THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 656/12

In the matter between: Reportable

JEFFREY KHATHUTSHELO MATSHIVHA **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Matshivha v The State* (656/12) [2013] ZASCA 124 (23 September 2013)

Coram: Ponnan, Maya, Shongwe and Tshiqi JJA and Zondi AJA

Heard: 30 August 2013

Delivered: 23 September 2013

Summary: **Rape – evidence – child witnesses, administration of the oath, capacity of a child witness to understand the nature and import of the oath, finding of incapacity to be preceded by an enquiry – child witness to be admonished to speak the truth, effect of evidence given without compliance with s 164 of the Criminal Procedure Act 51 of 1977.**

Murder – single witness – evidence subject to cautionary rule especially where contradicted by other factual and medical evidence.

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Hetisani J sitting as court of first instance):

The appeal succeeds and the convictions and sentences for rape and murder are set aside.

JUDGMENT

Zondi AJA (Ponnan, Maya, Shongwe and Tshiqi JJA concurring):

[1] The appellant, Mr Jeffrey Khathutshelo Matshivha appeared in the Limpopo High Court, Thohoyandou (Hetisani J) facing two charges: one for murder and the other for rape. In relation to the charge of rape the indictment alleged that on the night of 5 January 2000, at the complainant's home in Magau Village, Tshilwavhusiku, the complainant, a then seven year old girl was raped by the appellant. In the alternative the indictment alleged that the appellant in contravention of section 14(1)*(a)* of the Immorality Act 23 of 1957 had had sexual intercourse with a minor under the age of 16 years. With regard to the charge of murder, it was alleged that on 22 July 2000, at Madombidzha, the appellant murdered Mr Mukilasi Gideon Ramavhoya, (the deceased), by stabbing him with a knife.

[2] The appellant, who pleaded not guilty to both counts, was found guilty as charged and sentenced to life imprisonment in respect of the charge of rape and 45 years' imprisonment for the murder.

[3] It is common cause that in relation to the rape, the State's case rested exclusively on the identification evidence of the complainant and her brother, who, at the time they testified were eight and 13 years old respectively. When the appeal record was perused it was not clear whether the reception of the evidence of the complainant and her brother

complied with s 162 read with s 164 of the Criminal Procedure Act 51 of 1977 (the Act). Counsel were accordingly invited to file supplementary heads of argument on the propriety of the procedure the court below followed in receiving the children's evidence. Counsel were also informed that they would be required to address the court on whether there was proper compliance with s 162 read with s 164 of the Act.

[4] In his response counsel for the State stated that the appeal record was incomplete in certain respects. He alleged that upon receipt of our query he together with a stenographer and an interpreter listened to the audio recording of the trial relating to the administering of the oath in respect of the complainant and her brother. He discovered that certain questions which were put to them by the presiding officer were omitted from the transcribed record. An affidavit deposed to by the interpreter who was involved at the trial in which she sets out what was not captured on the typed transcript, was filed. I shall assume – without deciding – in favour of the State that we may have regard to the evidence contained in that affidavit in determining whether there has been proper compliance with the provisions of s 162 read with s 164 of the Act.

[5] To protect the identity of the complainant, I will employ the initials T M and G M respectively whenever references are made to her and her brother. In respect of her the record reads:

'HETISANI J: And what about, where is T M? Thank you, so the court commences now with this proceeding in view of the fact that the person who is in the witness box is a minor child who by law when a minor child testifies before a court of law the court must be cleared of all the people from the gallery except for one person who the court received an application or request that, that person would like to observe the proceedings for academic procedures. So will the rest of the people be cleared from the gallery please.

MR POODHUN: My lordship the witness is already in the witness box my lordship. (indistinct)
T M: d.s.s. (Through interpreter.)'

[6] In relation to the complainant's brother the following is recorded:

'MR POODHUN: Your lordship the state calls G M, my lordship the witness is only 13 years old, his guardian is present and your lordship the proceedings will continue *in camera* because of the age. As your lordship pleases.

HETISANI J: Thank you.

INTERPRETER: I do not know my lordship whether I should swear him in.

HETISANI J: What do we normally do?

MR POODHUN: Your lordship you must ask him whether he knows the truth between the truth and a lie and then you must ask him to speak the truth.

HETISANI J: There you are.

INTERPRETER: As the lordship pleases.

G M: d.s.s. (Through interpreter.)'

[7] In respect of the complainant, the State asserted that her evidence must be supplemented by the following:

'Judge Hetisani GNK: T M how old are you?

Do you know your age - Yes?

How many? - I am eight years old.

Do you know the difference between the truth and the lie - Yes

When a person lies is when a person is telling what? The truth or is when the person is not telling the truth. When it said that, that person is telling a lie – That is one person would be telling lies.

You speak lies? - No

What do you speak? - The truth

Thank you you may proceed.'

[8] The portion of the missing evidence relating to the complainant's brother is alleged to be the following:

'Judge: What are your names, boy?

Witness: G M

Judge: G who?

Witness: M

Judge: M, your Tshivenda name, don't you have another name?

Witness: Godi for short

Judge: Yes we know, but don't you have another name, Tshivenda name?

Witness: No

Judge: You're just G M?

Witness: Yes

Judge: Where do you reside?

Witness: At Ha – Magau

Judge: Where at Ha – Magau

Witness: (silence)

Judge: What is the name of the place, there at Ha – Magau. Ha – Magau it's a big area. Which side is your homestead.

Witness: It is on the side eish

Judge: Next to a school, Next to what?

Witness: Yes, but it's a little bit far from the school, but next to a school a little bit.

Judge: Which café is near you?

Witness: There is no café nearby.

Judge: Not even a shop, near your home?

Witness: We are far from a shop.

Judge: Do you attend school, Godi?

Witness: Yes

Judge: hmmm, I am also Godfrey, but I am Ray for short, but I am Godfrey, Now lets hear Godi, how old are you?

Witness: 13

Judge: Which year were you born?

Witness: (Silence)

Judge: Do you know, which year you were born?

Witness: No

Judge: Yes, then it means you are now old, you are about to receive pension money, not so, not too long, are you not old?

Witness: No

Judge: *Do you know the difference in telling the truth and not telling the truth, are you able to differentiate? Lies and truth, can you differentiate?*

Witness: *No*

Judge: *You cannot differentiate the truth and the lies.*

Witness: *Yes*

Judge: Are you able to tell the truth

Witness: Yes

Judge: When a person tells the truth, what will the person be telling?

Witness: Things that the person is sure of

Judge: Sure of, okay, you're a clever boy.

Judge: Now when a person wants to tell the truth, a person will swear by his sister sometimes, is that not so?

Witness: Yes

Judge: Do you have a sister?

Witness: Yes

Judge: What is your sister's Name?

Witness: T M

Judge: Have you ever told another person and said, I swear by my sister, T M my mother's child I am telling the truth, while playing with other's, have you ever done that?

Witness: Yes

Judge: Alright, now here. When a person swear's, the swears by God, saying surely God help me, so that I tell only the truth, are you prepared to do that, to tell the truth today in what you came for.

Witness: Yes

Judge: OK, you can swear him in

Interpreter: Now if it is like that indicating that you'll tell the truth the whole truth, you'll raise your hand and say God help me.

Witness: God help me to tell the truth.'

(emphasis added)

[9] Section 162 of the Act provides:

'(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:
'I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.'.
(2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so.'

And section 164 provides:

'(1) Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.
(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence.'

[10] The reading of s 162(1) makes it clear that, with the exception of certain categories of witnesses either falling under s 163 or 164, it is peremptory for all witnesses in criminal trials to be examined under oath.[1] And the testimony of a witness who has not been placed under oath properly, has not made a proper affirmation or has not been properly admonished to speak the truth as provided for in the Act, lacks the status and character of evidence and is inadmissible.[2]

[11] Section 164(1) is resorted to when a court is dealing with the admission of evidence of a witness, who from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or the affirmation. Such a witness must instead of being sworn in or affirmed, be admonished by the judicial officer to speak the truth. It is clear from the reading of s 164(1) that for it to be triggered there must be a finding that the witness does not understand the nature and import of the oath. The finding must be preceded by some form of enquiry by the judicial officer, to establish whether the witness understands the nature and import of the oath. If the judicial officer should find after such an enquiry that the witness does not possess the required capacity to understand the nature and import of the oath, he or she should establish whether the witness can distinguish between truth and lies[3] and if the enquiry yields a positive outcome, admonish the witness to speak the truth.

[12] I now turn to the facts of this case. Before receiving their evidence the court below put certain questions to the child witnesses in the manner as set out above. Here, it is not clear from the questioning of the witnesses by the court below what its purpose was. Was it intended to establish the capacity of the child witnesses to understand the nature and import of the oath or was it aimed at establishing their ability to distinguish between truth and falsity? The witnesses were simply sworn in, before their capacity to understand the nature and import of the oath was established. The Constitutional Court made it plain in

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[1] *S v Mashava* 1994 (1) SASV 224 (T) at 228*c–d*; *S v N* 1996 (2) SACR 225 (C) at 227*b–c*; *S v Seymour* 1998 (1) SACR 66 (N); *S v Vumazonke* 2000 (1) SACR 619 (C) para 10; *S v Raghubar* 2013 (1) SACR 398 (SCA).
[2] D T Zeffertt and A P Paizes *The South African Law of Evidence* 2 ed (2009) at 813.
[3] *S v N* 229*d–g*.

Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others that:[4]

'The reason for evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon. It is in fact a precondition for admonishing a child to tell the truth that the child can comprehend what it means to tell the truth. The evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused's right to a fair trial were such evidence to be admitted. To my mind, it does not amount to a violation of s 28(2) to exclude the evidence of such a child. The risk of a conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify. This would indeed have serious consequences for the administration of justice.'

The court went on to say in para 167:

'When a child, in the court's words, cannot convey the appreciation of the abstract concepts of truth and falsehood to the court, the solution does not lie in allowing every child to testify in court. The solution lies in the proper questioning of children; in particular, younger children. The purpose of questioning a child is not to get the child to demonstrate knowledge of the abstract concepts of truth and falsehood. The purpose is to determine whether the child understands what it means to speak the truth. Here the manner in which the child is questioned is crucial to the enquiry. It is here where the role of an intermediary becomes vital. The intermediary will ensure that questions by the court to the child are conveyed in a manner that the child can comprehend and that the answers given by the child are conveyed in a manner that the court will understand.'

[13] In argument counsel for the State was, however, constrained to concede that even if we were entitled to have regard to the evidence in the reconstructed record to determine the extent of compliance with the relevant provisions of the Act it still does not address the concerns we have with regard to the manner in which the oath was administered to the complainant and her brother.

[14] In the light of the difficulties I have highlighted, I am not satisfied that there was compliance with the provisions of s 162 read with s 164. That being the case, no reliance can be placed on the evidence of the complainant and her brother. Ngcobo J made it clear in *Director of Public Prosecutions, Transvaal* that the evidence of a child who does not

[4] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (2) SACR 130 (CC) para 166.

understand what it means to tell the truth is not reliable. The appellant's conviction for rape can therefore not stand.

[15] However, in my view, even if there had been proper compliance with s 164(1) of the Act, the evidence presented was insufficient to sustain a conviction on the charge of rape. It is not in dispute that the complainant was raped. This much appears from the medical evidence. The issue is about the identity of the perpetrator. Put differently, the case turned on the reliability of the complainant's identification of the appellant.

[16] The complainant's evidence was that in the early hours of the morning of 5 January 2000, the appellant who carried a beer bottle in his hand, knocked on the door of the house, in which she and her brother were sleeping. They were alone in the house; their mother was away visiting a relative. When they refused to let him in, he broke open the window through which he gained entry into the house. When that happened, the complainant's brother, who was extremely terrified, fled through the window leaving the complainant behind with the appellant. It was dark inside the house and a candle, the only source of lighting in the house, was not lit. This was the second encounter that the complainant had with the appellant. The first encounter was when the appellant visited her house on 1 January 2000.

[17] The appellant thereupon removed her from the house and took her to three different places where he raped her. Thereafter the appellant walked the complainant halfway to her aunt's place. The appellant told her that should her aunt ask her as to who had brought her to her place, she should say it was Godi from Madombidzha. According to the complainant when she arrived at her aunt's place she reported to her that 'Jeffrey' had raped her. The complainant's brother testified that he could not identify the suspect who came to their house because he wore a sporty hat which covered his entire face. In this regard his evidence is to the following effect:

'And this man who was there who came there and showed you the handle of the knife, can you still remember him? - - - No.'

[18] The complainant's aunt's evidence is that the complainant was reluctant to disclose the identity of her assailant to her. She had to probe and coerce the complainant to get her talking. It was only then that the complainant told her that she had been with Godi from Madombidzha area whom she identified as the person who raped her. The aunt testified that the complainant could not give a proper description of Godi's clothing, all that she could say was that he wore a sporty hat and had dreadlocks. It is significant to mention that according to her aunt the complainant never mentioned the name of Jeffrey to her although the complainant was adamant during cross – examination that she had done so. Her aunt confirmed that she examined the complainant's vagina and when she observed evidence of a sexual assault, she took her to a local police station from where she was later conveyed to Louis Trichardt Hospital for a medical examination and where the complainant's mother later joined them.

[19] The complainant's mother's evidence essentially related to what was conveyed to her by the complainant and her brother. According to her mother the complainant related the incident to her while she was in hospital shortly after having regained her senses following a medical examination which was conducted under general anaesthetic. What is significant though is the following evidence of the mother:

'Did she point out any other person (indistinct) - - -

The child did not point at anybody because the child was still in pain because when the child was proceeding to point him out she screamed and retreated backwards saying that she saw him and she cannot get closer to him to point him.'

[20] The appellant gave evidence and denied being responsible for the rape on the complainant. He could not recall where he was, or what he did, on 5 January 2000. With regard to 1 January 2000, the date on which he is alleged to have visited the complainant's house, his evidence was that he never left his home on the day in question. He celebrated New Year's day at his house with his family. He testified that after his arrest the police held an identification parade in which he was asked to participate. The complainant attended the identification parade but could not point him out.

[21] The court below accepted the State's version and rejected that of the appellant as false. The basis for its acceptance of the State's version is encapsulated in the following passages of the judgment:

'Indeed it is very difficult to take the evidence of a small child as the truth. The court must always exercise very great care in admitting the evidence of small children. However, in this instance, as we will all remember, that T M gave evidence whilst sitting in another room, because of her age, and we only saw her on the screen, as she was giving her evidence. One should also remember that while she was in that room she was always in the company of her mother. If it were indeed her evidence alone, the court would perhaps not accept it as the truth, but then her brother, who is a minor, 13 years of age, who was so frank, . . . (indistinct) . . . and straightforward, gave evidence.'

There is no factual support for the court below's finding that the complainant's brother 'told the court all what he saw'. It was his evidence that he could not see the suspect's face because he had it covered with his hat which he had pulled over his eyes. In my view as far as the complainant's brother's identification evidence is concerned, it did not take the State's case any further. The fact that the complainant's brother was frank and straightforward when he gave evidence does not provide support for the acceptance of his identification evidence. It was not enough for him to be honest.[5] What is important is the opportunity he had for recognising the appellant. The complainant's brother could not have had the opportunity to observe the appellant as he fled the scene before he could do so. The complainant's description to her aunt of features by which she claimed to recognise Godi was rather vague. It is clear from the court below's treatment and analysis of the complainant's evidence that it was alive to the fact that her evidence standing alone was insufficient to sustain a conviction, and for that reason it sought refuge in the evidence of her brother whose identification evidence was in itself lacking in substance.

[22] The only evidence regarding the rape is that of the complainant herself. She is a single witness who is also a child and thus her evidence was subject to the cautionary rule to which it appears from the record the court below failed to give proper consideration.[6] A disturbing feature of her evidence was the following:

'Thank you my lord, T M what happened after the person who was sexually assaulting you had

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[5] *S v Mthetwa* 1972 (3) SA 766 (A) at 768A–B.
[6] *R v Mokoena* 1932 (OPD) 79 at 80; *S v Sauls & others* 1981 (3) SA 172 (A); *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A).

finished what he was doing he directed to go to your aunt's [kraal]? - - -

I cannot answer.

Why can you not answer? - - - Because I am a small child.'

[23] The complainant did not volunteer an account to her aunt of what had occurred. The account she gave emerged in response to questioning on her part. She informed her aunt that she was raped by Godi. According to her aunt's evidence the name of the appellant was never mentioned to her, neither was she told that the name of Godi was suggested by the appellant. During her testimony the complainant testified that she informed her aunt that the person who raped her was the appellant but he told her that she should say it was Godi. Her mother's evidence was that the complainant described her assailant as 'the boy who came home on new year's day and she chased him away, that is Jeffrey Matshivha'. In cross-examination the complainant's mother testified that her children told her that 'the person who came and knocked there told [them] that he is Jeffrey who stays at Madombidzha . . .'. The incident occurred at night, while it was dark in the house. I am not satisfied that the complainant's evidence is reliable in the sense that she 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. No reliance can be placed on the hearsay evidence of the complainant's mother which contradicts that of the aunt to whom the complainant made the first report. In my view all of this affected the credibility of the complainant and the reliability of her evidence.

[24] The problems I have referred to above highlight the fact that the prosecution of rape presents peculiar difficulties that always call for greater care to be given and even more so where the complainant is young. As Nugent JA pointed out in *S v Vilakazi*:[7]

'From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence.'

[7] *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 21.

[25] In conclusion, I am unable to find that the State has proved beyond reasonable doubt that the appellant is the person who sexually assaulted the complainant. In these circumstances the conviction and sentence in respect of the rape should be set aside.

[26] In relation to the murder charge, the State relied on three pieces of evidence namely: eye witnesses' testimony, medical evidence and the appellant's warning statement.

[27] It is common cause that both the deceased and the appellant were at Madombidzha Bar Lounge on 22 July 2000 between 20h00 and 22h00. An altercation ensued between the deceased and the appellant which started when the deceased drank from the appellant's beer bottle without the appellant's permission. The appellant, who had all along been sitting with his friends at the table, approached the deceased and confronted him about his behaviour. The appellant grabbed hold of a beer bottle from the deceased's hands and the latter resisted. A tug of war ensued. At some stage during the struggle the deceased fell on the window. One or two persons who were with the appellant intervened and separated the two. The appellant together with his friends thereafter left the bar lounge. When the deceased was later attended to, it was noticed that he was bleeding. Shortly after the incident the police arrived at the scene and removed him to Louis Trichardt Hospital. The deceased did not make it. He died on the way to hospital. The next morning the police arrested the appellant at Ms Constance Mukosi's house in connection with the murder of the deceased. According to the doctor who conducted a post mortem examination on the deceased's body, the cause of death was excessive loss of blood due to a stab wound in the main artery of the chest.

[28] On the crucial issue as to how the deceased sustained a stab wound to his chest the evidence of the witnesses clashed. The State adduced the evidence of Mr Joseph Netshiungani (the bartender) and Ms Constance Mukosi (Ms Mukosi). According to the bartender the appellant arrived at the bar lounge in the company of two other persons at about 22h00. The deceased was amongst the persons who accompanied the appellant. The appellant and his friends proceeded to the dining room section of the bar lounge.

According to this witness, although his primary responsibility was to serve patrons at the counter, he was also required to collect empty bottles from various tables in the lounge. Some two or three minutes later when the witness walked towards the kitchen area, he saw the appellant busy stabbing the deceased. According to him, the appellant stabbed the deceased about three times. The first two stab wounds were inflicted on the back of the deceased while he was at the dining hall section of the bar lounge. The third wound was inflicted when the deceased moved to the snooker table area and that is where the deceased collapsed and leaned against the window. The appellant also kicked the deceased on the chest.

[29] Ms Mukosi gave a totally different version. According to her evidence when she arrived at the bar lounge at about 20h00 she found the appellant sitting at the table with two other persons. The deceased approached the appellant's table and removed a beer bottle which was on the table and drank from it. The appellant told him to stop what he was doing. The deceased again grabbed the appellant's beer and drank it. When the appellant confronted the deceased about his behaviour, the deceased responded by hitting the appellant with a fist on his face. Then a struggle between the two of them ensued. The appellant banged the deceased against the window causing a glass to shatter. One of the persons who was sitting with the appellant got up and intervened. He restrained the appellant and removed him from the bar lounge. Ms Mukosi left the bar lounge with the appellant and his friend. The appellant spent the rest of the night at her place until the following morning when the police arrived and arrested him in connection with the murder of the deceased. Ms Mukosi denied that the appellant had a knife and that he had stabbed the deceased with it.

[30] Inspector Mulaudzi, who arrested the appellant at Ms Mukosi's place testified that when he approached the appellant about the murder of the deceased, the appellant denied that he had stabbed the deceased. He informed Mulaudzi that he merely pushed the deceased and the deceased fell onto a window. In the warning statement the appellant repeated what he had told Mulaudzi when he arrested him. Doctor Maritz who performed the post mortem examination on the body of the deceased recorded one stab wound to the right chest on the post mortem report.

[31] The appellant testified in his defence and called a witness who essentially corroborated his version. The appellant's version is that the deceased fell on the window as they struggled over possession of a beer bottle belonging to the appellant, which beer bottle the deceased had removed from the table at which he sat without the appellant's permission. The appellant denied that he had stabbed the deceased or that he had a knife in his possession on the day of the incident. He said after the deceased had taken possession of his beer bottle, he confronted him about what he was doing. The deceased responded by hitting him with a fist on his mouth. As they struggled over possession of the beer bottle, the deceased lost his grip on the beer bottle and fell on the window. One of the persons who was sitting with the appellant namely, Mr Mukhauli Mudau intervened and separated them. Mudau suggested to the appellant that they leave the place which they then did.

[32] Mudau testified and his evidence corroborated that of Ms Mukosi and the appellant regarding what led to the struggle between the appellant and the deceased. Mudau also denied that the appellant stabbed the deceased. He did not witness the stabbing, neither did he see the knife as testified to by the bartender.

[33] The court below rejected the appellant's version as being not reasonably possibly true. This finding was based on the fact that the location and the depth of the stab wound were irreconcilable with the appellant's version. The court below reasoned that if the appellant's version was correct, the stab wound would have been located on the back of the deceased's body not in the chest area. It rejected Ms Mukosi's evidence as unreliable on the ground that she had lied about her relationship with the appellant.

[34] In my view the evidence adduced by the State was not such as to justify the conclusion that there is no reasonable possibility that the account of the appellant was not a truthful account. I do not share the court below's finding that the bartender's evidence was reliable because 'he saw all these incidents while standing at the kitchen'. He was a single witness and therefore there was an obligation on the court below to have

approached his evidence with caution.[8] The bartender testified about three stabbings for which there is no support. In fact, the objective medical evidence contradicts the bartender's evidence that the deceased was stabbed thrice. He is the only witness who testified about a knife having been used. Ms Mukosi, one of the State witnesses, contradicts his evidence and Ms Mukosi's evidence is corroborated by that of Mudau. There is a disturbing feature in the bartender's evidence which when considered in the light of the totality of evidence, in my view, appears improbable and renders his evidence less reliable. His evidence was that the appellant and the deceased were together when they arrived at the bar lounge and some two or three minutes later he saw the appellant stabbing the deceased without any reason. That is not consistent with the evidence of the other eye witnesses. Moreover, how, it must be asked, could he have seen two blows to the deceased's back with a knife, when there was no corroboration for that, to be found in the medical evidence? Nowhere in its evaluation of the evidence does the court below deal with these shortcomings in the bartender's evidence.

[35] In these circumstances, the conviction on the murder charge also cannot stand and must be set aside.

[36] In the result the appeal succeeds and the convictions and sentences for rape and murder are set aside.

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D H Zondi

Acting Judge of Appeal

[8] *R v Mokoena* 1932 OPD 79 at 80*; S v Sauls & others* 1981 (3) SA 172 (A).

APPEARANCES

For Appellant:	M Madima
	Instructed by:
	Justice Centre, Thohoyandou;
	Justice Centre, Bloemfontein
For Respondent:	A I S Poodhun
	Instructed by:
	The Director of Public Prosecutions, Thohoyandou; The Director of Public Prosecutions, Bloemfontein