THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 555/10

In the matter between:

ISAAC MOLEMA **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Molema v The State* (555/10) [2011] ZASCA 62 (1 April 2011)

Coram: STREICHER, SHONGWE JJA and PETSE AJA

Heard: **18 March 2011**
Delivered: **1 April 2011**

Summary: Appeal ─ Against the order of the high court refusing leave to appeal in terms of s 309C(7)(c) of the Criminal Procedure Act 51 of 1977 ─ whether there are reasonable prospects of success of an appeal to the high court against the appellant's conviction and sentence in the regional court on charges of rape.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Mailula J and Mabesele AJ on appeal from the Regional Court, Krugersdorp):

The appeal is dismissed.

JUDGMENT

PETSE AJA (STREICHER and SHONGWE JJA concurring)

[1] This appeal served before us pursuant to leave granted by this court against an order made in the court a quo (Mailula J and Mabesele AJ) refusing the appellant leave to appeal against his conviction and sentence in the regional court, Krugersdorp.

[2] The historical background to the matter is briefly as follows. The appellant stood trial in the regional court, Krugersdorp. He was charged with two counts of rape read with s 51 of the Criminal Law Amendment Act 105 of 1997.

[3] The allegation against the appellant was that on or about June 2006 and on 4 December 2006 he unlawfully and intentionally had sexual intercourse with Ziphora Mahlangu a 38 year old female without her consent. The alleged acts of rape were said to have occurred at or near Krugersdorp West and at or near Manziville respectively in the Regional Division of Gauteng.

[4] The appellant pleaded not guilty on both counts. In his substantiation of his plea of not guilty the appellant admitted to have had sexual intercourse with the complainant on the two occasions alleged in the charge sheet but averred that such sexual intercourse was with her consent.

[5] At the conclusion of the adduction of evidence the appellant was convicted on both counts and sentenced to 15 years' imprisonment, the counts being treated as one for the purposes of sentence.

[6] Aggrieved by his conviction and sentence the appellant applied for leave to appeal against his conviction and sentence in terms of s 309B of the Criminal Procedure Act 51 of 1977 (the Act). The application was refused. The appellant's petition to the high court, South Gauteng (Johannesburg) and his further application for leave to appeal against the refusal of his petition to that court were also unsuccessful.

[7] With that prelude I turn now to consider whether leave to appeal to the high court against conviction and sentence should have been granted. The test in an application such as the one under consideration in this appeal is whether there is a reasonable prospect of success in the envisaged appeal.

[8] In deciding on the fate of this appeal we are thus enjoined by judicial authority to reflect dispassionately upon the judgments sought to be appealed against, and reach a conclusion as to whether or not there is a reasonable prospect that the appellate court may come to a different conclusion to that reached by the trial court.

[9] In his endeavour to persuade us to uphold this appeal Mr Schaefer who appeared on behalf of the appellant deemed it advisable to, as he put it, argue the appellant's case as if he were arguing the merits of the envisaged appeal against conviction and sentence in order to demonstrate to us that on the facts of this appeal leave to appeal against the appellant's conviction and sentence in the regional court ought to have been granted. To that end he subjected the evidence of the complainant to intense criticism, most of which is encapsulated in the appellant's petition to this court, and contended that the complainant's evidence does not only not bear close scrutiny but that its entire edifice is inherently improbable.

[10] For present purposes and for the sake of brevity I do not propose to set out all the points that Mr Schaefer argued before us. I am content with summarising their upshot in the hope that in so doing I will not do injustice to Mr Schaefer's submissions. Mr Schaefer contended that the trial court: (a) misconstrued the nature of the onus resting on the state in a criminal trial; (b) too readily branded the appellant a liar and consequently rejected his evidence and accepted that of the complainant without giving due weight to its inherent improbabilities and shortcomings; and (c) afforded little or no weight to the fact that the complainant had a motive to falsely implicate the appellant as a result of her fixation on the fact that the appellant had not used a condom during the first rape and the complainant's belief that her illness was attributable to appellant's failure to use a condom. Mr Schaefer contended further that the complainant's version should not have been accepted because: (a) the complainant had continued to live at the shack provided to her by the appellant even after she had been dismissed from her employment by the appellant; (b) the complainant had denied that she had asked for money from the appellant on 4 December 2006 which is the reason why the

appellant visited her in her shack in the first place whereas her brother had testified to that effect; and (c) that it was inconceivable that if the complainant had indeed screamed when the appellant sexually molested her in her shack on 4 December 2006 that no one would have responded to her cries of help considering that her shack was on the same premises as the spaza shop.

[11] Before I deal with these contentions I consider it apposite at this juncture to record that although the appellant had admitted having had consensual sexual intercourse with the complainant on the two diverse occasions as set fourth in the charge against him, he for some inexplicable reason, vehemently denied having had sexual intercourse at all with the complainant on those dates when he testified in his defence.

[12] In order to put the contentions advanced by Mr Schaefer in their proper perspective it is necessary to record a brief summary of the evidence adduced at the trial. The state called three witnesses and the appellant was the only person who testified in his defence.

[13] The complainant was formerly employed by the appellant as a cashier at the appellant's 'spaza shop' in Manziville, Krugersdorp from February to September 2006. When she commenced her employment she was staying with her cousin with whom she later had a fall out. When the appellant got to know about the complainant's predicament he offered her accommodation in a shack situated on the spaza shop premises. This shack was, however, not in a habitable state and it was then agreed between them that the appellant would accommodate her in the spare bedroom in his home whilst he fixed the shack. In June 2006 the complainant spent the night in the appellant's guest bedroom in the

absence of his wife. Whilst she was sleeping she was woken up by the presence of the appellant in her bedroom. He was fondling her and pulling her panties down. Despite her initial resistance she was overcome by the appellant who then had sexual intercourse with her without her consent. After he had finished he returned to his bedroom. On realising that the appellant had had intercourse with her without using a condom she asked him as to why he had done that without a condom. The appellant, however, said that he had used a condom. The next morning the appellant drove her to work. She did not report this incident to anyone save to tell the appellant that what he had done to her constituted rape. The appellant was, however, dismissive of the rape accusation retorting that even if she were to report it to the police the police would dismiss it.

[14] In relation to the incident of 4 December 2006 she testified that she was feeling sick. Because the appellant had previously rebuked her for telling others about her sickness and not him, she telephoned the appellant to report her condition to him. The appellant then came to her shack and having asked her what was wrong with her, she showed him pimples on her face telling him that she was feeling really sick. The appellant, however, said there was nothing wrong with her and that she was merely suffering from a heat rash. Unexpectedly the appellant grabbed hold of her, threw her on the bed, pulled off her tights and panties, took off his pair of trousers and had sexual intercourse with her against her will. When she screamed the appellant got off her and comforted her saying that she should not cry. He also offered her money which she refused. She then got out of the shack in a state of bewilderment, puzzled as to why no one had responded to her cries for help. She then called her brother who was in Kagiso. At that point in time the appellant's sister-in-law who was by then working at the appellant's

spaza shop came out and enquired of her as to what had happened. She, however, did not tell her of what had just happened. When her brother arrived she reported both incidents to him and also to those persons who were present at the premises before her brother took her to the doctor.

[15] The complainant's brother also testified on behalf of the state. He confirmed that on 4 December 2006 he was telephoned by the complainant and in response to that call he repaired to her shack. Upon arrival there she told him what the appellant had done to her not only on the morning of that day but also in June 2006. She further told him that she had telephoned the appellant to ask for money as she was not feeling well and thus desired to consult a doctor. On his suggestion the matter was reported to the police.

[16] Dr Ruwina Wadee also testified on behalf of the state. She told the court that at 12h40 on 4 December 2006 she examined the complainant following a complaint of sexual assault. She did not observe any evidence of abnormality on complainant's genitals apart from a 'milky white substance discharge'. Her clinical findings, whilst not excluding vaginal penetration, were not conclusive. She nevertheless emphasised that the fact that she had found no injuries on the complainant did not mean that no forced penetration had taken place. She attributed her inability to arrive at a firm conclusion in this regard to a variety of factors that need not be traversed in this judgment.

[17] The appellant in his testimony claimed that he, at all material times, had a love relationship with the complainant and that they had had sexual intercourse together on diverse occasions. He, however, denied that they had any sexual intercourse in June 2006 when the complainant

was accommodated at his home and again on 4 December 2006 as alleged by the complainant. The essence of his version in relation to the June 2006 incident was that pursuant to their arrangements he accommodated the complainant in the visitor's bedroom at his home in Krugersdorp West whilst he slept alone in his bedroom. During the course of the night the complainant came over to his bedroom saying that she was scared of sleeping alone in the visitor's bedroom and wanted to rather sleep with him on the same bed to which he agreed. For the duration of the night they did not have sexual intercourse at all. Dealing with the 4 December 2006 incident the appellant denied that he had sexual intercourse with the complainant. He told the trial court that the complainant had telephoned him inviting him to come and see her because she had pimples on her face and an infection of her genitals. She asked for R280 in order to consult a doctor. But he told her to rather go to the clinic. Her response was that in that event she would call her brother and ask him to take her to a doctor. He then left. Later on he was confronted by the police with the allegation that he had raped the complainant which he denied.

[18] Once the adduction of evidence was concluded the magistrate evaluated the totality of the evidence having regard to the issue of credibility given the mutually exclusive versions of the state and the appellant and the question of the onus resting on the state to prove its case beyond reasonable doubt.

[19] As it is apparent from what is set forth in para 10 above it is not hard to see that, from the common thread running through the grounds of appeal, it is sought to assail the magistrate's findings of fact and credibility. On this score it is necessary to state the trite principle that a court of appeal will not ordinarily interfere with such findings unless it

has been demonstrated that they are vitiated by irregularity or unless an examination of the evidence shows that such findings are otherwise wrong. As this court held in the oft quoted cases of *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 705 et seq and *S v Francis* 1991 (1) SACR 198 (A) at 204c-f the trial court's findings of fact and credibility are presumed correct because the trial court is steeped in the atmosphere of the trial, had the advantage of seeing and hearing the witnesses, and thus is in the best position to determine where the truth lies.

[20] I am not persuaded that the criticism mounted against the magistrate's evaluation of the evidence is justified. In my view the magistrate's assessment of the evidence is unassailable. He found that on balance the complainant was a truthful witness whose version was in the main consistent and reliable. In coming to this conclusion he had regard to the following factors: (i) although she was a single witness in relation to the rape incidents her version was more plausible; (ii) the appellant had, despite his plea explanation, denied that, on these two critical occasions, he had sexual intercourse at all with the complainant; (iii) on this crucial aspect of the state's case the appellant's defence was essentially a bare denial; (iv) the complainant was in a vulnerable position having to contend with the appellant who was her employer and landlord who obviously exploited this situation to his advantage, which factors go towards explaining why the complainant never reported the first rape incident to the police soon after it had occurred.

[21] Mr Schaefer also called into aid the judgment of this court in *S v York* 2002 (1) SACR 111 (SCA) para 19 in which it was held that in its evaluation of the evidence in the context of a rape charge a court must forever be alive to the possibility of consent even where the accused

denies intercourse. It was thus argued that in the light of the appellant's plea explanation and the line of cross-examination of the complainant adopted by the defence at the trial it cannot be argued that he did not have sexual intercourse with the complainant on the dates mentioned in the charge. In my view there is a simple answer to this contention and it is that in this appeal there is no evidential basis for such a possibility. Thus to postulate such a possibility would be no more than pure conjecture. The appellant's version that there was at all material times a love relationship with the complainant was rejected by the magistrate.

[22] It remains to deal with the envisaged appeal against sentence. It is trite that the imposition of sentence is pre-eminently within the discretion of the trial court. Thus the appellate court will only be justified in interfering with the sentence imposed by the trial court if one or more of the recognised grounds warranting interference on appeal have been shown to exist. To my mind the magistrate properly took into account that the appellant was: (i) 46 years of age; (ii) married with dependant children; (iii) gainfully employed and thus contributing to the financial needs of his female companion, niece and mother; (iv) first offender; (v) his dependant children were still attending school; and (vi) that substantial and compelling circumstances were present. As against these mitigating factors the magistrate properly took cognisance of the following aggravating factors: (i) that the appellant had abused his position of trust; (ii) took advantage of the complainant who was vulnerable; (iii) lack of remorse; (iv) the gravity of the offence; and (v) the interests of society.

[23] That rape is an utterly despicable crime that shows utter contempt for the feelings of the victim brooks no argument to the contrary. That

this is so is evident from an abundance of judgments of this court notably *S v Chapman* 1997 (2) SACR 3 (SCA) at 5a-e in which the unanimous court expressed itself in these terms:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.

The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.

. . .

The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.'

In a more recent judgment in *S v N* 2008 (2) SACR 135 (SCA) para 30 Maya JA had occasion to say the following:

'. . . The sense of outrage justifiably roused by the offence of rape in the right thinking members of a South African society in which sexual violence is so endemic and hardly shows any sign of abating, must, in my view, be a critical factor in the imposition of a suitable sentence here.'

[24] I have given anxious consideration to the submissions advanced on behalf of the appellant on the issue of sentence. I am, however, unpersuaded that the magistrate exercised his sentencing discretion otherwise than in a proper judicial manner. See *S v Giannoulis* 1975 (4) SA 867 (A) at 868 E-H and *S v Kgosimore* 1999 (2) SACR 238 (SCA) para 10. Nor can I say that the sentence is otherwise shockingly severe or startlingly disproportionate to the gravity of the offences of which the

appellant was convicted.

[25] For all the aforegoing reasons therefore the appeal must fail.

[26] In the result the following order is made:

The appeal is dismissed.

XM Petse
Acting Judge of Appeal

APPEARANCES

APPELLANT: JK Schaefer
Instructed by BDK Attorneys, Johannesburg;
Symington & De Kok, Bloemfontein.

RESPONDENT: A Simpson
Instructed by the Director of Public Prosecutions, Johannesburg;
The Director of Public Prosecutions, Bloemfontein.