

SOUTH AFRICA / JUDGMENT

Madlophe v S (A848/16) [2018] ZAGPPHC 344 (2 March 2018)

[2018] ZAGPPHC 344

COURT

North Gauteng High Court, Pretoria

BEFORE

S Chesiwe, N P Mngqibisa-Thusi

CASE / FILE NUMBER

A848/16

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER JUDGES

(3)

REVISED

CASE NO: A848/16

2/3/2018

In

the matter between:

SAMSON
JABULANE
MADLOPHE
APPELLANT
and
THE STATE
RESPONDENT

JUDGMENT

CHESIWE AJ:

- [1] The appellant was convicted in the Regional Court Nelspruit on the following counts - count 1 - Housebreaking with intent to Rape and Rape, count 2 - Assault with intent to do grievous bodily harm. The appellant was sentenced to 10 years direct imprisonment on count 1 and acquitted on count 2.
- [2] Leave to Appeal against the conviction.

CONVICTION

- [3] It is common cause that on the 12 February 2010, complainants' house was broken into and sexual intercourse took place without her consent.
- [4] The crisp issue in this appeal is the identity of the appellant. Pertinently that the State's case rested on circumstantial evidence that the appellant was identified by the complainant by his voice.
- [5] The complainant testified that she was asleep in her shack on the night of the incident when she heard the appellant calling her. She knew him as her sisters' grandson and testified that appellant grew up in front of her. The shack was locked with a chain and padlock. She did not reply to the appellants calling. The appellant left and said he will return.
- [6] The appellant later returned and broke down the shack door. The complainant attempted to hide under a mosquito net in the corner of the shack. But the appellant found her and assaulted her all over her body. The complainant was wearing a panty when the appellant started to rape her whilst strangling her.
- [7] Although there was no light, the complainant was able to identify the appellant because of the moonlight, as the appellant was well known to her. After the incident the complainant went to her sister to tell her what happened to her.
- [8] According to the complainant she sustained body injuries, but these injuries are not reflected on the J88. The J88 only reflects the small 10cm superficial tear at nine o'clock in the wall of the vagina.

[9] It is trite that evidence on identification must be approached with caution. The dangers of incorrect identification are well-known. The pointing out of a wrong person by a witness who acts in good faith has led to cases of injustice. The evidence of identifying an accused person because of the ever-present possibility of an honest mistake being made by a complainant or a witness. The evidence of identification has to be approached with caution. In *S v Mthethwa* 1972(3) SA 766(A), at 768A-C, Holmes JA stated that:

"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest; reliability of his observation must also be tested. This depends on various factors, such as lighting; visibility and eyesight, the proximity of the witness; his opportunity for observation; boils as to time and situation, the extent of his prior knowledge of the accused; the mobility of the scene, corroboration, suggestibility, the accused's face, voice, built, gait and dress, the result of identification parades, if any, and, of course, the evidence by or on behalf of the accused.

The list is not exhaustive. These factors, or such of them as are applicable in particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities."

[10] In *Magadla v S* (80/2011) 2011it was stated that:

"The fact that a witness failed to provide a description of the accused does not always assist him or her in the event where the witness was at a situation where he or she had ample opportunity to make a proper and reliable observation of the perpetrator, especially where the witness did not have any reason to falsely implicate the perpetrator."

[11] The complainant was consistent throughout her testimony. She was constant in that she known the appellant as the grandson to her sister. She was able to identify the appellant by his voice as the appellant called her.

"Vusi's mother, Vusi's mother, Vusi's mother"--.. page 25 line 1 of the records.

The complainant was immediately able to identify the appellant as her sister's grandson. She further gave a description of the clothes the appellant was wearing as she saw the appellant wearing the clothes earlier in the day.

"Khakhi trousers and boot shoes from his employment."- Line 16 page 28 of the record.

" I saw him wearing those boots shoes that day earlier." - Line 20 page 28 of the record.

And

" What was he wearing earlier except the boots?"

" He was wearing the same shirt..... "

- Line 26 page 28 as indicated before court record? (Line 24 page 28 of the record). The witness had earlier testified that the appellant wore long sleeve check-red shirt.

[12] The complainant's evidence as to being raped was further corroborated with the J88 that was handed up by consent, that the doctor's finding supported the evidence of the complainant and further more corroborated by the complainants sister.

[13] Therefore the issue of identification of the appellant was settled at the trial Court. The trial court was satisfied with the evidence of the complainant. Nor did the trial court misdirect itself.

[14] The appellant elected not to testify, despite the unsuccessful application for discharge in terms of Section 174 of the Criminal Procedure Act. The appellant choose not to testify in view of being accused of such a serious offence draws the inference that the appellant could not answer to the allegations against him.

[15] In *S v Chabalala* 2003(1) SACR 134 SCA paragraph 2 1, Heher AJA said

"The appellant was faced with direct and apparently credible evidence which made him the prime mover in the offence. He was also called upon to answer evidence of a similar nature relating to the parade. Both attacks were those of a single witness and capable of being neutralised by an honest rebuttal. There can be no acceptable explanation for him not rising to the challenge.

To have remained silent in the face of the evidence was damning. He thereby left the prima facie case to speak for itself One is bound to conclude that the totality of the evidence taken in conjunction with his silence excluded any reasonable doubt about his guilt. "

[16] This dilemma is entirely consistent with the Constitutional position which was elucidate in *Osman and Another v Attorney - General Transvaal* 1998(2) SACR 493(CC) at para 22 and *S v Boesak* 2001(1) SACR (CC) at para [24] The Court said:

" The right to remain silent has application at different stages of criminal prosecution...

It arises again at the trial stage when accused has the right to remain silent and not testify during the proceeding".

[17] The appellant to have remained silent in the face of the evidence was damning. He thereby left the prima facie case to speak for itself. One is bound to conclude that the evidence taken in conjunction his silence excluded any reasonable doubt about his guilt (see *State v Chabalala* 2003(1) SACR 134 (SCA) para21).

[18] An Appeal Court will only temper with the Trial Court's factual finding made by the trial court were clearly wrong. It has not been submitted that the trial court committed any misdirection. Furthermore when consideration is laid to all consistencies; improbabilities, and contradictions there is no reason to doubt correctness of the credibility findings made by the trial court.

[19] I am satisfied that the State at the trial court proved its case beyond reasonable doubt. In my view the Trial Court correctly convicted the appellant and there is no reason to temper with the Trial Courts finding on the conviction.

[20] In the result the following order is made:

1. The appeal against conviction is dismissed.
2. The conviction of the Trial Court is confirmed.

S CHESIWE

Acting Judge of the Gauteng High Court, Pretoria

I agree.

N P MNGQIBISA-THUSI

Judge of the Gauteng High Court, Pretoria

Appearances

For Appellant:

Mr AJ Masiye

Instructed by:

Masiye Attorneys

For Respondent: Adv MJ Van Vuuren

Instructed by:

Director of Public Prosecutions, Pretoria

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