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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 80/2011

In the matter between

MCEBISI MAGADLA **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Magadla v The State* (80/2011) [2011] ZASCA 195 (16 November 2011)

Coram: MTHIYANE, MHLANTLA, BOSIELO, SERITI JJA and MEER AJA

Heard: 15 August 2011

Delivered: 16 November 2011

Summary: Criminal Law ─ Rape ─ appeal against conviction ─ appellant raising alibi defence ─ truthfulness of which was cast in doubt on appeal ─ appellant correctly identified as perpetrator ─ conviction confirmed.

ORDER

On appeal from: Eastern Cape High Court, Mthatha (Griffiths AJ and Petse ADJP sitting as court of appeal):

The appeal against conviction is dismissed.

JUDGMENT

MHLANTLA JA (MTHIYANE JA and MEER AJA concurring):

[1] The appellant was convicted of rape in the Willowvale regional court and sentenced to ten years' imprisonment. An appeal against his conviction was dismissed by the full bench of the Eastern Cape High Court, Mthatha (Griffiths AJ, Petse ADJP concurring). The court below refused leave to appeal. The appellant now appeals to this court with special leave granted by this court.

[2] Before us, the appellant does not dispute that the complainant was raped. The sole issue for determination in this appeal is the adequacy or otherwise of the evidence of identification. The appellant maintained that he is not the person who raped the appellant.

[3] At the trial the appellant tendered a plea of not guilty and elected not to disclose the basis of his defence. Two witnesses testified on behalf

of the State. They were the complainant and her friend Ms Thobeka Ngobe. The appellant testified in his defence and called his cousin Mr Sibongile Mnqetha as his witness.

[4] The complainant told the court that on Friday, 15 October 2004, at about 22h00 she went to a hiking spot not far from Willowvale after having an argument with her boyfriend. A man, whom she identified in court as the appellant, offered her a lift. He was driving a red vehicle with tinted windows. The appellant asked her what had happened as she had been crying. She told him that she had had an argument with her boyfriend. On the way the appellant requested that they stop at a tavern where he wanted to buy beers for himself. She agreed. On his return from the tavern he was accompanied by a male person whom he later dropped off. The complainant testified that she became concerned when the appellant drove in the opposite direction. When she enquired from him as to what was going on, the appellant ignored her and just kept on drinking his beer. He drove to a homestead in the district of Willowvale.

[5] He parked the vehicle and ordered her to get out of the vehicle but she refused. The appellant then pointed a firearm at her and forced her out of the vehicle. He ordered her to enter a certain room after instructing a person who had been inside to sleep in another room. The room was illuminated by an electric light. He ordered the complainant to sleep with him, she refused after which he pulled her. A struggle ensued between them as she tried to prevent him from removing her clothes. He overpowered her and forcibly removed her clothes. As a result, her trousers were torn. He picked up some condoms and grabbed her. She tried to push him away but he overpowered her and then raped her. She later saw him discarding the original condom and replacing it with a new

one whereupon he raped her again.

[6] The appellant kept her in the room until the next morning. In the early hours of the morning he stated that she would have to leave before the other people in the homestead awoke. They left at about 05h00. He dropped her at a certain spot on the way to the Taleni locality and gave her an amount of R20 and said 'you can decide what to do'.

[7] The complainant boarded a taxi and went to the home of her friend Thobeka in Dutywa. Thobeka provided her with a place to sleep. She reported her experience to Thobeka. She awoke during the day and washed herself. Thobeka accompanied her to town ─ to a shop called Just on Cosmetics.

[8] The complainant told the court that it was upon returning to Thobeka's home that she saw a red vehicle and recognised the driver as the man that had raped her. She pointed out the vehicle to Thobeka and told her what had happened to her. According to the complainant, Thobeka requested her brother to take her home. On their arrival, she asked Thobeka to inform her grandmother about her ordeal.

[9] The incident was reported to the police at Dutywa police station where the complainant made a statement. She was unable to provide the police with particulars of the perpetrator as she had met him for the first time that night. The police requested her to notify them if she ever saw the person in the neighbourhood again. She was later examined by a doctor. A few days later she saw the vehicle that had been driven by the person that had raped her. It was parked at a Total garage in Dutywa. She immediately reported this to the police. This led to the arrest of the

appellant ─ the owner of the vehicle.

[10] During her evidence-in-chief the complainant was asked by the prosecutor if she had the opportunity to observe the appellant. She responded in the affirmative. She was asked further how she observed him. Her reply was that the light was on in the room where she had been taken by the appellant. She further elaborated that the light in question was an 'electric light'. During cross-examination, the complainant averred that she had ample opportunity to observe the appellant as they were together in the vehicle. The lights of the vehicle were on at the time. Whilst in the vehicle, she had noticed that he had a firearm in his possession. She once again emphasised that the room where the incident took place was illuminated by an electric light. The appellant was in the same room with her until about 05h00 whereafter he dropped her off. It bears mentioning that she would have been in the company of the appellant from about 22h00 to 05h00 the next morning.

[11] Coming back to the occasion when the complainant saw the appellant's vehicle, she testified that Thobeka was with her when she saw the vehicle for the first time after the incident. It was driven by the appellant near the taxi rank in Dutywa. She was able to identify the vehicle by its colour and make. According to the complainant, the vehicle was a red van with a canopy and tinted windows. I must mention here that the appellant and his witness also confirmed that his vehicle was red and had tinted windows. She saw the vehicle again, three days after the incident, parked at the Total garage and notified the police. She was adamant that the appellant was in fact the person that had offered her a lift and later raped her. She denied the allegation that she had falsely implicated him.

[12] Thobeka Ngobe testified that on Saturday 16 October 2004, the complainant arrived at her home and sought a place to sleep. The complainant woke up at about 11h00 and had a wash. She requested Thobeka and another friend Thandokazi to accompany her to a certain shop. According to Thobeka, the complainant was very quiet along the way and her demeanour was different from what it normally was. Thobeka and Thandokazi enquired what was bothering the complainant but she did not respond. The complainant attended to her business and they returned home.

[13] At about 15h00 they went to town again because the complainant wanted to use the public phones. They were returning home when they saw a twin cab with tinted windows. The side windows were dark whilst the windscreen was partially tinted. Thobeka testified that she had mentioned to the complainant that the sight of the vehicle reminded her of one Mshefan, who was a student at J S Kanjana School. She said she knew the driver of that vehicle as she used to see him at the above-mentioned school when he came to fetch Mshefan. Mshefan used to say the driver was his father. Thobeka noticed that the complainant appeared to be uncomfortable and looked down when she spoke about this man.

[14] Thobeka testified that the complainant was traumatised but did not disclose the cause thereof to anyone. Thobeka and her family were concerned about the complainant's state of mind and decided to take her home. They hoped that she would disclose her problem to her family. She broke down and cried along the way. On arrival, the complainant initially did not report to her family that she had been raped, but eventually told her grandmother. Her grandmother later related the story to Thobeka. In

essence, the grandmother told her that the complainant had reported that she had been raped by the owner of the motor vehicle they had seen in town. Thobeka thereafter narrated to the court what the complainant's grandmother had told her.

[15] During cross-examination Thobeka was adamant that she knew the man she had seen in town on that Saturday afternoon, driving the red vehicle which had been converted into a van. She identified the appellant as the driver of the said vehicle. The appellant's alibi defence was for the first time put to the witness ─ that he had attended a funeral during that weekend. Thobeka denied the allegation. She was adamant that on that Saturday between 15h00 and 16h00, she had seen the appellant driving his vehicle, in town, as she and the complainant left the public phones. She denied the allegation that the appellant's vehicle was not operational. According to her, he was driving the said vehicle when she saw him and it had been sent to the Total garage for repairs on a different date.

[16] The appellant testified that he resides in Bende location, Taleni locality. He raised an alibi defence. He denied the allegations against him and stated that he had attended a funeral on 16 October 2004, at Fort Malan locality, Willowvale district. He had spent the Friday afternoon and evening at the family homestead assisting with funeral arrangements together with his cousin Mr Sibongile Mnqetha. He admitted to being an owner of a red vehicle that had been converted into a van and which had tinted windows. However, it had not been operational during the weekend of 15 October. On Saturday 23 October, he and his cousin towed the vehicle to the Total garage in Dutywa for repairs. He thereafter went to Mncwe Village to attend a funeral. He returned to the garage later that afternoon to collect his vehicle. He was advised that the police had

confiscated the keys as they were looking for him. He thereafter proceeded to the police station where he was arrested.

[17] The appellant's cousin Mr Sibongile Mnqetha supported his version regarding their attendance at the funeral. His testimony mirrored the appellant's version. According to Mnqetha, the funeral was held on Saturday, 16 October 2004, and they had been busy from the Friday afternoon. He further testified that none of the appellant's children ever attended school in Dutywa and he did not have a child with the name of Mshefan.

[18] The regional magistrate placed considerable emphasis on the fact that the appellant had not disclosed the particulars of his alibi defence to the State witnesses. The magistrate rejected the appellant's version as false. He found the complainant's evidence credible and accepted the evidence adduced on behalf of the State. He therefore convicted the appellant of rape.

[19] The court below, correctly in my view, held that the magistrate had misdirected himself when he laid significant emphasis on the appellant's failure to disclose the alibi defence to the State witnesses, as certain details had at least been put to Thobeka albeit not to the complainant. The court below therefore considered the evidence afresh. Regarding the alibi defence, the court held that the appellant had to be mistaken about the date on which he attended the funeral in view of the totality of the evidence and the probabilities. It accepted the evidence tendered on behalf of the State. The court below dismissed the appeal as well as an application to enable the appellant to pursue his appeal further. As indicated earlier, special leave to appeal was granted by this court.

[20] In this court, counsel for the appellant levelled a number of criticisms against the manner in which the trial court as well as the court below assessed the evidence. First, he submitted that the case was decided on probabilities. Second, that the complainant was not a credible witness and that her evidence could not be accepted in the absence of corroborating evidence implicating the appellant. Third, he argued that the issue of identification was dealt with in a perfunctory manner and that the State witnesses contradicted each other with regard to the issue of the first report. Finally, he contended that no clear finding was made by the court below that the appellant's version was false.

[21] Regarding the probabilities, it is so that the court below tested the evidence against the inherent probabilities. There is nothing wrong with this approach. This issue was considered in *S* v *Chabalala*,[1] where Heher AJA held that:

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'

[22] In the present case, there are certain indiciae in the evidence that lend credence to the complainant's version and cast doubt on the appellant's alibi defence. Take for example the unlikely coincidences inherent in the appellant's version. According to his version he would have been some 110 kilometres away from the place where the rape happened. By some coincidence the person who raped the complainant

1 *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15. See also *S v Shackell* 2001 (2) SACR 185 (SCA) at 194G-I.

has a red car with tinted windows – the same as his. The rapist's red car is modified and the appellant too, has a modified vehicle. The rapist was carrying a firearm and he, too has a firearm. One may ask rhetorically as to what the probabilities are of having such matching features where people live more than 100 kilometres apart. In my view these factors are quite significant in testing the truthfulness or otherwise of the alibi defence, which was in any event not put to the complainant in cross-examination. In my view it was permissible for the trial court to have regard to these probabilities.

[23] It is trite that the State has to prove its case against an accused beyond reasonable doubt and the evidence of a single identifying witness must be clear and satisfactory in all material respects. But it must not be forgotten that the court must have regard to all the evidence including that of an accused. I have already alluded to the fact that the acceptance of his alibi depends amongst other things upon the acceptance of the three unlikely coincidences referred to above. On the question of having regard to all the evidence Nugent J remarked as follows in *S v Van der Meyden*:[2]

'The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached . . . must account for all the evidence.'

[24] The correct approach to the evaluation of an alibi defence was set out by Holmes AJA in *R v Hlongwane*:[3]

'The legal position with regard to an alibi is that there is no *onus* on an accused to

2 *S v Van der Meyden* 1999 (2) SA 79 (W) at 82C-D.
3 *R v Hlongwane* 1959 (3) SA 337 (A) at 340H-341B.

establish it, and if it might reasonably be true he must be acquitted. *R v Biya* 1952 (4) SA 514 (AD). But it is important to point out that in applying this test, the alibi does not have to be considered in isolation. I do not consider that in *R v Masemang* 1950 (2) SA 488 (AD) Van den Heever, JA had this in mind when he said at pp 494 and 495 that the trial Court had not rejected the accused's alibi evidence "independently". In my view he merely intended to point out that it is wrong for a trial Court to reason thus: "I believe the Crown witnesses. *Ergo*, the alibi must be rejected." See also *R v Tusini and Another*, 1953 (4) SA 406 (AD) at p 414. The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses.'

[25] The identification of the appellant as the rapist is based on the evidence of a single witness. Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. There is no magic formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and consider its merits and demerits and having done so, should decide whether it is satisfied that the truth has been told despite the shortcomings or defects in the evidence.[4]

[26] Our courts have repeatedly stated that evidence of identification must be approached with caution. In *S v Mthetwa*[5] Holmes JA made the following observation with regard to the approach to be adopted when considering the evidence of identification:

'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent

4 *S v Sauls* 1981 (3) SA 172 (A) at 180E-G.
5 *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C.

of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities . . . .'

I will return to the dictum of Holmes JA in *Mthetwa* and try to show how the facts of that case are distinguishable from the facts of this case in so far as they bear on the question of identification.

[27] I turn briefly to the evidence of the first report. In this respect the complainant testified that she made a report to Thobeka when she saw the vehicle in town. On the other hand, Thobeka testified that the complainant did not make any report to her but to her grandmother. Counsel for the appellant made much of the apparent contradictions regarding the first report. He contended that not much reliance could be placed on the evidence of these witnesses.

[28] It is so that the complainant and Thobeka contradicted each other as described above. The court, however, has to determine the nature and impact of such contradictions based upon the entire evidence of these witnesses. Another factor that has to be borne in mind is that the complaint *per se* cannot be used to prove the truth of its contents nor is it corroboration of the complainant's evidence. Its purpose is to show lack of consent and consistency.[6] In so far as the contradictions are concerned, these, in my view, are not material in nature and do not render the veracity of the evidence suspect. Contradictions *per se* do not lead to the rejection of a witness' evidence. They may simply be indicative of an

6 See *S v Hammond* 2004 (2) SACR 303 (SCA) para 12.

error. Not every error made by a witness affects his or her credibility; in each case a trier of fact has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance and their bearing on other parts of the witness' evidence.[7]

[29] Regarding the attack on the approach adopted by the courts during the assessment of the evidence, it is important to note that the appellant made his attendance at a funeral on the day of the alleged incident a major challenge to the complainant's credibility. However, if the evidence of the complainant were to be accepted and the appellant's alibi rejected, it would follow ineluctably that on 15 October 2004, at a time when the appellant testified that he was at Fort Malan, busy attending to funeral arrangements, not only was he at Taleni locality with the complainant but that he also raped her.

[30] It must be accepted that the dictum of Holmes JA in *Mthetwa* remains good law. However, the distinguishing feature between this case and the *Mthetwa* case is that the complainant's identification of the appellant was not based solely on a so-called 'dock identification' or on a fleeting encounter in adverse lighting conditions. She was in the company of the perpetrator from about 22h00 to 05h00. There were no adverse circumstances when she accepted a lift from him and thereafter travelled with him in his vehicle. The appellant had not threatened her in any manner whatsoever as she went along with the promise he had made to take her to her destination. They were in close proximity to each other in the vehicle and as I have said at that stage there was no reason for her to be frightened. She was clearly at ease in his company and even related her argument with her boyfriend. They drove together to the tavern where

7 *S v Mkohle* 1990 (1) SACR 95 (A) at 98F-G.

he bought some alcohol and came out with a male companion. The circumstances changed when he threatened her with a firearm and took her to the homestead. There she was taken to a room that was illuminated with an electric light. This was not a mobile scene. They spent several hours in that room. They were once more close to each other as he had sexual intercourse with her. In fact she was able to observe the perpetrator when he discarded the original condom and replaced it with a new one. The perpetrator left with her the next morning at about 05h00. This, in my view, tends to suggest that she had ample opportunity to see the perpetrator and observe what he was doing. The submission that she did not have enough opportunity to identify the perpetrator has no merit and is accordingly rejected.

[31] The identification not only rested on the opportunity she had during that night but also on the identification of the appellant as the owner of a red vehicle which had been converted. She again saw this vehicle on two occasions after the incident. She saw it when she was in the company of Thobeka and again a few days later at the garage. She notified the police and this led to the arrest of the appellant. At the risk of repetition, the question to be asked is whether it was a sheer co-incidence that the complainant would state that the man that had raped her drove a red vehicle with tinted windows and that this vehicle had been converted into a van ─ a feature that made the vehicle unique. Furthermore, is it a co-incidence that the appellant happened to own a red vehicle, a sedan that had been converted into a van and which had tinted windows as described by the complainant? I think not. In my view it would be a remarkable co-incidence if the complainant were mistaken about the identity of the appellant.

[32] In my judgment, the complainant had ample opportunity to make a proper and reliable observation of the appellant. The fact that she failed to provide a description of the appellant does not assist him. She was neither asked in her evidence-in-chief nor during cross-examination to give a fuller description than she did, of the appellant. We do not know what her response would have been had she been asked. It had been suggested during the cross-examination of the complainant that she had falsely implicated the appellant. No reasons were advanced as to why she would do that. In my view that possibility is not sustainable. The evidence of the complainant contained no material contradictions save the issue relating to the first report referred to in paras 26 and 27 above. In my view, the complainant has not been shown to be an untruthful witness and her testimony was correctly accepted as credible.

[33] Thobeka's testimony with regard to the events of Saturday, 16 October 2004, cannot be disregarded. She was adamant that she had seen the appellant on that Saturday afternoon driving his vehicle at a time when the appellant ought to have been at Fort Malan attending a funeral and also driving a vehicle that was supposed to have been out of order. In my view, this evidence serves as corroboration of the complainant's version with regard to the sighting of the appellant on the said Saturday afternoon. This would make the appellant's version about his movements as well as the condition of his vehicle on that Saturday, a lie.

[34] Regarding the alibi, the only reasonable inference that can be drawn is that the appellant and his witness had conspired to deliberately

mislead the court by concocting false evidence in order to discredit the complainant. The appellant had lied deliberately in his evidence about the date of the funeral. He may have attended a funeral but on a different date. He was not content therewith and procured the false evidence of his cousin to support him in these lies. The court below properly considered the defence. It is apparent from its judgment that it rejected the appellant's alibi defence. The failure to make a finding in that regard does not fundamentally impact on the outcome. Even though the alibi defence was disclosed before the close of the State's case, it is not clear why this defence was not put to the complainant and emerged for the first time after an adjournment of about three months during the cross-examination of the State witness, Thobeka. The appellant's defence is accordingly rejected as false.

[35] The conclusion reached is not simply on the basis of the finding that the appellant gave false evidence but also in view of the totality of the evidence and the probabilities discussed above. The complainant's evidence pertaining to the identification of the appellant is sufficiently strong to prove beyond reasonable doubt that the appellant was the perpetrator of the offence and to render the rejection of the alibi defence. In the result the appellant's evidence was correctly rejected as not reasonably possibly true. There is accordingly no basis to disturb the trial court's finding.

[36] For all the reasons set out above the appeal against conviction is dismissed.

N Z MHLANTLA
JUDGE OF APPEAL

BOSIELO AND SERITI JJA (dissenting):

[37] We have had the benefit of reading the judgment of our colleague Mhlantla JA. We are, regrettably, unable to agree with her reasoning and conclusion. What follows are the reasons for our dissent.

[38] As the facts of this case have been extensively dealt with in the main judgment, we do not deem it necessary to repeat them. We shall only refer to those salient facts which may have been inadvertently omitted and which we feel will serve to explain our dissension.

[39] At the heart of this appeal is the question whether the court below was correct in finding that the identity of the appellant, as the person who raped the complainant on the night of 15 October 2004, has been proved beyond reasonable doubt. This becomes even more critical as such identification was based on the evidence of a single witness which has to be evaluated against the defence of an alibi raised by the appellant.

[40] Our courts have accepted many years ago that due to the inherent fallibility of human observation and memory, the evidence of identification should be approached with caution as it is dangerously unreliable. It is not so much the question of whether the identifying

witness is sincere, honest or even confident about the identity of the person he or she identified. A court has to be satisfied that the evidence is reliable and further that every possibility of an honest but mistaken identity has been eliminated.

[41] As pointed out in the main judgment it is correct that the complainant must have had sufficient opportunity to observe her assailant. First, on her evidence, she travelled together with her assailant in his motor vehicle from where she was offered a lift to the place where she was allegedly raped. Second, her assailant was with her in the room which was illuminated by an electric light. Third, he drove with her in his motor vehicle during the early hours of the next morning when he took her away.

[42] Notwithstanding the fact that this matter revolved around identity compounded by the fact that the appellant also relied on an alibi, not enough was done to properly explore and investigate the contentious evidence of identification. Regrettably, both the State and defence dealt with this all-important aspect in a rather perfunctory fashion. Some excerpts from the recorded evidence will demonstrate this amply. This became evident during the evidence-in-chief of the complainant:

'Now, Ma'am, tell me, did you know the accused before the day in question? — No.

It was your first time to see the accused?…It was the first time, yes.

As this thing took place at night, did you have an opportunity to observe him?…Yes, I managed to.

Can you tell this court how did you observe him?…At the room where he had taken me to there was a light on.

What source of light was that?…It was an electrical globe.

Yes. Do you know how the accused was arrested?…Yes, I do.

Can you tell the court how he was arrested?…Yes.

Proceed?…The police said if we managed to see him we must go and notify the police or any other policeman.
Did you eventually see him?…Yes, we saw the motor vehicle but he was not in the vehicle.
Yes?…The motor vehicle was at the Total Garage. I then notified the police.'

[43] As against Thobeka's version aforestated the complainant testified as follows:

'Yes?… I then washed myself. After washing we then went to town.
Yes?… On our return from town I then saw this motor vehicle and he was also inside the vehicle. I then pointed it out to Thobeka.
Yes?… I told her what happened.
You mean Thobeka?… Yes. Thobeka.'

[44] It should be patently clear that the evidence of Thobeka contradicts that of the complainant on a very material aspect of the case ie the identification of the appellant as the assailant. In this context it is important to recall that it is common cause that soon after the alleged rape the complainant went to Thobeka's home for succour. It is clear that she is her friend. Importantly, Thobeka testified that from the time the complainant arrived at her home that morning until the time they took her to her grandmother's place that afternoon, she never said anything about the red vehicle or any rape for that matter. This is notwithstanding the fact that they had repeatedly been asking her what was bothering her as she did not appear to be her usual self. She tendered no explanation for this rather bizarre behaviour, considering particularly that Thobeka is her friend. Surprisingly, Thobeka heard about the rape episode for the first time from the complainant's grandmother later that afternoon apparently after some serious cajoling and shouting by her grandmother.

[45] It is common cause that the complainant did not give any description either of the appellant's physical appearance or his clothes to the police. Furthermore, there was no identification parade held to afford the complainant an opportunity to identify her assailant. The complainant only identified the appellant after she was brought to the police station where he was detained and she was asked to identify him. Self-evidently this is akin to dock identification with no or very little probative value. Even during her evidence in court, the complainant did not mention any special, remarkable or peculiar features or marks with which she identified the appellant as her assailant.

[46] The appellant was arrested solely on the basis of the identification of his motor vehicle which he had taken to Total Garage in Dutywa for some repairs. It is this motor vehicle which the complainant pointed out to the police as the one driven by her assailant on the fateful night. This is the only evidence on which she relied for her identification. It is remarkable that neither Thobeka nor the complainant recorded the registration numbers of this vehicle when they allegedly saw it in town, a day after the alleged rape. They could only rely on its red colour and the tinted windows for its identification. This vehicle is said to be a red double-cab which had been converted and which had dark tinted windows.

[47] As against the above version, the appellant pleaded an alibi. He testified that on the night in question he was never in Willowvale as he was busy at a night vigil, of a late relative called Silulani Magadla at Fort Malan attending to the funeral arrangements for the funeral that was due to take place the next day on 16 October 2004. Furthermore, he testified that he could not have used his vehicle on this night as it had broken

down. Suffice to state this alibi was corroborated by his cousin, one Mr Sibongile Mnqetha in all material respects.

[48] Regarding the vehicle, the appellant admitted that he owned a red double-cab vehicle which had tinted windows. He testified however that during that period his vehicle had broken down and that he could not have used it. As a result he had it towed to the Total Garage in Dutywa for repairs. Incidentally, this is the place where the complainant and her friend Thobeka identified the vehicle two weeks after the alleged rape.

[49] In accepting the complainant's version, the court below held that because she was kept in a room which was illuminated by an electric light, for the better part of the evening and was only released in the early hours of the next morning, she had sufficient opportunity to observe the appellant to the extent that she subsequently identified him as her assailant. This is notwithstanding the fact that she was unable to give a single physical attribute or mark or item of clothing of the appellant with which she identified him. This is compounded further by the fact that she was unable to describe her assailant to the police. Contrary to what is stated in *R v Shekelele* 1953 (1) SA 636 (T) at 638, no questions were put to her by either the State or defence, not even the court itself, regarding any peculiar features, marks, height, build, complexion, clothing or any other indications with which she identified the appellant as her assailant. The complainant was content with the bald and unsubstantiated allegation that she had seen the appellant. Evidently the court did not have any independently verifiable and objective evidence to determine the reliability of her evidence of identification.

[50] It is common cause that the appellant was identified and arrested

through his motor vehicle which was found at the Total Garage at Dutywa. The court below appears to have accepted her version that when she saw this vehicle on the day after the rape, she readily pointed it out to her friend Thobeka after which Thobeka informed her that she knew the owner. However, Thobeka contradicts the complainant directly on this crucial aspect. Thobeka testified that she is the one who saw the red vehicle when she was with the complainant and Thandokazi. She then remarked that it reminded her of one Mshefan who was a student at the J.S. Kanjana School. Thobeka identified this red vehicle to be the one she used to see at the school, when it came to fetch Mshefan. Thobeka testified that when she said this, the complainant looked down and never uttered a word. She did not tell Thobeka and Thandokazi at this crucial moment that the driver of that vehicle had raped her the previous night. Nor did she tell them thereafter despite their repeated questions and exhortations for her to tell them what was wrong with her. The court below appears to have attached insufficient weight to this material contradiction on the crucial part of her case and the complainant's unexplained and bizarre behaviour.

[51] Whilst evaluating the contradictory evidence of both the complainant and Thobeka regarding the red motor vehicle, which is central to the identification of the appellant, it is important to bear in mind the evidence of the appellant to the effect that he does not have a son called Mshefan. Furthermore the appellant denied pertinently that he was ever at the school referred to by Thobeka.

[52] The correct approach to identificatory evidence was adumbrated as follows in *S v Mehlape* 1963 (2) SA 29 (A) at 32A-F:

'It has been stressed more than once that in a case involving the identification of a

particular person in relation to a certain happening, a court should be satisfied not only that the identifying witness is honest, but also that his evidence is reliable in the sense that he had a proper opportunity in the circumstances of the case to carry out such observation as would be reasonably required to ensure a correct identification; see for example the remarks of Ramsbottom, AJP, in *R v Mokoena,* 1958 (2) SA 212 (T) at p 215. The nature of the opportunity of observation which may be required to confer on an identification in any particular case the stamp of reliability, depends upon a great variety of factors or combination of factors; for instance the period of observation, or the proximity of the persons, or the visibility or the state of the light, or the angle of the observation, or prior opportunity or opportunities of observation or the details of any such prior observation or the absence or the presence of noticeable physical or facial features, marks or peculiarities, or the clothing or other articles such as glasses, crutches or bags, etc, connected with the person observed, and so on, may have to be investigated in order to satisfy a court in any particular case that an identification is reliable and trustworthy as distinct from being merely *bona fide* and honest. The necessity for a court to be properly satisfied in a criminal case on both these aspects of identification should now, it may be thought, not really require to be stressed; it appears from such a considerable number of prior decisions; see example the apprehension expressed by Van den Heever JA, in *Rex v Masemang* 1950 (2) SA 488 (AD), after reference to the cases of wrongly convicted persons cited in Wills *Principles of Circumstantial Evidence,* 7th ed p 193. The often patent honesty, sincerity and conviction of an identifying witness remains, however, ever a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence.'

See also *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C; *R v Dladla and others,* 1962 (1) SA 307 (AD) at p 310C.

[53] Although it may be true that the complainant had ample time to observe her assailant in a room where there was light, she failed to indicate, as is required by both *Shekelele* and *Mthetwa* any peculiar features or indications evident on the appellant, to satisfy the court that her identification of the appellant is not only honest and sincere but is

trustworthy and reliable. This is of even greater significance as the appellant was not known to the complainant before. I think this is the classic case which Williamson JA had in mind when he said in *Mehlape* at 34A-B:

'In the result it seems to me that the appellant in this case was convicted on the evidence of a single witness whose testimony as to identification, though found to be honest, stood untested in regard to at least two necessarily vital factors and uncorroborated by any other proved fact. In the absence of some other material and proper consideration which could be said to have removed a reasonably possible error in the witness' selection of the appellant as one of the robbers, it seems to me that the court should, apart from other possible considerations, have entertained a reasonable doubt as to the latter's guilt.'

[54] We are firmly of the view that the evidence of identification by the complainant did not pass the threshold. The bald and unsubstantiated assertion by the complainant is not a sufficient safeguard against a possible mistaken identification albeit honest mistake. This is particularly so as she is a single witness. Although s 208 of the Criminal Procedure Act 51 of 1977 allows for a conviction of an accused on the evidence of a single witness, such evidence must be clear and satisfactory in every material respect. The evidence of the complainant failed this test. She has been directly contradicted by Thobeka, her witness on a crucial aspect of her case ie the identification of the red vehicle and the appellant as her assailant. Given these glaring contradictions, we are of the view that it cannot be said that it has been proved beyond reasonable doubt that the appellant was properly identified as the person who raped the complainant.

[55] Our colleague Mhlantla JA seems to have accepted that the complainant's apparent confidence and firm belief that the appellant is

her assailant, as a sufficient basis for the acceptance of her evidence of identification. Is this apparent confidence and firm belief by the complainant a sufficient safeguard to exclude the possibility of an honest but mistaken identity, particularly as the appellant raised an alibi which was never proved to be false beyond reasonable doubt? We are of the firm view that it is not. Such an approach is contrary to the correct legal approach which was clearly set out in *S v Mlati* 1984 (4) SA 629 (A) at 632F-633C as follows:

'Die Verhoorhof het bevind dat die klaagster 'n besondere eerlike en bilike getuie was. Daar is geen rede hoegenaamd om van hierdie hoë aanslag van die klaagster as 'n getuie te verskil nie. Inteendeel spreek die oorkonde duidelik van 'n indrukwekkende eerlikheid en van 'n opregte poging tot objektiwiteit en billikheid van die kant van die klaagster in die aflegging van haar getuienis. Daarby was die klaagster baie beslis en seker van die korrektheid van haar uitkenning van die appellant as een van die persone wat haar aangerand en verkrag het. Juis die klaagster se ooglopende eerlikheid en haar eie vaste oortuiging van die korrektheid van haar uitkenning maan 'n mens egter tot groot versigtigheid by oorweging van die vraag of haar uitkenning met veiligheid as betroubaar aanvaar kan word, want in 'n saak soos die huidige mag die klaagster se eerlikheid en eie oortuiging nooit toegelaat word om die afsonderlike ondersoek na die betroubaarheid van haar uitkenning te vertroebel nie. Waar die Staat se saak teen 'n beskuldigde in sy kern uitsluitlik berus op die uitkenning deur 'n enkele getuie van die beskuldigde as die misdadiger, lê die gevaar van 'n verkeerde skuldigbevinding juis opgesluit in die altoos aanwesige moontlikheid dat die getuie 'n eerlike fout begaan in die identifikasie van die beskuldigde as die misdadiger. Hierdie gevaar, in die samehang van die teenstelling tussen eerlikheid en betroubaar-heid is al telkemale in die regspraak uitgewys, maar die omstandighede van die huidige saak verg dat dit weer eens beklemtoon moet word. Om dié rede haal ek by wyse van voorbeeld uittreksels aan uit twee beslissings van hierdie Hof. In die eerste, *R v Masemang* 1950 (2) SA 488 (A) op 493 het Van den Heever AR gesê:

"The positive assurance with which an honest witness will sometimes swear to the identity of an accused person is in itself no guarantee of the correctness of that evidence... In Wills on *Principles of Circumstantial Evidence* 7th ed at 193, the

learned author cites a number of cases in which persons have been wrongly convicted (and even executed) on this type of evidence, which fills one with apprehension."

In die ander saak, *R v T* 1958 (2) SA 676 (A) op 681, het Ogilvie Thompson Wn AR gesê:

"Again, undue weight cannot be attached to the circumstance that complainant readily picked out appellant at the identification parade. Her honesty is undoubted: the vital question is whether the firm belief of this young girl can be implicitly relied upon."'

Suffice to state that the dicta quoted above have withstood the test of time.

[56] Furthermore, it is crucial that the entire evidence be weighed against the alibi raised by the appellant. It is trite that there is no onus on an accused to prove his alibi. The correct approach is set out in *S v Khumalo & andere* 1991 (4) SA 310 (A) at 327G-I as follows:

'Waar `n beskuldigde `n alibi opper, rus die bewyslas op die Staat. Bestaan daar gevolglik `n redelike moontlikheid dat die alibi's van die beskuldigdes onder bespreking waar kan wees, sal die Staat hom nie van sy bewyslas gekwyt het nie (*R v Biya* 1952 (4) SA 514 (A) at 512D-E). Die korrekte benadering in dié verband is om elke alibi aan die hand van die totaliteit van die getuienis met betrekking daartoe, en die Hof se indrukke van die getuies te oorweeg (*R v Hlongwane* 1959 (3) SA 337 (A) at 341 A).'

This is the test against which the appellant's alibi has to be evaluated. See *S v Tandwa* 2008 (1) SACR 613 (SCA) para 132.

[57] The appellant may well be criticised that his alibi was only raised with the second state witness Thobeka and not with the complainant. However, as the State had not closed its case, the State still had an opportunity, if it so wished, to investigate and verify the appellant's alibi. Our colleague drew, as the only reasonable inference to be drawn from the totality of the evidence, the inference that the appellant and his

witness had conspired to deliberately mislead the court by concocting false evidence in order to discredit the complainant. With respect, we disagree as there is no factual basis for such an inference. To our minds this remains pure speculation. On the contrary it is not the appellant who tried to discredit the complainant. The complainant and her friend, Thobeka have discredited themselves on this crucial aspect ie how the appellant was identified. At the risk of repetition, the complainant testified that 'on our return from town I then saw this vehicle and he was also inside the vehicle. I then pointed it out to Thobeka…'. On the other hand, Thobeka testified that she is actually the one who saw this vehicle and told the complainant that it actually reminded her of a person called Mshefan. The complainant did not respond. This glaring and unexplained contradiction should have raised serious doubts about the reliability of the identification of the appellant as the assailant.

[58] Reverting to the alibi, if the prosecutor had doubts about the appellant's alibi, appropriate measures should have been taken to investigate and verify it as he or she still had ample opportunity as the State had not closed its case. Given the nature of the evidence available to the State, the State had an obligation and ample opportunity to investigate the appellant's alibi. Amongst others, the State could and should have gone to Total Garage, Dutywa where the mystery vehicle was found, to verify when it was brought there for repairs. Furthermore the State could and should have gone to the home where the appellant testified that he was assisting with funeral arrangements of a family member to verify if it is true or false. Even a visit by the Investigating Officer to the funeral parlour which was responsible for the funeral would have enabled the police to verify from the records if there was such a funeral during that weekend. It is not proper to reject an alibi that has not been proved to be

false on the basis of some speculative hypotheses not supported by the evidence. For as long as the alibi remains reasonably possibly true, the court cannot reject it. The appellant cannot be faulted for the unexplained failure by the State, with all the resources available, to follow up on his alibi and investigate it properly.

[59] As the appellant's alibi had not been proved to be false beyond reasonable doubt it should not have been rejected. The correct approach to this problem was succinctly set out by Jafta JA in *S v Liebenberg* 2005 (2) SACR 355 (SCA) para 14 as follows:

'The approach adopted by the trial court to the alibi evidence was completely wrong. Once the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false.'

[60] In the light of the above we are not satisfied that the guilt of the appellant had been proved beyond reasonable doubt. We would therefore have upheld the appeal and set the conviction and sentence aside.

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L O BOSIELO
JUDGE OF APPEAL

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W SERITI
JUDGE OF APPEAL

APPEARANCES:

For Appellant	:	M Tshiki Instructed by Tshiki & Sons Incorporated, Mthatha Mthembu & Van Vuuren, Bloemfontein
For Respondent	:	J M K Joubert Instructed by Director of Public

Prosecutions, Mthatha