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: A100/2023

In the matter between:

GIFT MADUNA Appellant

and

THE STATE Respondent

CORAM: **MHLAMBI J *et* LEKHOABA AJ**

HEARD ON: **10 NOVEMBER 2023**

DELIVERED ON: **15 February 2024**

JUDGMENT BY: **LEKHOABA AJ**

[1] The appellant was charged in the Regional Court, Frankford on charges of rape. The rape charges were brought in terms of section 3 of Act 32 of 2007, read with the provisions of section 51(1) of Act 105 of 1997. I hereby need to state that initially the accused was charged in terms of section 51(2) of Act 105 of 1997 and after the State Application in terms of Section 86(1) of the Criminal Procedure Act 51 0f 1977 which the court *a quo* decided to grant. ***This aspect of this case shall be dealt with later in this judgement.***

[2] The appellant has an automatic right to appeal in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977. This appeal is against the conviction and sentence.

This court is grateful to counsels in this matter for their oral arguments and written heads of arguments.

[3] Grounds for Appeal

a) The Court a quo erred by finding that the complainant was a satisfactory witness and satisfied the requirements of the cautionary rules.

b) That the contradictions between the witnesses were immaterial.

c) That the state witnesses were credible in particular the complainant.

d) That the version of the Appellant was not reasonably possibly true.

e) That the evidence of the Appellant was not reasonably possibly true.

f) That the evidence of the Appellant was not plausible.

g) The court erred by granting the application for amendment of the charge sheet.

[4] The background on this matter is briefly as follows: The Appellant was a 20-year-old man and the Complainant was 16 years old girl at the time of the rape. On 11 January 2020, the Appellant unlawfully and intentionally committed an act of sexual penetration by inserting his male genital organ into the female genital organ.

[5] Common cause facts

1. Both the accused and the complainant are known to each other

2. The place of the alleged rape is not in dispute.

3. the existence of sexual intercourse between the parties is also not in dispute.

4. The complaint went to the home of the Appellant.

5. The alleged offence took place on 11 January 2020.

[6] The offence was committed at the Appellant's grandmother’s house.

[7] The Appellant made a plea explanation that he had sexual intercourse with the complainant on 11 January 2020.

[8] The complainant testified that she used to collect a lunch box from Mrs. Madibo in the house that the appellant stayed in. She stated that if the lady was not available, she would get a lunch box from her son. She further testified that there were two structures in the yard. On the day in question, as she walked past the appellant's grandmother's house, the appellant texted her on WhatsApp, informing her to come and collect a lunch box. The complainant denied ever communicating with the accused on Facebook. Her evidence was that their conversation started on WhatsApp when she mistakenly obtained the appellant's number from one Kgontse.

[9] The appellant testified that the complainant sent him a WhatsApp message and asked him where he was. The appellant also testified that the complainant asked for his number from Facebook inbox. The appellant further testified that a lady was staying in the backroom. The appellant denied any knowledge of the lunch box and testified that they never spoke about it with the complainant.

[10] It is trite that the onus rests on the state to prove beyond a reasonable doubt that the accused committed the crime accused of. Equally trite is the principle that an accused should be acquitted if his or her exculpatory testimony can be reasonably possibly true.

[11] It has long been our law that the trier of fact should not consider the evidence implicating the accused and evidence exculpating the accused in a compartmentalised manner. The court must evaluate the evidence before it in its totality and judge the probabilities in the light of all the evidence; see ***R v***

Difford 1937 AD 373, S v Van der Meyden 1999(1) SACR 447 (W) and S v Toubie 2004(1) SACR 530 (W)

[12] The proper approach of a court was laid down by ***Malan JA in R v Mlambo 1957(4) SA 727 (A), especially at 738 A - C:***

"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.

An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."

This approach was approved by Olivier JA in ***Phallo and Others 1999 (2) SACR 558 (SCA) at 562g to 563e***

[13] In the matter of **Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others 2003 (1) SA 11 (SCA) Nienaber JA**

14I-J – 15A-D (two irreconcilable versions)

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows: To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his own version, (vi) the Caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. AS to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it."

[14] In ***S v Chabalala 2003 (1) SACR 134 (SCA) Heher AJA*** @140a-b said –

"The correct approach is to weigh up all the elements which points 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 to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be on an ex post facto

determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture in evidence."

[15] ***S v T 2005 (2) SCAR 318 (ECD) @ 329b-e***

"The state is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. This high standard of proof – universally required in civilized systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994, to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When the court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of a tyrannical system of law."

[16] In many rape cases, similar to this one, the victim is always a single witness to the alleged offence. Our law is clear that caution must be applied when assessing the evidence of a single witness as to has to be satisfactory in all material respect.

In the case of ***Stevens v S 2005 [1] All SA 1 (SCA):***

[17] 5d-e: In terms of s 208 of the Criminal Procedure Act, an accused can be convicted of any offence on the single evidence of a competent witness. It is,

however, a well-established judicial principle that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility.

The correct approach to the application of the so-called 'cautionary rule' was set out by Diemont JA in ***S v Sauls and Others 1981 (3) SA 172 (A) at 180E-G …***

[18] 5i-j, 6a-d: …her judgment illustrates the dangers of what has been called *"a compartmentalized approach"* to the assessment of evidence, namely an approach which separates the evidence before the court into compartments by examining the 'defence case' in isolation from the 'State case' and vice versa. In the words of Nugent J in ***S v Van der Meyden 1999 (1) SACR 447 (W) at 449c - 450b:***

"Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent. But what is required in order to reach that conclusion is at least the equivalent possibility that the incriminating

evidence might not be true. Evidence that incriminates the accused and evidence which exculpates him, cannot both be true – there is not even a possibility that both might be true – the one is possibly true only if there is an equivalent possibility that the other is untrue…

The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logic 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 (whether to convict or acquit) must count for all the evidence. Some of the evidence might be found to be false; some of it might found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none may simply be ignored"

S v Sauls and Others 1981 (3) SA 172 (A) at 180E-G

[19] There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness… The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether there are shortcomings or defects or contradictions in his testimony if he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 (in R v Mokoena), may be a guide to a right decision but it does not mean "*that the appeal must succeed if any criticism, however slender, of the witnesses' evidence where well founded …."* It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.

S v Artman and Another 1968 (3) SA 339(SCA) Holmes JA

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[20] Single witness – required that her testimony should be clear and satisfactory in all material aspects. The exercise of caution must not be allowed to displace the exercise of common sense.

There is a factor that causes some measure of concern as far as conviction is concerned. The trial court's evaluation of the evidence of witnesses is concerning. Despite numerous contradictions between the witnesses, the court a quo found the complainant a credible witness who was honest in the account of events.

[21] The court a quo stated that the contradictions between the witnesses were immaterial and the state witnesses were credible and reliable in particular the complainant.

[22] I would like to disagree with the court a quo concerning the testimony of the complainant on the following basis:

a) On how she got the contact details of the appellant. During examination in chief, she said she was under the assumption that the number belonged to Kgontsi whereas during gross examination she agreed with the defence that the reason why she got the appellant number was for the appellant to transport her from Frankfort to Reitz.

`Further, the court a quo in its judgement added that the complainant denied the version that was put to her that she and the appellant communicated on Facebook about the appellant taking her to Reitz. See page 392 of the Judgment.

b) During the examination in chief, she testified that after learning that the numbers belonged to the appellant, she immediately cut off communication and they never had any WhatsApp conversation until the day in question when the appellant texted her to come fetch the lunch box.

c) Having knowledge that the number did not belong to the so-called Kgoitsi, she, on the day in question, continued to communicate with the appellant.

d) She further testified that she used to collect lunch from a lady or his son. Surprisingly on the day in question, she went to collect from the appellant on a Saturday afternoon.

[23] As regards the issue of the amendment of the charge sheet, Section 86 of the Criminal Procedure Act 51 of 1977 (the CPA) provides for the amendment for a defective charge if it appears that the averments are not aligned with the evidence, that words are omitted or included, which should have been included or excluded or where there is an error in the charge. The court is empowered to grant an amendment at any time before judgment if there is ‘no prejudice’ to the accused.

[24] I am of the view that the amendment was not prejudicial since the evidence of both the state and the defence was that sexual intercourse took place more than once.

Conclusion

[25] In conclusion, the evidence adduced by the state was not sufficient to sustain the convictions under consideration in this appeal. The appeal succeeds, and the Appellant's conviction on the charge of Rape is set aside.

[26] In the result, I propose the following order:

Order:

1. The appeal against the conviction succeeds. The conviction is set aside, and the appellant is found not guilty.

2. The sentence imposed is set aside.

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LEKHOABA, AJ

I concur,

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MHLAMBI, J

Counsel for the applicant:	Mr. V.C Abrahams Legal Aid SA Bloemfontein
Counsel for the respondent:	Adv. M Lencoe Director of Public Prosecution Bloemfontein

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