

SOUTH AFRICA / JUDGMENT

Maphalala v S (A136/2016) [2017] ZAGPPHC 325 (15 June 2017)

[2017] ZAGPPHC 325

COURT

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo, E E Sethole

CASE / FILE NUMBER

A136/2016

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IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A136/2016

15/6/2017

BONGANI GOODWILL MAPHALALA APPELLANT

and

STATE RESPONDENT

JUDGMENT

KHUMALO J

INTRODUCTION

- [1] The Appellant is with leave granted on petition to this court, appealing against his conviction on 16 October 2013 by the Regional

Court, Vloksrust on 2 counts of sexual assault and a count of rape. He was sentenced to a period of 3 years imprisonment on each of the sexual assault counts and 10 years imprisonment on the rape count. The sentences imposed on the sexual assaults counts were ordered to run concurrently with the 10 year sentence imposed for rape. The Appellant was therefore to serve an effective sentence of 10 years imprisonment.

- [2] Leave to appeal was granted on both conviction and sentence, but Appellant proceeded to appeal only against sentence.
- [3] Appellant was arrested following a complaint laid against him by a seventeen year old D S ("the complainant"), on 11 October 2012 at the Volkstrust Police Station, that he on that day unlawfully and intentionally sexually violated the complainant at various places by touching the complainant's penis with his hand and also to have sexually penetrated and sucked complainant's penis without his consent.
- [4] At the trial Appellant was duly represented and he tendered a plea of not guilty to all the charges. He did not proffer a statement in explanation of his plea but chose to remain silent. He was found guilty on the evidence of the complainant who was a single witness. The court found that he was impressive.
- [5] Appellant's ground for seeking to set aside his conviction is that the court a quo erred when it rejected his evidence as being not reasonably possible true and finding that the state proved his guilt beyond reasonable doubt. His reasons are expounded later in the

judgment.

BACKGROUND

FACTS

- [6] The Appellant, is a social worker and a probation officer. At the time of the incident he was in the employ of the Department of Social Welfare for a period of seven (7) years. On 8th October 2012 he was called by one Constable Mavuso ("Mavuso") from Volkrust Police Station and requested to conduct an assessment and evaluation sanctioned by an order of the court on the complainant, a juvenile that was arrested the previous day on a charge of assault with intention to cause grievous bodily harm. In pursuant of the assignment the Appellant recommended that the complainant be released to his parents in the meantime. The complainant was released and his case postponed to 15 October 2012.
- [7] It is common cause that Appellant interviewed the complainant at his home in Wakkerstroom on 10 October 2012. He came back to the complainant's home on 11 October 2012 to collect a copy of his identity book ("Id") and was furnished with the original

Id. He drove back with the complainant to the Social Welfare Department offices in Volkstrust, where he made a copy and went to his office in room 6. He thereafter took the complainant back home and dropped him at the gate. Upon alighting from the motor vehicle, the complainant went straight to the police station to open a case of rape and sexual assault against the Appellant.

[8] The complainant and Appellant's version on what transpired at the office and on their way back to complainant's home is mutually

destructive. The Complainant alleges that the Appellant sexually violated him at the office and made various stops on their way back where Appellant again sexually violated and raped him. Appellant denies that the alleged stops, rape and assaults happened.

[9] The state secured a conviction on the basis of evidence led by the complainant and police officers namely, warrant officers Frederick van Zyl ("van Zyl"), Dominique Steyn ("Steyn") and Johannes Maritz ("Maritz"). The latter being the person to whom the complainant alleges to have reported the incident and who together with Steyn were part of the investigation. They are all from the Volktrust Police Station.

EVIDENCE LED

[10] Not all of the complainant's evidence was recorded. It was therefore reconstructed from the notes of the prosecutor and those of the Appellant's attorney in appropriate proceedings convened for that purpose and presided over by the learned magistrate. He confirmed that he was born on 3 March 1995. According to the complainant, Appellant arrived at his home on 10 October, 2012 accompanied by another man. The two introduced themselves as social workers and told him that they were there to work with him on his pending criminal case. They spoke to him standing outside the house and undertook to come back the next day. Appellant told him that he does not believe that he is 17 years old as he looked older. He then went to speak to his grandmother inside the house. Appellant took the numbers of his and the grandmother's cell-phone. He told him he needed to obtain a copy of his Id, and was going to collect it the following day. He had understood Appellant to mean that he needed to make a copy of his identity document.

[11] The following day Appellant called his grandmother and asked her to tell him not to move. He later arrived at his house in a car, asked for his id and told him to come with him. He had a bag that looked like a lady's bag with documents in it where he put the Id book. He drove with him to the Social Welfare offices in Volksrust. There he made a copy in one of the offices and they proceeded to room 6, that is Appellant's office. Appellant showed him where to sit and went to sit behind his desk. He took out a file. He then closed the curtains, locked the door and told him to take off his pants so he can show him that his penis and his birth date do not match. Appellant then touched his penis. He let Appellant do that to him because the court told him to do everything that he was told to do. Appellant continued to stroke his penis and told him to put on his pants when he finished. He unlocked the door, took the id book and they left. They drove back along the Piet Retief road towards Wakkerstroom and stopped about 2 minutes outside the township at a nearby sewerage farm

near a house. Appellant switched off the engine and touched his penis again. He told him that he was going to make certain that his penis match his age. Appellant told him that what he was doing was part of his job and instructed him to lower his pants. He continued to play with his penis. When Appellant realised that there were people passing, he told him to put on his pants and started the car.

- [12] They left the spot and drove past the Vilakazi house on to the Groenvlei road Appellant again parked the car under a tree and told him to lower his pants. He touched his penis stroking it up and down and told him that he was going to suck it until its bigger and had an erection. Appellant sucked his penis until he ejaculated. Appellant opened his door and spit out the semen, took a tissue and wiped his mouth. He then “wiped the complainant's penis with the same tissue and threw it out. Complainant then again said Appellant used the same tissue that he wiped off semen from complainant penis to wipe his mouth).On their way driving back to the township Appellant said to him he cannot believe that his penis can be so big and erect, and nobody must hear about what happened. He left the documents and the id with him and said he will come back to fetch them. Appellant left him at the gate of his house.
- [13] As soon as Appellant had driven off he went to the police station where he found Maritz and reported to him what had just happened. He asked him if Appellant was correct to test him in that way. Whilst he was talking to Maritz he received a call from Appellant asking him if he was ok. He lied to Appellant and said he was fine. He informed Maritz and Mavuso about the phone call. He however did not tell his grandmother what happened.
- [14] Under cross -examination he confirmed that he made a statement to the police in which he stated that when Appellant came to his home for the first time he found him at home with a friend, grandmother and uncle. Appellant told him during that visit that he was going to check his penis. He however did not raise an alarm. He did not tell his grandmother or anybody else what Appellant said. He says at the time he was young and could never understand what big people were up to. They also did not ask him what Appellant spoke to him about even though they knew what was going to take place the next day. He confirmed that no semen came out at the office and explained that as when he was about to ejaculate Appellant told him to put back his pants. It was pointed out to him that in his statement he said semen actually came out of his penis at the office. Also that in chief, he did not say anything about what is in his statement regarding the Appellant telling him at his office that his penis does not match his age and that he can help him make it bigger .He confirmed that in his evidence in chief he did not say what is in his statement. Even the allegation that Appellant told him to come with him so that he can show him that it can be done and drove towards Wakkerstroom . He said he did not say all the things in his statement because he got scared when he looked at defence counsel. He was also asked that in one of his many version he said after Applicant sucked his penis under the bluegum tree, he spit out the semen, took a tissue and wiped his penis and then his mouth with it, if that is so, why was there no semen found in the tissue. He said he did not understand why. He denied that Appellant told him what the purpose of the report was. He also denied that the reason why

he lay charges against Appellant was because he was going to be put under house arrest. He confirmed that the case against him was in the meantime finalised. He insisted that everything happened.

[15] In re-examination he confirmed that the court told him he must continue on good behaviour until before December otherwise if he doesn't he is going to appear before the court again. Answering the court's question he said his penis was not erect at the office, it became erect at the farm but then there were a lot of people.

[16] During the evidence of T Linde, the constable who photographed the crime scene and compiled the photo plan, the court again experienced a problem with the recording. The parties however agreed that the photoplan is not in dispute. It was together with the following exhibits recorded by the court to have been admitted into evidence:

- (1) The Complainant's affidavit as exhibit "A".
- (2) A copy of the complainant's identity document as exhibit "B".
- (3) The photo plan and key of the crime scene that included tyre prints/markings and anything around them as exhibit "C".
- (4) The report by the Chief of the Forensic Pathology Laboratory regarding the toilet paper found at the scene and alleged to have been used by the Appellant to wipe his mouth which stated that "no semen detected on the tissue, and ""not enough DNA was obtained on the toilet paper as exhibit "D".
- (5) Frederick van Zyl's affidavit as exhibit "E".
- (6) The report on the vehicle from the security company that indicate that one Bongane ("the Appellant") on 11 October 2012 used the vehicle [...] GP, drove it for 60 km and came back. The reading indicated on the odometer when he took the vehicle it was 2060Km and when he returned it was 2182Km. He took the vehicle at 12:20 and was back at 15:20. The kilometres driven were 122

km, the vehicle was out for 3 hrs marked as exhibit "F"

[17] van Zyl, a police dog master or handler was the next state witness to testify. His evidence was that on 11 October 2012 around 17h00, he visited the crime scene by a pipe factory near a bluegum tree on the Groenvlei road, where he found Maritz who had called him earlier that day. Maritz was accompanied by an unknown black male. He checked the scene. and found markings of vehicle tyres coming from the right side of Wakkerstroom, veering to the left and onto the grass, turning in a circle and going back towards Wakkerstroom .He decided to lift the right hand side prints. The first print that he lifted was of the right back wheel that he reproduced at about 10 meters south of the bluegum tree on the gravel road. The second prints were from the right front wheels of the vehicle. He lifted them 9 meters south of the bluegum tree. He reproduced them and handed them over to the Wakkerstroom SAPS 13 the next day. On the 12 October 2012, he was contacted by Stein who informed him

that he had obtained the vehicle's logbook. Seeing that the right back wheel prints were not clear or that visible he asked Steyn to take out the right front wheel of the vehicle. He received the tyres from Steyn delivered at his office on the 19th of October 2012. He compared the markings on the tyres and could not find any distinctive markings on this tyre as all of them were relatively new. What he found was that the tyres

were of the same size and that the threads/prints were identical. In the light of the marks at the scene he realised that the grooves on the road were very deep being an indication that it must have been a reasonable new tyre and of similar type. He noticed that all 4 prints/markings on the ground at the crime scene are from the same make of tyres.

[18] Explaining his statement that he lifted the tyre markings from the road, he said the vehicle veered first from the road to the left and onto the grass, turned around in a circle and drove back towards Wakkerstroom. The prints/markings he reproduced were of the around turn on the right hand side which were the clearest. The part from where he lifted the prints is sand or gravel on the side of the road. The only other marks that were there were from Maritz's car. He said the road is an open public road used by farmers and the Groenvlei community to go in and out of Groenvlei. It is a reasonably broad gravel road. He said when he looked at the specific prints he did not think that another vehicle with the same prints may have driven on the same road driven by the Appellant. He confirmed that he could not find any unique marks on the road, all were the same. He said he had discovered that the brand was during that period being used by the Social Welfare Department. The Department had a special contract specific for the Matador tyres. He was sure that the tracks were made by the Matador tyres that belong to one of the motor vehicles of the Department. They were not generally used in the market and could not find any other similar tyres in South Africa as they were new in the market. He therefore could not say how popular was the brand, or how easily available was it, except to say that the tyres are supplied

specifically to vehicles belonging to the Department of Social Services on a special contract. He also could not say whether the

tyres are installed in all the Department vehicles. He said it is a bakkie type of brand. The marks on the exhibit tyre are not common marks and each brand moulded differently and the blocks in between differ from manufacture to manufacture. The Matador type is the same there is nothing unique to show that one mark made by an old or a new tyre between them. The brand can be identified from the markings. It should be taken into consideration that no proof of allegation relating to the Social Department tyre contract and of van Zyl's expertise regarding the manufacturing of tyres.

[19] The photos of the tyre, logbook and van Zyl's report were together admitted into evidence as exhibit "E". He concluded his evidence by submitting that the markings he found near the scene on the Groenvlei road were identical to the tracks/prints of the four wheels of the bakkie driven by the Appellant on the day. They saw the tracks going down near the road to the sewerage farm, stopped, made a u-turn back to the direction of Wakkerstroom.

- [20] Warrant officer Maritz's testimony was that he was at work on 11 October 2012 when he received a call from Constable Mabuse informing him that he had a problem with a child (Complainant) in one of the cases Maritz was investigating. He told him that the child (complainant) was at the station and had made certain allegations against one of the social workers that was conducting an assessment in the child's assault case. He then went to the office and met with the complainant. He was asked by the complainant if he was supposed to co-operate with the social worker in that way and if that is the way the assessment is conducted. The complainant then told him the whole story as to what happened during the day at the Appellant's office, in the bushes and near the road.
- [21] According to Maritz what the Complainant reported to him was that Appellant asked him his age when they were at his office and when he told Appellant that he was seventeen years old, Appellant warned him that he has a way of proving ff that was true. Appellant then shut the curtains and locked the door. He started stroking the complainant's penis. Afterwards they left the office and drove back towards Wakkerstroom .They stopped along a road that goes into the township near a sewerage farm. Complainant said Appellant again told him that he has a way of checking If indeed he was seventeen years old. Appellant then instructed him to lower his pants and again stroked his penis. Appellant then told him that they should leave as the road was rather busy. They drove off and again stopped under a tree along the Groenvlei road. Appellant instructed him to take off his pants, stroked and sucked his penis until complainant ejaculated. Appellant then opened the left hand side door of the car and spit out. He took a toilet paper out of a black bag and wiped his mouth and himself on his private parts. On further examination he said complainant said Appellant wiped himself and the complainant's penis. He thereafter threw the toilet paper or tissue out of the car. Appellant then took him home.
- [22] Maritz testified further that after hearing the story he asked the complainant if he can show him where all this happened. He together with Constable Mabuse and the complainant drove to the alleged crime scenes. Complainant took them to the Appellant's first stop near the sewerage farm that is along the road to Ezasemaleni. There was no indication that a car had stopped there as the road was old. They then continued to drive along the Groenvlei Road and stopped under a big tree. Complainant told them that it is the second stop where Appellant parked the car. He could see marks of a car veering off the road, driving on the side and stopping under the tree. The complainant explained to him that the Appellant drove a metre further down made a u turn and drove back towards Wakkerstroom. He parked near the fence a metre further from the spot where its alleged Appellant had stopped the car and found a tissue paper. He reported on all that and contacted Steyn and Van Zyl to come and do the necessary at the scene. The two came the next day on 12 October 2012 and he assisted them to get the necessary prints and evidence.
- [23] Under cross examination he said he knew about the call that the complainant received from Appellant during their presence. The complainant informed them of the call. Although he knew the information was important, he however omitted to mention it in his evidence in

chief or in his statement under oath. He also in his statement did not mention all the details he testified about in court. He failed to mention in his statement that the complainant was taken to Appellant's office, nor did he say anything about the first scene pointed by the complainant at the sewerage farm. He however insisted that the testimony in court is the truth and he had no reason to lie. He said he could not say if the Groenvlei road is busy or not but is basically used by the farmers and nearby residents. A car may pass hourly or 3 cars hourly.

[24] The final state witness was Steyn. He confirmed that the vehicle driven by the Appellant was confiscated and its log reading

photocopied. The admission of the logbook as an exhibit was not contested by the defence. He said he was present when a statement was taken from the complainant by warrant officer Hammond. He calculated the distance from the Vukazake Social Welfare Offices in Volktrust to the complainant's house, to be 28.2 kilometres. The distance from driving to complainant's house and going back to Volktrust, taking back the complainant and driving back to the offices to be approximately over 112 kilometres, so he worked on 113. He testified that veering off to where the probation officer is alleged to have made stops, he registered a distance of 119 kilometres. However, the last distance that was registered on the logbook was 122 kilometres. He could not comment to the fact that Appellant had clocked a distance of 27 km to go to Wakkerstroom and from there to the complainant's house another 3 and 0.5 kilometre which when the distance is done 4 times will amount to 122 kilometres as reflected in the logbook, a distance Appellant alleges to have made during the trips. He however confirmed that it is possible. He cautioned that it should be taken into consideration that a few vehicle speedo-metres are different and will give a different reading for the same distance travelled due to different factors, which include the size of the tyres.

[25] On the distance covered he further testified that what he registered was a distance from the Appellant's office to the last stop street in Wakkerstroom to be 26.4 kilometres and from there to the complainant's house it is 28.2. The distance from the office to the sewerage farm is 26.1, and from there to the bluegum tree in Groetvlei it is 3.1 kilometre. From the tree to the complainant's

house it is 3.2 kilometres. From the complainant's house to the Appellant's office it is 28 .2 kilometres confirming that the total

would be 119 kilometres travelled.

[26] Furthermore, he confirmed that no DNA was found on the tissue allegedly found at the scene, suggesting different reasons for that. He speculated that Appellant might have swallowed the semen and only wiped the outside of his mouth which did not have any semen. He denied that he at any time had a confrontation with the Appellant over a report or that Appellant submits reports. He confirmed that he had known the Appellant for a period of nearly a year and that he was an assistant to the person that prepares the reports. He said so far there were no similar allegations made in other child cases were the Appellant

was involved.

DEFENCE' S EVIDENCE

- [27] The Appellant, testified that at the time of his testimony he was in the employ of the Social Welfare Department for a period of eight years and working as an Assistant Probation Officer. His job entailed collecting information for preparation of assessment reports when a child in conflict with the law has finished a program. He assisted in writing Mediation Reports that form part of the Supervision Reports.
- [28] On Monday 8 October 2012, Constable Mabuse called him about the complainant's arrest. As he was busy with another assignment, he told Mabuza that the child can be released to his parents and undertook to see the family on 10 October 2012. On that day he booked a car and drove to complainant's address given to him by Mabuza, where he met with the complainant, his grandmother and uncle. He interviewed the three and gathered the information he required for the assessment. He then went back to his office.
- [29] He however realised during the interview that the complainant did not want to answer some of the questions in the presence of his grandmother, especially relating to school. He kept on checking to see if his grandmother was at earshot. He then reprimanded him and told him that he has not driven all the way from Volksrust to play games. He then informed the complainant about the diversion

conditions as well as the home supervision. As he was not attending school he qualified to undergo a home base supervision equivalent to house arrest. The complainant was not happy about that and therefore avoided answering some of the questions posed to him. He then asked the grandmother to excuse him and he left. He says the next day on 11 October 2012 whilst working at the office he received a call from his superiors that he has to be in Ermelo on Friday 12 October 2012. He realised that he did not obtain a copy of the complainant's Id or birth certificate to prove his age and the complainant was going back to court the following Monday on 15 October

2012. He as a result phoned the complainant's grandmother and asked to speak to the complainant. The complainant confirmed that he had a copy of his identity book. He booked a car and drove to his home to collect the Id copy.

- [30] He arrived at complainant's home and hooted at the gate, beckoning the complainant to bring a copy of his id. The complainant said it is with his grandmother. His grandmother brought the complainant's Id book instead of a copy. The grandmother then complained to him about the complainant saying he was very naughty and they did not want him at home. She asked that the complainant be sent to one of the schools of industry. He asked the grandmother to call the complainant. He questioned the complainant about the grandmother's complaints, his attempted suicide and stay in Gauteng, information he heard about from the grandmother for the first time that day. He was not informed of all that the previous day. The complainant still did not want to talk to him in the presence of his

grandmother. He asked the grandmother to excuse them. He got the feeling that the complainant wanted to speak to him alone. The grandmother went back to the house. He then again spoke to the complainant, whilst they were both sitting in the car. The complainant suggested that they move from there. He still did not want to speak there.

- [31] They drove down the street and turned into a street parallel to the complainant's street. He asked the complainant about the whereabouts of his paternal grandparents. The complainant pointed at a house on that street. He questioned him about the suicide attempt. He realised whilst they were talking that he still did not have a copy of the complainant's Id which was vital to the assessment. He therefore decided to drive to their offices in Volkrust to make a copy. Whilst driving there he continued to interview complainant on the suicide and complainant told him that his mother does not want to buy him clothes and likes his younger brother more who is four years old. He told complainant that it is senseless to want to kill himself for that. When they arrived at the Social Welfare offices, they started at the Registrar's office to make a copy. Thereafter they walked to his office. The complainant sat on the clients chair whilst he sat behind his desk. The door was open. He placed the copy of the Id in complainant's file. He took another file and took out a house diversion programme that the complainant was to follow and gave it to him. He was then alerted to the headlights he had left on. He went out and switched them off. When he came back the complainant was on his phone. He heard him lying saying he is at Wakkerstroom shopping mall. He put back the files whilst complainant was wrapping up his conversation. He then drove the complainant back home. He denied that he at any stage locked his office or told the complainant that he wanted to feel his private parts. He drove back to complainant's house and dropped him at the gate.
- [32] The next day on Friday he was at Ermelo when he got an sms that the police were looking for him and he told them that if they were looking for reports they will receive them on Monday. A colleague then informed him that they were also taking away the vehicle he drove the previous day. He was arrested on his way to the police station.
- [33] When he was asked what he thought might be the reason the complainant would open a case against him. He said he was not sure, he thought maybe he was not happy about the home based diversion program as every time he spoke to him about it they would quarrel. Complainant was also not giving him enough information specifically about a school he was alleging to be attending at Etwatwa. He fortunately was aware of all the schools around there and the complainant was in fact not attending school. He committed the offence at a party or a shebeen and for that reason his rights to be out at night were also being taken away. So he was bitter. He pointed out that some of these kids do lie but in this instance the complainant was the worst.
- [34] He was asked if there was anything between him and Steyn. He indicated that he once had a quarrel with Steyn about the issuing of requisition forms which they were trained were only issued by the courts. Steyn however issued his own requisition forms to their office (Welfare Services). So they used to run up and down collecting information for assessment at Steyn's

request, only to find that the requisitions are wrong and the matter thrown out of court. So their office were not entertaining any requests unless issued by the court. As a result Steyn's requests were piling up at the office. Steyn wrote a letter to their senior in Ermelo complaining. He however personally had nothing against him. He was also not aware of any problems with Maritz and Mabuza. Sometimes they would not be happy with the information he compiled but did not think it could be that serious. He confirmed that he logged that he took the car at 12h20 and brought it back at 15h20 logging 122 km.

- [35] He further in his testimony denied that he took the complainant to the sewerage farm and sucked his penis. He then pointed out that complainant's evidence at his Disciplinary hearing was different. He mentioned a lot of other things there that he did not mention at the trial. Also that if it was not for what his grandmother told him he would not have taken him to go and interview him further in the absence of his relatives. He would have just picked up the copy of the id and left which also was unfortunately not available as well.
- [36] Under cross examination he denied that he was accompanied by somebody when he went to complainant's house on the first day as alleged by the complainant. He denied going to all the other additional places mentioned by the complainant or driving along the Groenvlei road. He confirmed when asked by the learned magistrate that he drove around the block before driving back to Volkrust which was when he asked the complainant to show him his paternal parents' home. It probably explains the small margin of difference in distance. He indicated that the Transport Officer collected the kilometres. Again asked by the court he confirmed that he could have made a copy close by. The learned magistrate then asked him why the complainant would get into such details if he was lying about him. Further putting to him that he indicated that the complainant was very arrogant like the youngsters of today not appreciating the accountability that goes with his actions. The learned magistrate then asked him again if he drove back to Volksrust with the complainant just to make a photocopy (magistrate now criticising the Appellants). He replied that at the office he also prepared a report, made a photocopy and briefly interviewed the complainant. He also spoke to the complainant about the suicide he wanted to commit. They thereafter drove back to take the complainant back home and he drove back to his office. He denied doing anything to the complainant. He said he thinks that the complainant was like all other children that come from Johannesburg, they would sometimes threaten to stab them with knives and are very violent. He viewed the complainant as a Johannesburger to be very clever and probably only wanted to get him back for doing his job.

[37] Appellant alleges that:

[37.1] The learned magistrate should not have taken into consideration Frederick van Zyl's evidence as it was hearsay evidence and inadmissible speculation. The tyre tracks/prints he lifted could by no stretch of imagination be said that corresponded in any way with the prints of the tyre of the vehicle that was driven by the Appellant.

[37.2] Johannes Maritz's testimony regarding the report made to him was not reliable and could not have been accepted as relevant corroboration as it is highly unlikely that he would be able to remember all the details that were as totally lacking in the statement he made a year earlier.

[37.3] The evidence of Dominique Steyn was highly speculative in that he used another vehicle to drive the route allegedly driven by the Appellant and with no evidence forthcoming to prove that the vehicle driven by the Appellant would have indicated the same distance as the one he used. As a result the evidence should not have been admitted as circumstantial evidence in evaluating the evidence.

[37.4] The learned magistrate's questioning of the Appellant was not within the boundaries of clarifying certain aspect as his evidence was clear, to the point and without contradictions. Appellant indicated that the complainant's institution of a false version was as a result of the pending matter he was to evaluate.

[37.5] The learned magistrate referred to the evidence of Bennet Linde who never testified. He also in evaluating evidence introduced something that was not reflected in evidence at all, his observation of the wiping of the Appellant of his mouth with a toilet paper at court in a similar manner as it was alleged he did during the incident.

ANALYSIS

[38] It is common cause that the complainant was the only witness to the alleged sexual assaults and rape. Therefore In dealing with the evidence of the complainant the court was required to take into account that although it is trite that a conviction can be returned on the evidence of a single competent witness (see s 208 of the Act), the evidence led still has to prove the guilt of the accused beyond reasonable doubt. The single witness's testimony would certainly have to be satisfactory to justify the conviction, depending on the circumstances. The question therefore that needed to be answered is whether or not the state established credible evidence that proved the guilt of the accused beyond reasonable doubt; see *Modiga v The State* [2015] ZASCA 94 (unreported, SCA case no: 20738/14,1June 2015) at [32]that endorsed *S v Sauls & Others* 1981 (3) SA 172 (A) at 1800.

[39] Another difficulty in single witness evidence is as a result that generally, it is accepted that sexual misconduct allegations are easy to make and often very difficult to refute, due to their nature. Usually there are no eye witnesses, which extends the problem beyond guarding against malicious incrimination: see *Hiemstra's Criminal Procedure*, Issue 9 p24-9. For that reason cautiousness in dealing with the evidence becomes of utmost importance. In casu, the learned magistrate relied heavily on the reporting and circumstantial evidence to find corroborative evidence to the complainant's allegations. In such circumstances the presiding officer is required to cautiously analyse all the evidence, details being of vital importance; ([*S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396; 2009 (1) SACR 552 (SCA) par [21]. What is required is credible evidence which makes the complainant's version more likely and the accused's version less likely; see *S v Gentle* 2005

(1) SACR 420 (SCA) Pars [18] and [30] per CLOETE JA.

[40] The following remarks by DE VILLIERS JP in *R v Mokoena* 1932 OPD 79 at 80 offer a guideline in exercising the caution required to arrive at the right decision:

"Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction (by the section), but in my opinion that section should only be relied on where evidence of a single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where for instance, the witness has an Interest or bias adverse to the accused, where he has made a previous Inconsistent statement, where he contradicts himself In the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc. (my emphasis)

[41] The learned magistrate in the court a quo found the complainant to be an impressive witness and his evidence reliable. It is therefore important to evaluate the evidence of the complainant to determine as to exactly what was his version that was found to be reliable by the court a quo and the basis for finding the Appellant's evidence less reliable.

[42] In analysing the evidence the court will usually find it profitable to compare the nature and quality of the complainant's evidence with that of accused: *Moake v DPP* [2011] 1All SA 460 (SCA) at [6] - [8].

[43] The learned magistrate had found the complainant's evidence to have been corroborated by Maritz's testimony. The main aspect being the fact that the complainant reported the incident to Maritz. Yet it is trite that the fact that a complainant reported the incident is not corroborative of his allegations but relevant only as far as their consistency and admissibility is concerned. What is alleged to have been reported proves only the consistency in complainant's allegations and the admissibility thereof; see *S v Hammond* 2004 (2) SACR 303 (SCA) [25]. It is similar to the reporting made to the police under oath and in some way affects reliability.

[44] When complainant's version is assessed serious discrepancies become evident between his version in chief, under cross examination, when he reported under oath either to the police or to Maritz. His evidence therefore lacked the requisite consistency, congruence and sincerity to justify any reliance upon it. This was brought to the fore during the complainant's cross examination and Maritz'

testimony, an aspect that seemed to have been seriously misread by the court a quo.

[45] The complainant had in his evidence in chief alleged that the Appellant accompanied by another person came to his home and

introduced themselves to him as social workers. They informed him why they were there. They undertook to come back the next day. He said then Appellant then refuted complainant's age saying he looked older and then went inside the house to talk to his grandmother, also got her cell numbers. Before they left Appellant said he had to obtain his Id (which complainant says he

understood to mean he was to make a copy of Id thereof) and they will come back the next day. Complainant did not mention anything regarding checking his penis. However in his police statement he stated that only the Appellant came to interview him at his home alleging that Appellant called him outside and said to him he was going to come back the next day or on Friday to check if the size of his penis compares with his age. Maritz on the other hand said complainant told him that Appellant asked him his age only at Appellant's office and when he said he was 17 years old the Appellant refuted that and told him that he has a way of proving that the complainant was older by checking his penis. These are three different versions that the court a quo had to assess that show inconsistency. What truly happened is not clarified by the three versions, all made under oath on a material aspect that is supposed to have led to the sexual assault claims.

- [46] The learned magistrate relied on the version of the report allegedly made to Maritz on this aspect of the complainant's evidence. However in that version, checking the penis to verify complainant's age was never mentioned as the reason for Appellant's visit on the next day as also was not mentioned in complainant's evidence in chief. As a result the learned magistrate erred in concluding in accordance with the complainant's unsubstantiated police statement that the Appellant said he will come back to check the complainant's penis if it compares with his age. It erred further when it instead found corroboration in Maritz's testimony. The learned magistrate's misdirection was serious as this was one of the material facts that was to establish reliability of the evidence alleging the commission of the offence.
- [47] The complainant alleged further in his evidence in chief that when the Appellant came back the next day, he told him to bring his id and come with him. In his police statement, he stated that when Appellant arrived he told him to fetch his Id. He fetched the Id and when he came back, on his own he climbed into the vehicle as opposed to being told by Appellant to climb into the vehicle. According to Maritz, complainant said Appellant fetched him and took him to Volkrust. In addition the complainant's allegation in chief that the Appellant told him to come with him is unsubstantiated. In his police statement he said he climbed in the car on his own, as it was also alleged by the Appellant.
- [48] In his evidence in chief he says after making a copy at Volkrust; they went to Appellant's office where Appellant instructed him to take off his pants as he was going to show him that his penis and his birth date do not compare. Appellant touched his penis, stroking it up and down. After which he ordered him to put his pants back. He was for the first time in his evidence in chief mentioning a reference to his penis by Appellant. In his police statement he said they drove to Appellant's office where Appellant instructed him to take off his pants, put his hand on his penis and started stroking it up and down, until he ejaculated. No reference to penis or age or an explanation why Appellant was doing that to him and ejaculation mentioned. On the other hand he reported to Maritz that at Appellant office Appellant stroked his penis asked him his age and when he told him that he was seventeen years old, Appellant warned him that he has a way of proving that he is not so old. If Appellant had just made a copy of the complainant's Id why would he ask him his age? Also

to Maritz, there was no mention of penis, age or size prior to being at the office.

- [49] Furthermore complainant alleged that when he told Appellant he was seventeen, Appellant said he has a way of proving that he was not that old which is again improbable as he had alleged that Appellant already on his first visit questioned his age. In his police statement he instead stated that Appellant said he will help him to make his penis bigger. These are just a few examples of material inconsistencies if not contradictions in complainant's report to Maritz and to the police. Such serious inconsistencies weakens the probative value of the state's evidence.
- [50] In his evidence in chief, the complainant also made no mention of his penis at the office being erect after being stroked and ejaculation. However in his police statement he gave details as to how he had an erection with Appellant stopping only when he was about to ejaculate. He also mentioned a conversation they allegedly had thereafter when Appellant offered to make his penis bigger and the argument that followed about whether Appellant could or could not help him. Whilst to Maritz he did not say anything about an erection or ejaculation or semen, or anything of the sort like in his evidence. Under cross - examination complainant struggled to explain these inconsistencies and omissions in his evidence in chief and to say what exactly was the true version. He cartwheeled and alleged to have had an erection but no semen came out, but when answering the court's question he said he ejaculated and semen came out. He also said that he did not mention all the details in his evidence in chief including what Appellant said about his penis not matching his age or that he can help him to make it bigger because he got scared when he looked at defence counsel, which was insincere of him since the omissions were during his evidence in chief.
- [51] The question arises as to what exactly happened and was said by the Appellant at the office? If indeed something happened, which version of the complainant is fact? It is therefore questionable if any of his allegations are true.
- [52] It is the complainant's further allegation in chief that at their first stop from the office which is near the sewerage farm, Appellant only stroked his penis again and told him that he can check his penis to see if it matches his age, when he asked him why, Appellant said it is part of his work. He ordered him to take off his pants and again stroked his penis. Due to the people that were passing by, Appellant told him to put on his pants and they drove off. No mention is made of Appellant licking his penis to make it bigger. However in his police statement he said Appellant stroked him and then asked him to take off his pants so that he can lick his penis to make it bigger like he said he will do in his office. He took his pants off and Appellant stroked his penis. He said he was going to lick his penis and all that was part of his work. In his evidence Maritz said nothing about any untoward behaviour of the Appellant alleged by the complainant at the 1st stop after the office. When cross examined about it he said complainant did not tell him anything of significance that happened there and they anyway could not find traces or markings of a car having stopped there. The actual crime was committed at the 2nd stop. This was said oblivious of the fact that the 2nd count was alleged to have been committed there. Appellant denied being there. There is no clear

and satisfactory evidence that the court can rely upon to find the Appellant guilty also of the second count of sexual assault. Again the question is whether or not this actually happened and if it did which of the various versions is the correct one. Did they actually go to that place? No markings were found according to Maritz.

- [53] Finally the complainant testified in chief that on the Groenvlei road under the Bluegum tree, the Appellant again touched his penis and stroked it up and down and put the penis in his mouth, sucked it until complainant ejaculated. Appellant thereafter opened the door and spit out the semen from his mouth, took a tissue and wiped his mouth. Confronted with his police statement he said Appellant with the same tissue wiped his (complainant's) penis before throwing it out. In his police statement he said Appellant stroked his penis until he got an erection upon which the Appellant asked his consent to suck his erect penis. He wanted to know if complainant was consenting to that or refusing. Appellant then sucked his penis until the sperm came out. It happened whilst his penis was still in Appellant's mouth. Appellant spit the semen out the vehicle and took a toilet paper or tissue with which he wiped clean complainant's penis. Using the same tissue he wiped his mouth and threw it out. Maritz's testimony is that complainant told him that Appellant stroked his penis and put it in his mouth, sucked it until complainant ejaculated. Appellant then, opened the door and spit out the semen. He took a tissue and wiped complainant's penis. Answering a leading question Maritz then said Appellant actually he wiped off the semen on complainant's penis and used the same tissue to wipe his mouth. He then threw it out on the left hand side. Nothing was said about permission being sought by the Appellant to suck complainant's penis either during complainant's evidence in chief or by Maritz. The issue of consent only appeared in the statement. There was also no consistency in whether or not the Appellant wiped the complainant's penis or his mouth or both with the tissue. This evidence was also very material since it indicates that the tissue should have had complainant's semen and Appellant's DNA. Where both had not been found and there is no consistent evidence by the complainant regarding the facts of the tissue being part of the evidence, the testimony should be discredited. Therefore the finding of the tissue is itself of no significance, therefore cannot be corroborative of complainant's allegation that he was sucked or stroked. In actual fact it should weaken the state's case. There is no proof of anything complainant alleged to have happened.

- [54] Remarkably, the learned magistrate found exhibit "E" a tissue allegedly picked up at the scene to be of significant

importance and weighty, sufficient to prove the alleged rape, even though the toilet paper had no traces of semen or any of the parties' DNA. In order to support the admissibility of the evidence of the tissue, the learned magistrate took into account what he said was his observation during the trial of Appellant's tendency to constantly wipe his mouth with a tissue. He regarded that as sufficient proof or corroboration of complainant's allegation that Appellant used exhibit "E" a tissue to wipe his mouth and complainant's penis after raping complainant. No such tendency was alleged to have been observed by the complainant or any state witness. The only time

complainant mentioned Appellant using a tissue was when he testified about the last incident and the allegations were not consistent. The magistrate therefore erred in admitting complainant's evidence on the tissue on that basis.

- [55] In another context of the argument, if the learned magistrate had intended his observation to be admissible as evidence of similar conduct that is corroborative of the complainant's testimony (which I do not believe is the right decision), he was supposed to bring it to the attention of the parties and ask their comments, in order to circumvent any party, especially the Appellant suffering any prejudice as a result thereof. The parties were supposed to be warned that the court has made or is making such an observation and contemplating to take it into account in deciding whether or not to rely on the evidence of the complainant in establishing the guilt of the accused. Any potential prejudice would have been vitiated by the opportunity that the Appellant would have had to challenge such decision or observation. The court in this instance committed a serious misdirection that was fatal to the proceedings. It was argued on behalf of the Appellant that the court took such an observation and elevated it to circumstantial evidence. The court's conduct of the proceedings and decision did not accord with the fair administration of justice.
- [56] Complainant's evidence in respect of the person to whom he reported the matter was also not as clear and satisfactory as it should be. He testified that he went straight to the police station and found Maritz to whom he reported the incident. He asked him if what was done to him by the Appellant was right. Whereas in his police statement he said that he found both Constable Mavuso and Maritz to whom he reported the incident. Maritz version is totally different. He alleges that he heard of the complainant's presence at the station from Mavuso who informed him of the accusation complainant was making against the Appellant. If complainant found them together and made a report to both why would Maritz allege to have heard from Mavuso about the allegations the complainant was making? It was also difficult for the court to make out if it was Maritz or Mavuso to whom the complainant made the first reporting. The learned magistrate misdirected himself on this aspect by concluding that if complainant was lying there would have been a big difference between his testimony, statement to police and Maritz's testimony. As illustrated there are glaring and major discrepancies and inconsistencies in material respects that such evidence cannot be relied upon. What is required is credible evidence which makes the complainant's version more likely and the accused's version less likely.
- [57] In addition, the Appellant denied calling the complainant after dropping him off at home, the state did not try to prove that such a call was made, even though Maritz and Mavuso are alleged to have been there when complainant received the call. Appellant's number would have been reflected on the complainant's phone, whether from the office or his cell number. Mavuso had instructed the Appellant to do the assessment on the complainant. Nevertheless, none of them alleged to have verified the number to establish if the call was indeed from the Appellant. Maritz did not mention the call, he had to be reminded of it, whilst Mavuso did not testify. The court on the basis of such unsubstantiated allegations

decided to accept the complainant's unclear and unsatisfactory allegations.

- [58] The learned magistrate was made aware during the cross examination of the complainant and Maritz that the complainant has made a previous inconsistent statement and that Maritz's testimony was also not consistent with the complainant's evidence in chief. Furthermore the court on its own conceded that there were major differences and contradictions recognised in the two versions of the complainant and also that the complainant had a motive to incriminate the Appellant as he was not happy with the findings and recommendation the Appellant was making, notwithstanding the trial court, strangely, still found the complainant to be a credible witness. These discrepancies in his evidence indicate that he was neither truthful nor sincere, his evidence devoid of any credibility.
- [59] The learned magistrate then furthermore relied upon the evidence of Van Zyl regarding the prints allegedly made by the vehicle that was driven by the Appellant at the second crime scene. His expertise to compare and identify prints have allegedly been obtained from his dogmaster course/qualifications. He continued to profess himself having knowledge of the workings of the Social Welfare Department's procurement of its motor vehicles and tyres and the workings of particular tyres. Nobody bothered to find out how he became an expert, or gained knowledge of the allegations he was making.
- [60] At the first scene it was conceded by Maritz that there was no proof of complainant's allegation. The prints Van Zyl looked at were allegedly lifted from the alleged scene of the crime on the Groenvlei road under the Bluegum tree and compared with the tyre he removed from the vehicle. He observed the tyres to have the same treads and width. He said he could not find a unique mark on the tyres as they were all relatively new but the same type of tyre as the prints left at the scene.
- [61] Van Zyl is not an expert in the manufacturing of tyres, the tyre treads and prints. The print that was shown to have been reproduced from the gravel has nothing that is visibly identifiable that can be relied upon as proof that the marks are identical. His attempt to strengthen his identification by alleging that the tyres are used in all the cars by the Department of Social Welfare was accepted by the court without proof, when it could have been verified. It is worthless standing on its own, unsubstantiated. Nevertheless what is of major importance is that he could not give his word that the prints found at the scene were made by the vehicle that was driven by the Appellant. The court's finding was based on the conclusion it made that there are slim chances that a car with the same tyres using a matador could have also driven at that same place and disregarded the quality of the print that it was so poor that there is no visible mark that confirms that the prints are of a matador tyre brand.
- [62] The evidence regarding the distance travelled could also not be proof of the Appellant having been to those places mentioned by the complainant. The court had said it believed the Appellant and had no reason to doubt him. It however considered the big difference in

kilometres to be proof of Appellant having diverted from taking the complainant straight home. The Appellant had explained satisfactorily that he drove with the complainant firstly around the block when he asked the complainant to show him where his paternal grandparents stay. Since he wanted to discuss the grandmother's concerns and the complainant did not want to talk in the presence of the grandmother he decided to drive to the offices of the Department to be able to talk to him away from his home and also make a copy of his id. The difference is actually minimal and confirmed by Steyn that different vehicle would register the distance differently. Steyn used a different vehicle to measure the distance and actually according to his evidence the Appellant if he had diverted would have clocked more kilometres.

[63] In consideration of all this the state's case lacked consistency and credibility and therefore could not be regarded as clear and satisfactory to can be relied upon to prove the guilt of the Appellant beyond reasonable doubt.

[64] On the other hand the Appellant's evidence was given with no hesitation or any apparent contradictions. He gave a sound explanation of why he had to go back to the complainant's place. His intention being just to obtain a copy of the complainant's id. He found that a copy was still not available and complainant's grandmother told him about more complains that he had to deal with or investigate. The complainant was also not willing to speak in the presence of his grandmother and he (complainant) on his own climbed into Appellant's vehicle. Appellant then drove off, firstly around the block to see where the complainant's paternal grandparents reside. He then drove to the offices of the Social Welfare Department to make a copy and also talk to the complainant. In consideration of all the evidence this is plausible. The distance covered almost make up for the kilometres allegedly unaccounted for. He also has indicated that the diversion programme he recommended was tantamount to house arrest which the complainant did not want but was not coming

forward with the name of the school he was allegedly attending. The grandmother was also not happy with home based arrest.

[65] The Appellant does not have to place any evidence before court as it is not his duty to prove his innocence but that of the state to prove his guilt beyond reasonable doubt. A principle highlighted by Brand AJA in *S v Shackell* 2001

(4) SA 1 (SCA) on para 30;

"It is 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 of a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonable 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 reasonable possibly be

true".

[66] However, whilst the complainant's version is less likely and lacking the required credible evidence that justifies a conviction, the Appellant's version is reasonably possibly true.

[67] The state had as a result failed to prove the guilt of the Appellant beyond reasonable doubt. Under the circumstances, the appeal must succeed.

It is therefore ordered that:

1. The appeal against conviction is upheld. The conviction and sentence Imposed by the court a quo is set aside.

N V KHUMALO J

JUDGE THE HIGH COURT

GAUTENG DIVISION: PRETORIA

I concur

E E SETHOLE AJ

ACTING JUDGE OF THE HIGH

COURT GAUTENG

DIVISION: PRETORIA

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