



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO .	
(2) OF INTEREST TO OTHER JUDGES: YES / NO .	
(3) REVISED.	
17 NOVEMBER 2023
DATE	SIGNATURE

CASE NO: A53/2023

In the matter between:

MOTAU, JOHOHANNES

Appellant

and

THE STATE

Respondent

Coram: Millar J et Nharmuravate AJ

Heard on: 7 November 2023

Delivered: 17 November 2023 – This judgment was handed down electronically by circulation to the parties' representatives by

email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 17 November 2023.

Summary:

Criminal law and procedure – Appeal against conviction – two mutually destructive versions - independent witness called by the Court in terms of section 186 of the Act corroborating evidence of both complainant and appellant – witness found to be truthful and credible in all respects – Court a quo obligated to consider all evidence holistically – version of complainant showing material inconsistency – version of appellant ‘reasonably possibly true’ – appeal upheld and the conviction set aside and replaced with an order of acquittal.

ORDER

On appeal from: The Regional Court, Gauteng, held at Nigel.

It is ordered:

[1] The appeal against conviction on the single count of the indictment is upheld.

[2] The order of the Court a quo is set aside and replaced with the following order:
“The accused is acquitted.”

JUDGMENT

MILLAR J (NHARMURAVATE AJ CONCURRING)

- [1] On 12 October 2020, the appellant, a 24-year-old man was arraigned before the Regional Court in Nigel on a single charge of rape. The State indicated at that stage that it intended to rely on s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and that in the event of conviction, that the minimum sentence of 10 years imprisonment should be imposed.
- [2] The appellant pleaded not guilty to the charge on 12 October 2020. After the trial and on 12 April 2022, he was convicted and on 25 July 2022 a sentence of 10 years imprisonment was imposed. The appellant applied the same day for leave to appeal against both conviction and sentence before the Court *a quo* and this was refused.
- [3] The present appeal is before us, leave to appeal having been granted on petition to this Court on 23 January 2023.

THE EVIDENCE

- [4] The evidence led at the trial for the State was that of the complainant (Ms. Sibanyoni) and her cousin (Ms. Ngcobuka). The appellant (Mr. Motau) also testified. After both the State and appellant had closed their cases, the Court, acting in terms of s 168 of the Criminal Procedure Act¹ (the Act), then directed that two further witnesses, Mr. Khodisang and Ms. Mokoena, be called to testify. Only one of those witnesses, Ms. Mokoena testified. I will return to this aspect later in this judgment.
- [5] Besides the evidence that was led, a statement made by Ms. Sibanyoni to the South African Police Service was entered into evidence as exhibit A and the J88 medical report as exhibit B.

¹ 51 of 1977.

Ms. Sibanyoni

- [6] Ms. Sibanyoni testified that on 10 August 2019, a Saturday, she and Ms. Ngcobuka had started drinking alcohol during the afternoon at home. The day wore on and at approximately, 19h00, they had then gone to a local tavern called Masilele Beer Hall - where they had continued to drink. Her evidence was that at that stage she was already drunk but described it as *“just normal but not very, very, drunk”*. At some stage, Mr. Motau and a friend had sat down at the table they were sitting at and had then drank with them.
- [7] She testified that at around 24h00 – midnight on 11 August 2019, she had gone outside to smoke, and Mr. Motau had followed her and asked her what she was doing outside. She told him that she had gone outside to smoke but now needed something with which to light her cigarette. She said that Mr. Motau knew where a shop was and they had then gone to that shop. When they arrived at the shop, they found it closed. On the way back to the tavern, they had passed a house and Mr. Motau, who had a key to the house, invited her in. According to her, when she asked him what they were going to do at the house, he told her that she should not ask him that.
- [8] When they got inside the house, there was no furniture, only a mattress on the floor in the bedroom. It was at that stage she testified that Mr. Motau dragged her to the mattress, undressed her and then raped her. When he had finished, she stood up and dressed herself. She was crying. It was at that point that his friend who had been with him at the tavern, had arrived. His friend had asked her why she was crying, and she said that she told him that he should ask Mr. Motau.
- [9] She testified that after leaving the house, *“I no longer went back to the tavern, however I headed to the police station, as I was going to the police station. . . , my cousin was also coming along so as to enquire what had happened to me. She noticed that I was crying, and she asked me what happened, and I told her that this happened.”* She had then gone to the police station where she had made a report and made

a statement about what had transpired.

- [10] In cross examination, she admitted that she knew Mr. Motau by name, where he worked and where he lived. She conceded that as the tavern had a smoking area inside, there had been no need for her to go outside or even to have accompanied Mr. Motau to a shop as she could have gone inside to the smoking area and asked someone to light her cigarette. Furthermore, she testified that she had gone with Mr. Motau voluntarily.
- [11] When pressed on why she had gone with him voluntarily after they had found the shop closed, she said that she thought that he was going to take her somewhere where she could get matches. In her evidence in chief and under cross examination, she testified that after Mr. Motau and his friend had sat with her and her cousin Ms. Ngcobuka there had been no conversation between them and that besides them talking about going to the shop, they had not spoken to each other on the way there or even on the way to the house.
- [12] It was put to Ms. Sibanyoni that his friend, Mr. Khodisang, had arrived at the house with his girlfriend, Ms. Mokoena but Ms. Sibanyoni denied seeing her there. The written statement made by Ms. Sibanyoni to the South African Police Service was put to her. She was unable to explain why, immediately after the incident, she had told the police that after they had gone outside “ *he continued by grabbing my right arm and he said why I refused to talk to him. I told him to leave me alone but he continued dragging me with my arm to another house at Khwezi Street, he then opened the door on the back room and pushed me inside.*” She was unable to explain the discrepancy between her evidence in Court and what she had told the police.
- [13] When it was put to her that Mr. Motau would testify that she had consented to intercourse, she denied it. However, when it was put to her that he would say that she had asked him for money, she testified that she could not remember.

Ms. Ngcobuka

[14] The second witness to testify, was Ms. Ngcobuka. She testified that Ms. Sibanyoni is her cousin and that on 11 August 2019 they had gone to Masilele's Bar but had started drinking at about 11h00 that day. They were drinking Black Label beer and Strongbow cider. She also testified that they were "*normal like drunk*". Her evidence was that she had not taken particular notice of what had gone on inside the tavern as "*I was just under the influence of alcohol, dancing, I did not take notice of anything.*" At some stage she noticed that Ms. Sibanyoni was no longer there but did not know when she had left. The next she saw her, was after the tavern had closed and she was standing outside. Ms. Sibanyoni had approached her and was crying. When she asked her why she was crying, she told her.

Mr. Motau

[15] Mr. Motau testified that on 11 August 2019, he had met up with a friend, Tshepo. They had gone to Masilele's Beer Hall where they had played pool and were drinking. He testified that he had won some money from Betway on a soccer match and that as it was Tshepo's birthday, he had surprised him with a bottle of Russian Bear vodka.

[16] At some stage, during the evening, Ms. Sibanyoni and Ms. Ngcobuka had approached them and asked to join them. He said that he knew Ms. Sibanyoni from 2015, when he had first moved to the area. He worked at the local clinic and had seen her there. Over time, they had chatted and come to know each other and for his part, had developed feelings for her. He said that her interaction with him over time had led him to believe that she may also be interested in him.

[17] They had agreed that the ladies join them, and Ms. Sibanyoni had thereafter asked him if he would buy two beers for her. He proceeded to buy her two Black Label beers. Thereafter, he sat with Ms. Sibanyoni and they enjoyed their drinks and chatted. Later on, the conversation turned to love and culminated in them "*proposing love to one another.*" Ms. Sibanyoni then asked him if they could

go outside and find a quiet place to talk. Mr. Motau knew that his friend Tshepo had the key to a house where they could go and went and got the key from him.

[18] He testified that after leaving the tavern, he and Ms. Sibanyoni went to the house where they had consensual intercourse. While this occurred, Ms. Sibanyoni had asked him for some money, and he had told her that he would only be able to give her R200.00 which he subsequently did. When they had finished and whilst they were still getting dressed, there had been a knock at the window. They had ignored the knock on the window and thereafter there was a knock on the door. Mr. Khodisang and Ms. Mokoena were at the door and came in. He gave the key back to Mr. Khodisang and they had all parted ways.

[19] He testified that after they had intercourse and had parted ways that evening, they had done so as friends.

Mr. Khodisang

[20] Initially, the State had indicated that it also wished to call Mr. Khodisang as a witness but it then decided against this and had made him available to the defence. Neither the State nor the defence called Mr. Khodisang.

Ms. Mokoena

[21] The final witness called was Ms. Mokoena. Her evidence was ordered by the Court in terms of s 186² of the Act. Her evidence was led after both the State and the defence had already closed their cases.³ None of her evidence was put to either Ms. Sibanyoni or Mr. Motau. She testified that she knew Mr. Motau from the Devon Clinic where he was employed, although besides this, had no connection to him at all. She testified that on the day in question, she was at

² The section provides that "*The Court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings and the court shall so subpoena a witness or cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.*" *S v B and Another* 1980 (2) SA 946 (A).

³ *S v Molendorff and Another* 1987 (1) SA 135 (T). *S v Kwinika* 1989 (1) SA 896 (W).

the tavern and met up with her boyfriend Mr. Khodisang there.

[22] During the course of the evening, Mr. Motau *“and his girlfriend”* left the tavern *“saying that they were going to sleep.”* Both Mr. Motau and Ms. Sibanyoni had said this. She said that she did not know if Ms. Sibanyoni was actually Mr. Motau’s girlfriend as she did not know her. When she arrived at the tavern, Ms. Sibanyoni was already sitting with Mr. Motau and Mr. Khodisang.

[23] It was her evidence that she too drank quiet heavily and indicated that she had drunk 12 beers although she was *“not so much intoxicated”*. After the tavern had closed at around midnight, she and Mr. Khodisang had gone to the house where Mr. Motau and Ms. Sibanyoni were. When they had arrived there and entered, she had heard Ms. Sibanyoni crying softly. She testified that when she saw Ms. Sibanyoni in the house, she was wearing blue jeans and when asked what the state of the clothing was, she said that it was not disheveled or in any way damaged.

THE CONVICTION

[24] There are a number of inconsistencies in the evidence led on the part of the State as well as the defence. The only evidence led in regard to the complaint was that of Ms. Sibanyoni. Her evidence is to be weighed against that of Mr. Motau who, although admitting intercourse, denied that it was not consensual.

[25] All the evidence before the Court is corroborative of the fact that on 11 August 2019, all of those who testified found themselves in various stages of inebriation at the Masilele Beer Hall in Devon. At some stage, Mr. Motau and Ms. Sibanyoni left together.

[26] The evidence of Ms. Ngcobuka was that she did not know when they left or why they left and that the next time she saw Ms. Sibanyoni was outside the tavern after it had closed when she had observed her crying and she had made a report to her.

- [27] The evidence of Ms. Mokoena is that both Ms. Sibanyoni and Mr. Motau had both said they were leaving the tavern to go and sleep. She too made the observation of Ms. Sibanyoni crying but did not make any enquiry as to why. Furthermore, she observed that Ms. Sibanyoni's clothing was not in any way damaged or disheveled.
- [28] So, the evidence of Ms. Sibanyoni that she was crying, when she saw Ms. Ngcobuka was corroborated and even though she denied seeing Ms. Mokoena at the house on the evening in question, corroborated by her as well.
- [29] Insofar as the evidence of Mr. Motau was concerned, his evidence that he and Ms. Sibanyoni had left the tavern together to go and sleep was corroborated by Ms. Mokoena, and she corroborated his evidence that she had arrived at the house with Mr. Khodisang.
- [30] In the present matter, the court *a quo* was faced with two mutually destructive versions, each of which was corroborated in some respects by the evidence of an independent witness. In the circumstances, the evidence must be considered and evaluated holistically in order to determine whether the State has discharged the onus it bears.⁴
- [31] It was held in *In S v Janse van Rensburg*⁵ that:

"Logic dictates that, where there are two conflicting versions or two mutually 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 a civil or criminal matter. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not

⁴ *S v Chabalala* 2003(1) SACR 134 (SCA) para 15. "The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: *S v Van Aswegen* 2001(1) SACR 97 (SCA). The correct approach is to weigh up all the elements which point 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 favor of the State as to exclude any reasonable doubt about the accused's guilt."

⁵ 2009 (2) SACR 216 (C) at para 8.

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.”

[32] The learned Magistrate in his judgment on conviction, found that in regard to the evidence of Ms. Sibanyoni, that she was a truthful and credible witness in consequence of her evidence of the amount of alcohol that she had consumed and her state of inebriation. However, he inexplicably then went on to find:

“the consumption of alcohol did not play tricks on her memory that normally one would expect from a person heavily under the influence of alcohol and that there is obvious gaps and rivers and ravines in their memory caused by the flood of alcohol. She was subjected to a detailed and critical cross examination . . . but she did not contradict herself on material aspects.”

[33] In regard to the obvious discrepancy between the statement made by Ms. Sibanyoni to the police immediately after the incident and her evidence in Court, he found:

“but whether this is so material as to cast an enormous shadow of gloom over her evidence in total, I do not agree with that argument. As we should not forget and leave it, the valuation that this affidavit was made shortly after the incident was clearly still in a state of mind that she experienced being traumatized.”

[34] The discrepancy was not explained by her in her evidence. On this particular aspect her evidence was simply not credible and ought not to have been accepted without more.⁶

[35] Insofar as the evidence of Ms. Mokoena was concerned, the learned Magistrate

⁶ *S v Sauls* 1981 (3) SA 172 (A).

found that she was independent and impartial and was satisfied that she was a truthful, honest, and credible witness.⁷

[36] The learned Magistrate found in regard to the appellant's version that when he was cross examined, *"it was like the proverbial tsunami that engulfed the accused set of lies and totally lifted his little boat of lies out of the sea of truth"* and went on to find that the appellant's version was false beyond reasonable doubt.

[37] Insofar as the learned Magistrate found that he could rely upon the evidence of Ms. Mokoena, he was obliged to rely on all her evidence, save where it had been impeached. None of her evidence was impeached and he completely disregarded, in his evaluation of the evidence, Ms. Mokoena's corroboration⁸ of the evidence that they had both said they were leaving to go and sleep.

[38] He accepted the evidence of Ms. Mokoena that she had been at the house and seen Ms. Sibanyoni but did not accept her evidence as to the state of her clothing which was corroborative of the version of Mr. Motau. This corroboration of the evidence of Mr. Motau was not dealt with at all. The use by the learned Magistrate of emotive language in the evaluation of the evidence before him, is unhelpful and only served to obfuscate the fact that he had overlooked dealing with this aspect.

[39] It is the State that bears the onus of proving the guilt of Mr. Motau "beyond any reasonable doubt" and that in evaluating the evidence, the accused need only show that his version is "reasonably possibly true".⁹

⁷ *S v Masooa* 2016 (2) SACR 224 (GJ). *S v Steyn* 2018 (1) SACR 410 (KZP) at para [25].

⁸ *S v Artman and Another* 1968 (3) SA 339 (SCA) at 341A-C.

⁹ *R v Difford* 1937 AD 370 at 373. *S v Shackell* 2001 (4) SA 1 (SCA) at para [30] - *"Though I am not persuaded that every one of these suggested inherent improbabilities can rightfully be described as such, I do not find it necessary to dwell on each of them in any detail. There is a more fundamental reason why I do not agree with this line of reasoning by the Court a quo. It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version*

[40] The failure on the part of the court *a quo* to consider all the evidence of Ms. Mokoena in his evaluation and consideration of whether the state had discharged the onus upon it, was in the circumstances, in my view a material misdirection and patently wrong.¹⁰

SENTENCE

[41] In consequence of the view that I take in respect of the conviction, it is unnecessary to deal with the appeal against sentence.

[42] In the circumstances, it is ordered:

[42.1] The appeal against conviction on the single count of the indictment is upheld.

[42.2] The order of the Court *a quo* is set aside and replaced with the following order:

“The accused is acquitted.”

is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain improbabilities in the appellant's version, the reasonable possibility remains that the substance thereof may be true. This conclusion is strengthened by the absence of any apparent reason why the appellant would, without any motive, decide to brutally murder the deceased by shooting him in the mouth at point blank range. As a consequence, the matter must be decided on the appellant's version. According to the appellant's version he never intended to fire a shot. On the acceptance of this version there is no room for a finding of dolus in any of its recognised forms. It follows that the conviction of murder cannot stand.”

¹⁰ *S v Mabena* 2012 (2) SACR 287 (GNP) at para [11] – “On appeal it was argued that the regional magistrate ought to have accepted that the evidence of the appellant was reasonably possibly true. It was, however, not suggested that the regional magistrate misdirected herself in any respect. The power of an appeal court, to interfere on fact with the findings of the court below, is limited. Interference in this regard is only permissible where the findings of the court below are vitiated by misdirection or are patently wrong.”. See also *Quartermark Investments v Mkhwanazi* 2014 (3) SA 96 (SCA) at para [20] referring to *R v Hepworth* 1928 AD 265 at 277.

A MILLAR

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I AGREE

N NHARMURAVATE

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD ON: 7 NOVEMBER 2023

JUDGMENT DELIVERED ON: 17 NOVEMBER 2023

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