THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 609/10

In the matter between:

SIMPHIWE RAYMOND SHUSHA Appellant

and

THE STATE Respondent

Neutral citation: *Shusha v The State* (609/10) [2011] ZASCA 171 (29 September 2011)

Coram: HEHER, CACHALIA, SHONGWE, THERON and MAJIEDT JJA

Heard: 18 August 2011

Delivered: 29 September 2011

Summary: Criminal law – Assessment of Evidence – Accused's version should not be rejected merely because it is improbable – Accused's version should only be rejected on the basis of inherent improbabilities if it is so improbable that it could not reasonably be true.

ORDER

On appeal from: KwaZulu-Natal High Court (Pietermaritzburg) (Ndlovu J with Moosa AJ concurring, sitting as court of appeal)

The appeal is upheld, the conviction and sentence are set aside.

JUDGMENT

THERON JA (HEHER, CACHALIA, SHONGWE AND MAJIEDT JJA concurring)

[1] The appellant stood trial in the regional court, Port Shepstone, on one count of rape. On 26 July 2004, he was convicted and sentenced to eight years' imprisonment, two of which were conditionally suspended. The matter was sent on special review in terms of s 204(4) of the Criminal Procedure Act 51 of 1977 as the magistrate had not applied the relevant minimum sentencing provisions of the Criminal Law Amendment Act 105 of 1997. On review, the sentence was set aside and the matter remitted to the magistrate to impose sentence afresh. On 18 March 2005, the appellant was sentenced to the applicable minimum sentence of ten years' imprisonment. He appealed to the Kwazulu-Natal High Court (Pietermaritzburg). The appeal against conviction was dismissed but the appeal against sentence was allowed to the extent that the sentence of ten years' imprisonment was set aside and replaced with a sentence of eight years' imprisonment, two of which were conditionally suspended. The appellant appeals against his conviction, with the leave of this court.

[2] The complainant and the appellant had been employed at the Margate police station. The appellant had held the rank of Inspector in the South African Police Service, while the complainant had worked at the police station as a volunteer.

[3] At the time of the incident, the complainant had been living with her sister, Nonkululeko Ngwabe (Ngwabe), in Uvongo, while her rural home was in Nkotaneni where her grandmother resided. The evidence was that she lived in Uvongo during the week and visited her rural home over the weekends. It was common cause that the appellant had given the complainant a lift to her rural home a few days prior to the incident.

[4] The appellant had, on the day of the incident, given the complainant and other colleagues, a lift home from the police station. After the other colleagues had been dropped off, the appellant, accompanied by the complainant, drove to a construction site where he encountered and had a conversation with state witness Afzal Khan (Khan) about a case which he, the appellant, was investigating. Thereafter the appellant drove the motor vehicle to an isolated spot, not too far from where they had met Khan. The complainant alleged that the appellant had forcibly, and against her will, had sexual intercourse with her. She also said that he had taunted her about being ‘stupid’ and ‘unable to move’ after the rape. The appellant, on the other hand, maintained that the intercourse had been consensual. The narrow issue on appeal, as in the lower courts, is that of consent.

[5] It was common cause that the complainant had reported the incident to her sister later that evening. Ngwabe gave evidence in support of the complainant’s

version. Ngwabe testified that when the complainant returned home from work that day, she, the complainant, was visibly upset. Upon enquiries from Ngwabe, the complainant told her that the appellant had raped her. Ngwabe and her husband had assisted the complainant in laying a charge at the police station.

[6] The appellant had testified in his defence. It was common cause that he and the complainant had, en route to Nkotaneni, engaged in meaningful conversation regarding the complainant's personal circumstances such as her education, financial position and living conditions. The appellant testified that he had, during the journey to Nkotaneni, touched the complainant in an intimate manner and that she had not objected. It was his evidence that he had, subsequent to the trip to Nkotaneni, and prior to the incident, visited the complainant in her office at the police station and she had confirmed that she was interested in pursuing a love relationship with him. On the day of the incident they had, according to the appellant, merely taken their relationship to the next level.

[7] The magistrate was alive to the fact that the narrow issue before him was whether or not the intercourse was consensual. In assessing the versions of the complainant and the appellant, the magistrate had said:

'The two versions before the court, one being that the sexual intercourse was not consensual by the complainant and that by the accused that the sexual intercourse was consensual, are mutually exclusive, meaning that if the court accepts the one it has necessarily got to reject the other.'

[8] The magistrate, in his analysis of the evidence, concluded that:

'The court is further satisfied that the probabilities in this matter favour the case for the state and militate strongly against the evidence of the accused or the accused's version.'

In support of this conclusion, the magistrate went on to add:

'The accused wants the court to accept that he had a relationship with her and that the sexual intercourse was by consent. However, there is nothing in the evidence that shows any probability that the complainant arrived home late and because she was late she was in trouble or going to be in trouble and therefore she cried rape. She was emotional when she arrived home, she was emotional and crying when the statement was taken. It is improbable that the person whom she met and she is a willing partner to, who she is interested in, would now be implicated or falsely implicated in this rape charge. It is improbable that the accused, who has so much knowledge of her personal circumstances, the problems … relating to her boyfriend and sexual intercourse, would take her home late.'

[9] It is apparent from the passages quoted above that the magistrate had applied the incorrect standard of proof. The magistrate appears to have rejected the appellant's version on the basis that it was improbable. This was a fatal misdirection.[1] It is trite that in criminal matters the state must prove its case beyond reasonable doubt. An accused's version can only be rejected if the court is satisfied that it is false beyond reasonable doubt. An accused is entitled to an acquittal if there is a reasonable possibility that his or her version may be true.

[10] A court is entitled to test an accused's version against the improbabilities. However, an accused's version cannot be rejected merely because it is improbable. In *S v Shackell*,[2] Brand JA put the matter thus in relation to inherent probabilities:

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[1] *S v Heslop* 2007 (4) SA 38 (SCA) para 10.
[2] *S v Shackell* 2001 (4) SA 1 (SCA) para 30.

‘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.’

The magistrate, in his judgment, did not point to any improbabilities in the appellant’s version. In my view, there are none. As in *Shackell*, the reasoning of the trial court ‘lacks this final and crucial step’. It cannot be said, after weighing the probabilities and improbabilities in this matter that ‘the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt’.[3]

[11] The background facts leading up to the complainant accompanying the appellant and the appellant driving to the isolated spot where the incident occurred are largely common cause and do not, in the view I take of the matter, favour either party. It is clear that the appellant had, on the Friday prior to the incident, gone considerably out of his way in order to take the complainant to her rural home in Nkotaneni and that the two of them had, during the course of the journey, become better acquainted. It was also common cause that on the day of the incident, the appellant had given the complainant and her colleagues a lift home from work, and that she had, at his request, accompanied him while he carried out certain investigations. The fact that the complainant had agreed to accompany the appellant does not lead to the suggestion that she was inclined towards a romantic relationship with him, as suggested by counsel for the appellant. She explained that she had trusted him and took comfort in the fact that he was protective of her. She

[3] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

did not believe that he would do anything untoward and for that reason was not apprehensive.

[12] The complainant had described a struggle between herself and the appellant and had said that the physical force exerted by the appellant was such that it had made her submit to him. The complainant's evidence was that her fingers were visibly red and swollen as a result of being squeezed and bent by the appellant. It was contended, on behalf of the appellant, that it was extremely unlikely that the complainant would have emerged from being forcibly raped in the manner she described without any injuries. It was common cause that the doctor had not observed any injuries on the complainant at the time he had examined her. It was noted by the high court, that 'the inconclusive nature of the medical evidence was no proof that the rape was not committed'. I would add that the converse is also true. The medical evidence did not support the commission of the rape. It must be borne in mind that the complainant was 26 years old at the time, the mother of two children and that she had, on her version, prior to penetration, ceased resisting the appellant. These factors would certainly reduce any chance of serious or visible injury. Against this background, the medical evidence favours neither the defence nor the state.

[13] It further transpired that the appellant had removed the complainant's panties without any resistance from her. She explained this by saying 'because I was tired he was doing what he likes'. The complainant further described how the appellant had provided her with a towel to wipe herself after the sexual intercourse. The complainant admitted that the appellant's cellular phone rang during that time and

he had answered it while she was wiping herself and neatening her clothing. These events, which occurred after the incident of sexual intercourse between the parties, do not assist with the determination of the narrow issue of consent. They do not support either the state's case or the appellant's defence.

[14] The conclusion is inescapable, that the reasons advanced by the magistrate for reaching proof beyond reasonable doubt are flimsy. The probabilities which he relied upon are not probabilities that bear upon the presence or absence of consent. In these circumstances, and applying the test as formulated in *Shackell*, this court cannot find the appellant's version to be inherently improbable. The appellant is therefore entitled to an acquittal.

[15] The appeal is upheld, the conviction and sentence are set aside.

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L V THERON

JUDGE OF APPEAL

APPEARANCES:

APPELLANT: J E HOWSE

Instructed by:

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