IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: A178/2022

In the matter between:

TSIE STEVANS MOTSOANE **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: REINDERS, J *et* THAMAE, AJ

HEARD ON: 04 SEPTEMBER 2023

DELIVERED ON: 15 SEPTEMBER 2023

JUDGMENT BY: THAMAE, AJ

[1] The Appellant was convicted of the offence of rape, in contravention of section 3 of the Criminal Law Sexual Offences and Related Matters Amendment Act, Act 32 of 2007 by the Regional Court Bloemfontein. Aggrieved by his conviction, the Appellant lodged this appeal after leave to appeal was granted by the Regional Court.

[2] At the onset Ms. Kruger for the Appellant, responsibly conceded that although, the Appellant's heads of argument stated that the Regional Magistrate drew a negative inference from Appellant's failure to testify, that, from the learned Regional Magistrate's judgment, it is clear that no such

negative inference was made. The issue for determination by this court on appeal remains then, whether the learned Regional Magistrate's finding that the state has proved its case against the Appellant beyond reasonable doubt is correct. The contention in the main, is based on the argument that the learned Regional Magistrate applying the principles in ***R v Blom*** 1939 AD 188, should not have concluded, on the evidence presented by the state, that the only reasonable inference is that the Appellant had penetrated the Complainant's genitals.

[3] The principles which should guide an appeal court in an appeal purely upon fact have been set out in ***Rex v Dhlumayo and another*** 1948 (2) SA 677 (A). In singling out only those principles I deem applicable to the present scenario, the court in ***Dhlumayo*** stated among others that:

1. An appellant is entitled as of right to a rehearing, but with the limitations imposed by these principles; this right is a matter of law and must not be made illusory.
2. Those principles are in the main matters of common sense, flexible and such as not to hamper the appellate court in doing justice in the particular case before it.
3. The trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.
4. …Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.
5. …Consequently the appellate court is very reluctant to upset the findings of the trial Judge.
6. Sometimes, however, the appellate court may be in as good a position as the trial Judge to draw inferences, where they are either drawn from admitted facts or from the facts as found by him.
7. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.
8. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

[4] It is common cause that based on, among others, the report filed by the clinical psychologist Dr. Le Roux, the state did not call the Complainant to testify. The findings in the clinical psychologist's report are not relevant for this judgment thus I will not discuss same. It is also common cause that after the state closed its case, the Appellant did not testify nor lead any other evidence in his defence. It is common cause further that the finding regarding penetration was made by the learned Regional Magistrate based on

circumstantial evidence presented by the state. Having been guided by the authority in ***S v Reddy*** 1996 (2) SACR 1 (A)[1] and having considered the principles set out in ***R v Blom***[2], the relevant evidence on which the learned Regional Magistrate relied, for her conclusion, is succinctly stated in her judgment along the following terms[3]:

> As far as penetration is concerned, the court only has the evidence of an eyewitness Theresa Ncobo who testified that she saw the accused having sexual intercourse with the complainant. She could not say whether there was penetration.
>
> And then the court has the evidence of the forensic nurse who examined the complainant and indicated abrasions of the fossa navicularis the five and six o'clock positions which were indicative of forceful penetration and this was done on the same day of the incident.
>
> The DNA results thirdly linking the DNA of the accused with the DNA sample taken from the panty of the complainant.

The learned Regional Magistrate continues in her judgment to state that[4]:

> Although there could be many explanations for abrasions on the genitals of a woman. I find the abrasions together with all the other factors which I have mentioned leads to the conclusion and the only conclusion that the accused penetrated the genitals of the complainant on that particular day.

[5] The accused having not testified, the Regional Magistrate was faced with deciding the case before her solely on the evidence presented by the state, which she did. From the record before us, the heads of argument submitted and oral submissions made in court, the Learned Regional Magistrate's reasoning and findings cannot be faulted. I thus find no reason to interfere with her findings.

In the circumstances, I propose to make the following order:

ORDER

1. Appeal is dismissed.

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[1] In S v Reddy 1996 (2) SACR 1 (A) at p3 it appears that Mr Horwitz, in the supplementary heads of argument, emphasised the argument that the inference of guilt drawn by the magistrate from the circumstantial evidence led was not the only reasonable inference to be drawn which was consistent with the proved facts. The court held that the fact that a number of inferences can be drawn from a certain fact, taken in isolation, does not mean that in every case the State, in order to discharge the onus which rests upon it, must indulge in conjecture and find an answer to every possible D inference which ingenuity may suggest any more than the Court is called upon to seek speculative explanations for conduct which on the face of it is incriminating

[2] See: Page 124, line 18 -25 and Page 125 line 1-2 of the record.

[3] Page 125, line 3-13 of the record.

[4] Page 125, line 14 -18 of the record.

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MS THAMAE, AJ

I concur and it is so ordered.

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C REINDERS, J

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ON BEHALF OF THE APPELLANT:	MS. S. KRUGER
INSTRUCTED BY:	**LEGAL AID SOUTH AFRICA, FREE STATE** BLOEMFONTEIN

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ON BEHALF OF THE RESPONDENT:	ADVOCATE .M. LENCOE
INSTRUCTED BY:	**N D P P, FREE STATE** BLOEMFONTEIN