22/9/2017

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A240/2015

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

22/9/2017

In the matter between:

PHILLIPUS THEUNIS VILJOEN **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

SARDIWALLA, AJ

Background:

[1] The appellant was convicted on 8 March 2011 by presiding Magistrate Botha in the Regional Court, Lydenburg, on one count of rape[1]. The appellant was sentenced to 8 years direct imprisonment on 27 July 2012 based on the finding that substantial and compelling circumstances exist to allow the Court to deviate from the minimum prescribed sentence. The appellant was also declared unfit to possess a firearm.[2]

[2] The appellant applied for Leave to Appeal on 14 August 2012 in respect of conviction and sentence and leave was denied.

[3] The appellant subsequently petitioned this Court for Leave to Appeal against conviction and sentence and Leave to Appeal was granted by Honourable Judges' Prinsloo and Van der Westhuizen on 10 February 2015.

[4] The matter was referred to the Full Bench on 23 May 2016 by Honourable Judges' Mabuse and Fourie and was set down for hearing on 4 November 2016[3] however, on same date the matter was postponed *sine die* due to lack of instructions from the appellant to his legal representative. The appellant then indicated to his legal

[1] Read with Section 51(2), 52(2), 52(A) and 52(B) of Act 105 of 1997.
[2] Section 103 (1) of the Firearms Control Act 60 of 2000.
[3] Before Honourable Judges' Tolmay, Mothle and Janse van Niewenhuizen.

representative that he is proceedings with the appeal, against the conviction only. The matter was again enrolled[4] and on 28 April 2017 it was postponed to 15 September 2017.

[5] The appellant pleaded not guilty to the charge of rape and made a formal admission in terms of Section 115 read with Section 220 of the Criminal Procedure Act[5]. In his formal admission, the appellant does not deny having sexual intercourse with the complainant but in defence submits that it took place with the complainant's consent.

[6] The Court *a quo* found the appellant guilty as charged based on the totality of evidence presented as well as in considering the reasonableness of his version of events.

Grounds of Appeal:

[7] The appellant submits that the complainant was a single witness and that the Court *a quo* did not properly consider the probabilities and improbabilities of the circumstances of the case.

Evidence:

[8] Two mutual destructive versions were submitted in Court, in the form of testimony by the complainant and that of the appellant on which the Court *a quo* based its conviction.

[9] In total three witnesses testified for the State, the complainant, Mr Moloto, a security guard at the complex security gate where the complainant was employed and Mrs Joubert, the investigating officer however, the Court *a quo* held that the evidence of the investigating officer as well as the security guard did not assist the Court in making a finding in the matter. Similarly, the Court *a quo* held that the J88 was of no assistance in deciding the matter.

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[4] Before Honourable Judges' Prinsloo, Makgoka and Louw.

[10] The appellant testified, in his own defense as follows: he and David went to the house where the complainant was employed to spray insecticides. The complainant opened the premises for them in order to gain access. The appellant sprayed the inside of the house. He testified that the complainant was very talkative and spoke to him in Afrikaans. At one point the complainant mentioned that the appellant made a lot of money and that she did not have bread. He told the complainant to phone his employer to which she responded that she does not have airtime. The appellant responded by giving the complainant R55 to buy airtime, and he informed her that he would add it to the bill of her employer. The complainant then wanted to borrow R200 from the Appellant. He, in response, told her that he was not able to assist her and that she must ask her employer. The complainant then closed the curtains of the windows which faced the roof of the house next door, as there were workers busy on the roof. The appellant turned around and saw that the complainant was not wearing any underwear and the complainant then asked the appellant to have sex with her, but the appellant declined. The complainant asked why she could not also have a boyfriend like her friend and proceeded to lie down on the floor. The appellant then took of his pants and had intercourse with the complainant. Whilst busy having intercourse the complainant said to the appellant that he must give her R200, which the appellant refused and he attempted to get up. The complainant grabbed him tight around the waist with her legs but he managed to get up and went to the bathroom. The complainant persisted that the appellant must give her R200 but the appellant once again refused. The complainant then laughed at the appellant. The appellant finished spraying the inside of the house with insecticides. The complainant thereafter spoke to David, who was spraying the outside of the house, but he did not understand the language they spoke. David later told the appellant that the complainant wanted to know how much the appellant is paying him. When the complainant and David had completed spraying the outside, the complainant opened the gate for them to leave. The appellant testified that he went to the Police after he was requested to do so by one Marx. Upon his arrival he

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[5] Act 51 of 1977.

met Marx as well as Mark Plessers at the Police Station. While he was talking to them he was arrested by a Police Officer. The appellant testified that he later made a statement through his legal representative which was provided to the Investigating Officer.

[11] The complainant testified as follow: her employer informed her the previous day that people would come to the home to spray insecticide and that she must open for them and contain the dogs in the garage during this time. This was the first time that the complainant and the appellant met and the complainant testified that she had an uneasy feeling about the appellant and that she was scared of him. The appellant finished the ground floor area of the home and went upstairs to the second floor of the home. The appellant then yelled at the complainant from the second floor but she felt uncomfortable to go upstairs but proceeded to do so. The appellant wanted the complainant to pick up a dvd from the floor in the baby room. She responded by telling the appellant that it's not necessary and that she will spray with Doom, herself. The appellant continued to spray the wardrobe area in the baby room and the complainant told him not to spray too much. The appellant replied by saying that it's fine but that usually when he finished spraying a house he "*spuit ook die ousie wat daar werk*". The complainant ignored this comment by the appellant but got angry and told him to rather leave, on which the appellant replied that he is not finished spraying the house. The complainant then told the appellant not to scream at her again as this made her angry. The complainant left the room and went to the bathroom and sat on the toilet seat.The appellant once called her back and on this occasion, to pick up clothing next to the other wardrobe in the baby room. After the complainant went into the room and picked up the clothing and on her way out of the room the appellant grabbed the complainant from behind around her neck and she fell down backwards, hitting her head and back on the floor. The appellant held the complainant down with his knee against her shoulder and she struggled to get up and tried pushing the appellant off her but couldn't succeed, she screamed but then decided that no one will hear her as it was only herself and the appellant in the house. The complainant was wearing a cross over folding skirt which in

course of the struggling with the appellant folded open and the appellant pulled the complainant's underwear down and in response she pulled it back up. The appellant managed to pull down the complainant's underwear to her knees, as she continued to struggle to get away from him he pulled down his own pants and the complainant noticed that he was wearing blue underpants. The appellant eventually succeeded in pulling the complainant's underwear down as the complainant was tired because of the struggle with the appellant. The appellant through the complaint's underwear to the side and proceeded to have sexual intercourse with her, telling her that black people are "*lekker*". The complainant told the appellant that she didn't like what he was doing to her and that she is going to lay a complaint against him at the Police, this was whilst he was busy having sexual intercourse with her. The appellant laughed at these comments of the complainants. The complainant admitted that she didn't struggle with the appellant anymore at this point as her back was too painful from the fall. When the appellant finished, he got up cleaned himself and put his underpants and work pants back on and was laughing. The complainant in the meantime also got up and was looking for something to throw at the appellant but she couldn't find a suitable object. The complainant told the appellant that she was going to lay a complaint against him at the police station, the appellant then took out his wallet and gave the complainant R50 and told her that black people are always needing money to buy airtime. The complainant took the R50 from the appellant. The appellant told the complainant to open for him so he can go out, the appellant and his colleague left whereafter the complainant went to the security guard (Mr Moloto) to report the incident. Mr Moloto, after being informed of the incident by the complainant, phoned the complainant's employer as the complainant didn't have airtime on her phone. The complainant spoke to her employer on the phone and told her what happened on which the employer told the complainant to wait at the security gate and that she is on her way there.

[12] It is not necessary, for purpose of this appeal, to go into the further testimony of the complainant of what happened after she reported the incident to Mr Moloto and her employer as the basis on which the appellant was convicted was in respect of the

complainants version of events and the lack of consent to the sexual intercourse, being more probable than that of the appellant.

[13] The appellant submits that the following is highly improbable: 1. that the assistant to the appellant was told to remain outside the house doing nothing, while the appellant did all the work himself; 2. that the complainant had a reason to be afraid of the appellant as she has never met him prior to the incident and that the appellant scared the complainant; 3. that the complainant would sit on the toilet while watching the appellant work after he told her that *"as ek klaar die huis gespuit het ek spuit ook die ousie wat daar werk"*.

[14] The State on behalf of the complainant submits that the appellant's version is highly improbable in that: 1. it is very improbable that the complainant would ask a person she has never met before for R200 on more than one occasion; 2. that the appellant refused to give the complainant R200 on more than once occasion, but then after having sexual intercourse with her, he decides to give her R55 to phone her employer for bread; that the appellant would, without consent of the complainant's employer, loan the complainant money for the employers account; the appellant did not state at first possible opportunity and in his defence that the sexual intercourse was with consent, this only became his version some four months after the incident took place and most likely because the appellant were told by Mrs Joubert that the complainant went to the hospital and as an afterthought that his DNA might have been found in the complainant.

[15] The State further submits that the inconsistencies in the testimony of the complainant, being whether the bathroom (toilet) door was open or closed when she used it and whether the appellants' underpants where black or navy blue, are insignificant inconstancies and does not impact on the credibility of the complainant.

Mutually destructive versions:

[16] As indicated there exist two conflicting versions as to the incident that transpired between the appellant and the complainant on or about 15 May 2007 which lead to the conviction of the appellant on a charge of rape.

[17] In ***S v Janse van Rensburg***[6] it was said:

> *"Logic dictates that, where there are two conflicting versions or two mutually destructive stories, both cannot be true. Only one can be true. Consequently the other must be false. However, the dictates of logic do not displace the standard of proof required either in civil or criminal matters. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and in the process measured against the probabilities. In the final analysis the court must determine whether the State has mustered the requisite threshold – in this case proof beyond reasonable doubt. (See:* ***S v Saban en 'n Ander*** *1992 (1) SACR 199 (A) at 203j to 204a-b;* ***S v Van der Meyden*** *1999 (1) SACR 447 (W) at 449g-j – 450a-b and* ***S v Trainor*** *2003 (1) SACR 35 (SCA) at para 9.)"*

[18] It is trite that in assessing two conflicting versions all the evidence should be considered and none should be ignored.[7] In ***S v M***[8], Cameron JA, as he then was, stated the proper approach to adopt succinctly as follows:

> *"The point is that the totality of evidence must be measured, not in*

[6] 2009 (2) SACR 216 (C) at para 8.
[7] *Langeberg v The State* [2017] ZAFSHC 49 (16 March 2017) (Unreported).
[8] 2006 (1) SACR 135 (SCA) at para 189.

isolation, but by assessing properly whether in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides the balance weighs so heavily in favour of the state that any reasonable doubt about the accused's guilt is excluded."

[19] In the case of ***S v Singh***[9] the following is stated on the approach of a Court of Appeal to two mutually destructive versions:

"Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witness and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and demerits of the State and the defence witnesses but also the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner in the abovementioned example is to be found in its reason for judgment including its reasons for the acceptance and the rejection of the respective witnesses."

[20] Having considered all the evidence in this matter and the improbability of the events as testified to by the appellant, I have no doubt that the State proved its case beyond reasonable doubt and that the appellant is guilty as convicted.

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[9] 1975 (1) SA 227 (N) at 228.

Single Witness and Oral Evidence:

[21] A Court must be cautious when considering the reliability of evidence provided by a single witness.[10] After reading the record of the proceedings in the Court *a quo*, we are satisfied that the Court *a quo* indeed approached the evidence of the complainant with the necessary caution and that the complainant testified truthfully and was satisfactory witness. In ***S v J***[11]the Supreme Court of Appeal held that when evaluating the evidence of an alleged victim of rape or sexual assault cases, a Court need to do no more than exercise the caution that is necessary when there is only one witness to the offence alleged.

[22] It needs also be considered that the Court *a quo* had first hand interaction with the complainant as witness and that a Court of appeal will only under special circumstances interfere with the findings made in a Court of first instance, where such failure to interfere will lead to a miscarriage of justice.[12]

[23] On the contrary the appellant was found by the Court *a quo* to be an untruthful witness, who changed his version of events continuously whilst being questioned by the State.

Order:

[24] The appeal is dismissed.

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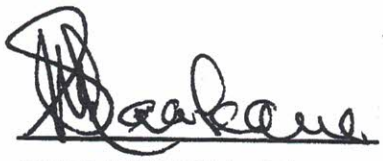
[10] *R v Moekoena* 1932 OPD 79, *S v Sauls* 1981 (3) SA 172 (A) at 180 and *Stevens v S* 2005 (1) All SA 1 (SCA).

[11] 1998 (2) SA 984 (SCA).

[12] *S v Francis* 1991 (1) SACR 198 (A) at 198j – 199a – ***"The powers of a Court of Appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of Appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence – reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of Appeal will be entitled to interfere with trial court's evaluation of oral testimony."***

C SARDIWALLA, AJ
ACTING JUDGE OF THE
HIGH COURT OF SOUTH
AFRICA, GAUTENG
DIVISION, PRETORIA

TJ RAULINGA, J
JUDGE OF THE HIGH
COURT OF SOUTH
AFIRCA, GAUTENG
DIVISION, PRETORIA



SS MAAKANE, AJ
ACTING JUDGE OF THE
HIGH COURT SOUTH
AFRICA, GAUTENG
DIVISION, PRETORIA

HEARD ON: **15 September 2017**

DATE OF JUDGMENT: **22 September 2017**

Appearances:

For the Appellant:	**Adv LA van Wyk**
Instructed by:	Legal Aid Board, Pretoria
For the Respondent:	**Adv JJ Jacobs**
Instructed by:	The Director of Public Prosecutions