onus, "to convince the court". If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. It is against this background that this court evaluates the evidence of the complaint. It is improbable that the Appellant's hand was inserted into her vagina, together with the Appellant's erstwhile co-accused, at the instruction of the Appellant, to examine if she is pregnant or not without the complainant having sustained any vaginal injuries. The state did not prove all the elements of the offence and in this case one of the essential elements of this particular offence of rape is penetration by hands.

[18] The Magistrate erred in his conclusion that there was penetration by hand by the Appellant. The Magistrate should have been vigilant in his assessment and evaluation of the evidence in order to eliminate the risk of conviction on the basis of insufficient evidence, particularly where the offence carries a heavy punishment. **(See S v K 2008 (1) SACR 84 (C) at**

p 85 par 4.) In this court's view, the Magistrate erred in not applying the cautionary rule and convicting the Appellant on Count 2. The charge of rape lacks support from the facts and the law and the State did not discharge the onus beyond reasonable doubt that the Appellant is guilty of the offence in Count 2. The Magistrate misdirected himself in this regard as well.

[19] In light of the misdirections, the conviction and sentence on Count 2 by the trial court, stand to be set aside. In the result the appeal against the conviction and sentence on count 1, attempted murder, should fail, but the appeal against the conviction and sentence on count 2, rape, should succeed.

[20] This court therefore makes the following order:-

1. The appeal against the conviction and sentence on Count 1, attempted murder, is dismissed.
2. The Appeal against the conviction and sentence on Count 2, Rape, is upheld.
3. The conviction and sentence on Count 2 is set aside.

M. NAUDE
ACTING JUDGE
THE HIGH COURT

I AGREE:

M.F. KGANYAGO
JUDGE OF THE

HIGH COURT

APPEARANCES:

HEARD ON:	**4 SEPTEMBER 2020**
JUDGMENT DELIVERED ON:	**26 OCTOBER 2020**
For the Appellant:	Mr. L.M Mantzini
Instructed by:	Legal Aid South Africa
For the Respondent:	Adv. Jacobs
Instructed by:	The Director of Public Prosecutions