THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 528/2018

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS:
LIMPOPO **APPELLANT**

and

MOHALE RAMALEKANA **RESPONDENT**

Neutral citation: *DPP v Ramalekana* (528/2018) [2018] ZASCA 187 (14 December 2018)

Coram: Maya P, Mocumie and Schippers JJA and Carelse and Nicholls AJJA

Heard: 26 November 2018

Delivered: 14 December 2018

Summary: Criminal procedure - appeal by the Director of Public Prosecutions in terms of s 311 of the Criminal Procedure Act 51 of 1977 – accused acquitted on charge of rape under s 3 Criminal Law (Sexual Offences of the and other Matters) Amendment 32 of 2007 – DNA evidence excluding accused as the perpetrator – whether decision in favour of accused on a question of law – matter struck from the roll.

ORDER

On appeal from: Limpopo Division, Polokwane (Phatudi ADJP and Semenya J sitting as court of first instance in terms of s 310(1) of the Criminal Procedure Act 51 of 1977):

The matter is struck from the roll.

JUDGMENT

Mocumie JA (Maya P, Schippers JA and Carelse and Nicholls AJJA concurring):

[1] The issue in this appeal is whether a decision on a question of law has been given in favour of the respondent within the meaning of s 311(1) the Criminal Procedure Act 51 of 1977 (the CPA). In 2014 he was acquitted by the Tzaneen Regional Court on a charge of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Other Matters) Amendment Act 32 of 2007, pursuant to a plea of not guilty. The State failed to prove that the respondent had penetrated the complainant or that his DNA matched a genital swab specimen taken from her. The appellant, the Director of Public Prosecutions, Limpopo (DPP), contending that the acquittal was based on a question of law, more specifically that the respondent should have been convicted of attempted rape, requested the magistrate to state a case for the consideration of the high court, as envisaged in s 310(1) of the CPA.[1] The high court held that the respondent's acquittal

[1] Section 310(1) reads:
'**Appeal from lower court by prosecutor**
310(1) When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law, including an order made under section 85(2), the attorney-general or, if a body or person other than the attorney-general or his representative, was the prosecutor in the proceedings, then such other prosecutor may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon

followed on factual issues only, that there was no question of law decided in his favour and struck the matter from the roll. Not satisfied with this decision, the DPP applied for special leave to this Court, which was granted in line with decisions of this Court to the effect that leave to appeal is not required and the provisions of the Superior Courts Act 103 of 2013 do not apply.[2]

[2] In brief, the factual background of this case is as follows. The complainant who was 15 years of age at the time, testified that in the early hours of 29 November 2014, she left a tavern with three friends, where they had been socialising the previous night. The respondent joined them subsequently. The complainant asked her friend, Mr Levi Manyama, to take her halfway to her home, but he declined because he was injured. The respondent offered to walk her home. The complainant refused the offer. He then threatened her with a knife and she ran home. The respondent, still armed with the knife, chased her. When nobody opened the door to her house, the complainant ran to the home of her brother's friend, Mr Mashakeni.

[3] The respondent, still armed with a knife, followed her. He told Mr Mashakeni that he had rescued the complainant from certain men who had attacked her at the tavern. He went into Mr Mashakeni's house where, according to the complainant, he ordered her to take off her clothes, which she did. The respondent then stripped down to his knees and had sexual intercourse with the complainant without her consent. He did not use a condom and ejaculated inside her. The complainant said that Mr Mashakeni entered the room while they were having intercourse and the respondent offered him R20 for the use of the room. The police, who had been called in the interim, entered the house and found the respondent on top of the complainant, and arrested him. The complainant testified that she had not engaged in consensual intercourse with any person other than the respondent for seven days before, or after the alleged rape.

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and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law.'

[2] *Director of Public Prosecutions, Gauteng v KM* 2017 (2) SACR 177 (SCA) para 51. Section 1 of the Superior Courts Act 10 of 2013 provides, inter alia, that an appeal in Chapter 5 'does not include an appeal in a matter regulated in terms of the Criminal Procedure Act (Act 51 of 1977), or in terms of any other criminal procedural law'. *DPP v KM* was affirmed in *Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi* 2017 SACR 384 (SCA) para 16.

[4] The version of the respondent was that he had stopped a fight between two of the complainant's friends after they had left the tavern. After her friends went in different directions, the complainant and the respondent were alone and, in his words, he 'proposed love' to her. She replied that there was no problem. When they got to Mr Mashakeni' s house he offered the latter R50 for the use of the place and told Mr Mashakeni that he was going to sleep with the complainant. They went into the house and he was sitting on a bed talking to the complainant when the police arrived and arrested him. The respondent denied that he had engaged in sexual intercourse with her. In this regard he presented evidence by a forensic analyst who testified that the respondent's DNA was not found in the semen extracted from the complainant's body (which under normal circumstances lasts for a period of five days). The semen found inside the complainant belonged to somebody else. The respondent also denied that he was in possession of a knife and that he had chased the complainant to Mr Mashakeni's home.

[5] The trial court evaluated the evidence as well as the applicable case law and concluded as follows:

'With the evidence tendered before this court, the court cannot safely accept that you penetrated Ms Mabusela on the date in question for, it is your evidence that at that time the police official arrived. You were intending to have sexual intercourse with her but it was before you penetrated her . . . . I am persuaded now based on the evidence that was tendered before this court and having thoroughly analysed it to accept the version of the defence. For the witness was not a credible one. There is no way that the swab could have contained semen if she did not have sexual intercourse with anyone within the period that has been indicated before this court especially that the expert witness also strengthened the evidence that the, in the normal course of events the lifespan of the semen is more or less five days.

There is evidence, there is corroboration on other aspects which were placed before this court but not disputed on the main issue.'

The trial court concluded;

'The main issue in dispute is that you did not penetrate the complainant the victim Ms Mabusela. As such evidence of Ms Mabusela is hereby rejected. You are given the benefit of a doubt you are found NOT GUILTY AND DISCHARGED.'

[6] In the high court, the parties agreed and the court also found that the case, as stated by the trial court in response to the request by the state, was defective and did not comply with the requirements of the CPA. The high court decided to deal with the matter based on the question formulated by the state, ie 'whether incriminating evidence of the state was accounted for or not'.[3]

[7] Counsel for the state contended that the trial court ignored certain pieces of evidence or lacked appreciation of relevant evidence. He contended that nowhere in its judgment did the trial court consider whether or not the state had proved attempted rape, despite the fact that the charge sheet referred to s 256 of the CPA, which provides that 'if the evidence in criminal proceedings does not prove the commission of the offence charged but proves an attempt to commit the offence or an attempt to commit any other offence of which the accused may be convicted on the offence charged, the accused may be found guilty of an attempt to commit that offence or, as the case may be, such other offence'. The failure to consider attempted rape, so it was contended, demonstrated that the trial court did not properly consider the evidence by the state witnesses placed before it. Despite this narrow approach by the trial court, the high court concluded that the evidence of the state was evaluated holistically and misconceived the concept 'accounting for the evidence', as explained in *Van der Meyden*.[4] The high court's failure to take into account relevant evidence, it was argued, was an error of law.

[8] Having listened to both parties, the high court found:

'[I]t is evident that the trial court extensively evaluated the version of the appellant against that of the state witnesses. It criticised the appellant's failure to challenge damning evidence that points to his guilt. It further dealt with the improbabilities in his version and gave reason for rejecting it. The trial court went further to address discrepancies between what was put to the state witnesses during cross-examination and what the respondent said in his evidence-in-chief.'

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[3] See *Director of Public Prosecution, North Gauteng v Pistorius* 2016(1) SACR 431 (SCA), *DPP, North Gauteng v Moloi* (1101/2015) [2017] ZASCA 78(2 June 2018) and *S v Van der Meyden* 1999(1) SACR 447 (W).

[4] *S v Van Der Meyden* 1999 (1) SACR 447 (W) at 449c-450b.

[9] The high court further held:

'Apart from weighing the defence's case against that of the state, the trial court dealt with what it believed to be weaknesses in the state's case. There is no doubt that the trial court, wrongly or rightly, placed more emphasis on forensic evidence. It is however evident from the judgment that the trial court has evaluated that forensic evidence against the evidence of the complainant. Having done so, it proceeded to make an adverse finding against her.'

[10] In conclusion, the high court found:

'It is my finding that the trial court evaluated the evidence presented before it holistically. I am further satisfied that the respondent's acquittal followed on factual issues only and that there is no question of law that was decided in the respondent's favour. The High Court is not permitted to hear the appeal under these circumstances. Whether or not I agree with the trial court's conclusion is immaterial.'

[11] In order to ascertain whether the high court gave a decision in favour of an accused on a question of law, its judgment must be examined so as to determine whether the accused succeeded on a matter of law.[5] If it appears from the judgment that the high court gave a decision in favour of the accused on the facts and not a matter of law, the appeal must be struck from the roll on the ground that it is not competent for the DPP to appeal. However, if it appears from the judgment that the court gave a decision in favour of the accused on a matter of law, then this court is duty-bound to consider whether or not the high court erred in law.[6]

[12] The determination of whether an issue is a question of law or fact was recently distilled in *Nzimande v S*[7] at paras 11 – 13 of the judgment which I find fitting to quote as is:

'[11] In *S v Petro Louise Enterprises (Pty) Ltd and Others* (a case referred to in the judgment of the High Court, but in a different context) it was argued by counsel for the State that the question whether a given inference was the only reasonable inference to be drawn from certain facts, was a question of law – essentially the same argument that was addressed to the high

[5] *Attorney-General, Transvaal v Moores (SA) (Pty) Ltd* 1957 (1) SA 190 (A) at 195E.
[6] *Moores* fn 5 at 196B-C.
[7] *Nzimande v S* [2010] ZASCA 80; 2010 (2) SACR 517 (SCA).

court in this instance. The State's argument was rejected by the court (per Botha J, Van Dyk AJ concurring) in the following passage:

“I am unable to accept counsel's widely-based and generalised proposition that in all cases the question whether a particular inference is the only reasonable possible inference to be drawn from a given set of facts is a question of law. To accede to the proposition in such general terms would, I consider, open the door to the possibility of large numbers of appeals being brought under sec. 104 of [the Magistrates' Courts] Act 32 of 1944, contrary to the limited scope of that section which I conceive the Legislature contemplated. One example of those possibilities that were canvassed during the argument will suffice. Suppose that an accused is charged with an offence of which a specific intent is an element, e.g. assault with the intent to do grievous bodily harm. On the evidence, the magistrate finds that such intent is not the only reasonable inference to be drawn from the facts, and consequently he convicts the accused of common assault. I cannot for one moment imagine that the Attorney-General will have a right of appeal upon the footing that an intent to do grievous bodily harm was the only reasonable inference to be drawn from the facts.”

[12] In *Magmoed v Janse van Rensburg and Others* Corbett CJ (writing for a unanimous court) quoted the above passage from *Petro Louise Enterprises* and expressed his 'full and respectful agreement' with the analysis. In the course of his judgment, the learned Chief Justice also said the following:

“[I]n my opinion, a question of law is not raised by asking whether the evidence establishes one or more of the factual ingredients of a particular crime, where there is no doubt or dispute as to what those ingredients are.”

And further:

“[T]he fact that in a particular case the prosecution relies upon inference to prove the agreement to accomplish a common aim does not make the question as to whether the prosecution succeeded in establishing this inference beyond a reasonable doubt one of law. As was often pointed out in the field of income tax appeals on a question of law, facts may be classified as primary, ie those facts which are directly established by the evidence, and secondary, ie those facts which are established by way of inference from the primary facts . . . . I have no doubt that an inference drawn from proven facts that the accused had by agreement formed a common purpose which embraced, say, the possibility of an unlawful killing is an inference of fact, and not one of law. It is a secondary fact. *It is seldom in a case of murder that there is direct evidence of the perpetrator's actual state of mind. Consequently, whether the unlawful killing*

was accompanied by dolus *in one of its forms on his part is normally a matter of inference from the primary facts. Clearly this is an inference of fact and any question as to whether the trial Court correctly decided this issue is a question of fact.* I can see no difference between this and the issue, also to be determined by inference, as to whether a number of accused formed a common purpose which embraced both an unlawful killing and *dolus* in one of its forms. It is true that the legal consequences of a common purpose may be said to fall within the sphere of a rule of law, but in a case such as this the rule itself and its scope are not in issue. What is in issue is the factual foundation for the application of the rule. That is a question of fact."(My emphasis.)

[13] The principles so lucidly articulated in *Petro Louise Enterprises* and in *Magmoed* have subsequently received the express imprimatur of the Constitutional Court in *S v Basson*, and are dispositive of the present appeal ' (Footnotes omitted)

[13] On an examination of the high court's judgment, the DPP's contentions do not withstand scrutiny. The court dealt with the matter on the basis of the question as formulated by the State, namely whether all the incriminating evidence adduced by the State had been accounted for. The high court considered the evidence in its totality and held that all of it had been accounted for. It found that the trial court had extensively evaluated the appellant's version against that of the State witnesses, and that it had weighed the forensic evidence against the complainant's evidence, after which it made an adverse credibility finding against her. The high court concluded that the trial court had assessed the evidence before it holistically; and as already stated, found that the respondent was acquitted on the facts and that no question of law had been decided in his favour.

[14] In my view, that conclusion cannot be faulted. On the facts, the State failed to prove its case beyond reasonable doubt, and the complainant's evidence was rightly rejected as unreliable and not credible. She testified that she did not engage in consensual intercourse with anyone other than the respondent before or after the alleged rape; that the respondent had had unprotected sex with her; and that he had ejaculated inside her. Again, on the facts, it was found that if the complainant never had sexual intercourse within the relevant period, then there was no way that semen could have been found in the DNA that was analysed. Consequently, it could not be accepted,

as a fact, that the respondent had penetrated the complainant on the day in question. And it was also established, as a fact, from DNA analysis that the respondent did not have sexual contact with the complainant.

[15] In the circumstances of this case, all these findings were quintessentially findings of fact. Further, the argument that the failure to consider a conviction of attempted rape, is likewise an attempt to frame, as a question of law, something which in substance is a matter of fact. Save for the complainant's testimony, there was no evidence of any sexual assault or attempted rape by the respondent, as they were alone at the relevant time. Now if her evidence could not be accepted because it was unreliable and not credible for the reasons already advanced, and the trial court accepted the version of the defence, then on the facts, there was no conceivable basis upon which the respondent could be convicted of attempted rape. Aside from this, a question of law is not raised by asking whether the evidence establishes one or more of the factual elements of a particular crime – as the DPP sought to do – where there is no doubt as to what those elements are.[8]

[16] This appeal does not fall within the ambit of s 311(1) of the CPA, as the high court gave a decision in favour of the respondent on the facts. The matter is accordingly struck from the roll.

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B C Mocumie

Judge of Appeal

[8] *Magmoed v Janse Van Rensburg & others* 1993 (1) SA 777 (A) at 808B.

APPEARANCES

For Appellant:	M Sebelebele
	Instructed by: Director of Public Prosecutions, Polokwane Director of Public Prosecutions, Bloemfontein
For Respondent:	L M Manzini
	Instructed by: Legal Aid, Polokwane Legal Aid, Bloemfontein