

SOUTH AFRICA / JUDGMENT

Sibanda v S (A193/2016) [2017] ZAGPJHC 314 (30 October 2017)

[2017] ZAGPJHC 314

COURT

South Gauteng High Court, Johannesburg

BEFORE

Opperman, Mangena

CASE / FILE NUMBER

A193/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NUMBER: A193/2016

Not

reportable

Not

of interest to other judges

Revised.

30/10/2017

In

the matter between:

SIBANDA,

MPHO

ALBERT APPELLANT

versus

THE

STATE RESPONDENT

JUDGMENT

OPPERMAN j

Introduction

- [1] The Appellant appeared in the Regional Court Magistrate sitting in Protea, Soweto on 6 counts of rape, which had occurred on 17 November 2008. He was legally represented, pleaded not guilty and did not provide a plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977 (the CPA).
- [2] Both the state and the appellant called three witnesses. On 18 May 2010 he was found guilty on all counts and on 29 May 2010 the appellant was sentenced to life imprisonment, all counts were taken together for purposes of sentence.
- [3] The appellant has an automatic right of appeal by virtue of the imposition of the sentence of life imprisonment.

Nature of the evidence

- [4] The state called 3 witnesses – the complainant, Ms Lizzy Mhone and Dr Lebethe. The appellant testified in his own defence and called three defence witnesses – Mr Jabu Mathebula, Ms Portia Majola and Mr Hyman Phiri.

The common cause facts

- [5] The common cause facts as they unfolded during the trial can be summarised as follows:
The appellant and the complainant knew each

other as landlord and tenant, the complainant being a tenant at the property of the appellant. They spent most of 17 November 2008

together during which time they had sexual intercourse on several occasions. The appellant contends that this was consensual and that they had been conducting an affair.

State's witnesses

- [6] The state called the complainant who testified that she had known the appellant for about 11 months when this incident occurred. On the morning of 17 November 2008 she had gone outside to brush her teeth when she bumped into the appellant who said he wanted to speak to her. She explained that she did not have time as she needed to go to work. She went into her room and when she turned around she saw the appellant standing behind her. He took out a knife and said that if she screamed, he would stab her. He proceeded to blindfold her and tie her up. He also put a cloth inside her mouth. He took her to his house and started to undress her whereafter he had sexual intercourse with her twice in the dining room and 4 times in his bedroom. During this time he took photographs of her on his cell phone.

- [7] She testified that she was crying, all the time begging him to release her. She said he asked her whether she would tell anyone and she undertook to tell no one and to go straight to work. At about 17h00 he accompanied her to the taxi rank where she boarded a taxi. She did not go to work and instead went to the second state witness Ms Mhone who told her to report the matter to the police. She phoned her boyfriend, inspector Ngubeni to accompany her to the police station as she was scared to walk alone. After reporting the matter to the police she went to the clinic where she was examined. She had sustained some injuries to her private parts and was given anti-retrovirals. She said that the appellant knew her boyfriend very well. She said that prior to this day, she had respected the appellant and had treated him like a brother. During cross-examination she was criticized for not calling for help. She explained that the other tenants were sleeping but that in any event, her mouth was gagged and that when Mosa, one of the other tenants came, she was still gagged. She was asked why she did not ask for help on the way to the taxi rank. She said that the appellant was next to her, with a knife in his pocket and that she was scared.
- [8] It was put to her that the Appellant took pictures of her on a previous occasion, which she denied. She was also confronted with the version that a week prior to this incident she had allegedly asked him for R650 to pay her debts. He had undertaken to give it to her within two weeks but that she had asked for the money within a week. He had told her that his friend Sipho had undertaken to help him raise the money. The two of them had decided to spend some time together during which period, the appellant had repeatedly phoned Sipho. Between 14h00 and 15h00, they went to Sipho's place but Sipho did not have the money. The appellant was carrying her overnight bag (the complainant sleeps at her employers place of residence during the week). It was put to the complainant further that she was annoyed and that he had then accompanied her to the taxi rank. It was suggested to her that she had laid the charges because the appellant did not give her the money. All of this was denied. It was also put to her that before they left to go to Sipho, she had bathed herself. She said that the appellant had bathed her.
- [9] Ms Mahone testified that on the day in question, the complainant had arrived in tears. She was asked what had happened and she explained
- that she had been raped by her landlord. Ms Mahone did not know her landlord. She testified that the complainant had told her that the landlord had threatened her with a knife and had raped her. He had also used her phone to call someone in the yard to collect her keys. She said that although she was very close to the complainant she did not know who her boyfriend was but she could say it was not the landlord.
- [10] Dr Ruben Richard Lebethe testified. He had performed an examination of the complainant on 17 November 2008 and had completed the J88 form received as evidence. He had recorded multiple lacerations at the 6 o'clock area between the vagina and the anus and a laceration at 3 o'clock, on the hymen as well as tenderness over the muscle that joins the shoulder to the neck (the sternocleidomastoid). Her emotional condition was recorded as 'scared'. The doctor opined that the multiple lacerations was evidence of forced

penetration. He explained that during consensual sexual intercourse, penetration of the vagina is assisted but when penetration is denied, lacerations in that particular area are expected. During cross-examination he conceded that the lacerations could also be caused during consensual sexual intercourse.

- [11] The appellant testified in his defence and said that he was the landlord and that the complainant's sister was renting from him. She had approached him with a request that her sister, the complainant could stay over, over weekends to which request he had acceded and got to know the complainant as a result. She would be there every weekend as, during the week, she would work as a nanny in Mondeor. On Saturday evenings she would join him in the main house to watch DSTV. One thing led to the other and they became lovers. She used to bath in the main house. About 2 weeks prior to this incident, she requested R650 to pay some debts and to send some money to her child in Zimbabwe. On the Friday before the Monday, the 17th of November 2008, she had reminded him about her request for the money. On the Saturday she went to a funeral. He decided to avoid her and slept elsewhere on the Sunday as he knew she would be leaving Monday morning. He met her the Monday morning as he was preparing to go to work. She was pressing him for the money as she owed one of the woman on the property R100. He said to her that he was going to get the money from a friend, Sipho, later that day. She said she would wait. He asked her about her work commitments and she responded that it would not be a problem as her employer knew that she had gone to a funeral and would assume she had not returned yet. They then went into his house and he used her phone, to phone Mosa as he did not have air time. They were waiting and watching tv in the bedroom and then they started having sexual intercourse. He used a condom. Afterwards he phoned Sipho and then they had sexual intercourse again. He tried Sipho again and even did so using a different number he had for Sipho. He told her to prepare herself to go to Sipho. She bathed herself and they left the yard with the appellant carrying her bag. They arrived at Sipho's house where the complainant waited at the gate. Sipho explained that he had been unable to raise the money. The appellant asked Sipho to go with him to the complainant so he could explain to her that he did not have the money. Sipho complied. The complainant was very disappointed. They walked to the taxi rank where he left her.
- [12] Mr Jaby Mathebula testified that he grew up with the appellant and that on 17 November 2008 at about 15h00 he was at Sipho's home when the appellant and an unknown woman arrived. The appellant was carrying her bag. He thought they were in a love relationship. The lady waited at the gate whilst the appellant spoke to Sipho. He did not hear what they were saying. The only question posed to this witness was whether he knew the lady.
- [13] The appellant's girlfriend, Ms P M, testified that a woman by the name of 'B' (one shared by the complainant), used to call the appellant. She found the name on the phone's call list. On one occasion, she found them at the appellant's home together. She confronted the appellant who denied any love relationship but owned up to it later. During cross-examination it was suggested to Ms Majola that she was fabricating these events to assist her boyfriend. She

denied this conceding that she was jealous at the time but that it was she, who had approached the appellant's attorney when she saw the complainant at court, and explained to him that she knows this woman and the circumstances surrounding it.

- [14] The last witness called by the appellant was Mr Hyman Phiri who testified that he was a tenant at the property of the appellant and that he knew the complainant. He said she used to visit her sister who was also a tenant. He testified that in his view they were involved in a relationship. He based this on the fact that he would often find her in the appellant's house over weekends. He also noticed her taking a towel to have a bath there. None of the other tenants bathed in the landlord's house and none of the other tenants spent time with the landlord over weekends. He lived there from 2007 until 2010.

Misdirection

- [15] In *S v Hadebe*, 1997 (2) SACR 641 the court re-emphasised the following principles:

"Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary.

- [16] The learned magistrate correctly defined the issue in the case to be whether or not the complainant and the appellant had engaged in consensual sexual intercourse on the day in question. However, in doing so, she erroneously limited the relevance of the appellant's

witnesses' evidence to whether or not such evidence could substantiate the inference of a love relationship between the appellant and the complainant or not, thereby limiting her assessment of the witnesses evidence to the inferences they drew from the facts they had presented to the court. In this process, the learned magistrate overlooked the fact that the reason the appellant advanced for them being at his home on the day was the alleged request for R650 and Sipho's role in this.

- [17] In respect of the witness, Mr Mathebula, the learned magistrate says only the following – '... and the evidence of Jabu Mathebula does not take us any further'. She reaches this conclusion as she focuses on the part of his evidence dealing with the appellant carrying the complainant's

bag and whether that was sufficient to conclude they were lovers (which clearly it is not). More significantly though is the fact that it places the appellant at Sipho's house at a time when he was allegedly raping the complainant at his house. A witness's

evidence cannot be ignored or discarded without cogent reasons for doing so. In respect of Mr Mathebula, his evidence was not only

relevant in relation to him having witnessed the appellant carrying a lady's bag but crucially, also to the time and location that he saw this. Mr Mathebula testified that at about 15h00, on the day in question, he saw the appellant and an unknown woman at the home of Sipho. If the complainant's evidence is to be accepted, at that time, the appellant was with her at his house busy raping her. During cross-examination it was never disputed that it was the appellant who was with a woman at Sipho's house at 15h00 on 17 November 2008. The fact that Mr Mathebula could not say that the woman was the complainant is irrelevant as it was the appellant's version that he was at Sipho's house at approximately 15h00 and this fact stands undisputed.

[18] Fundamental to the appellant's defence is the alleged request for a R650 loan and Sipho's role in this. His visit to Sipho's house on the day, which is corroborated by Mr Mathebula, is not a fact that can simply be disregarded. At that time he was, according to the complainant, at his house busy raping her. The complainant denies the request for the loan or having accompanied the appellant to Sipho's house for this purpose or any other. According to her, they went from his house directly to the taxi rank. This appears not to be so.

[19] In *Rex v Difford* 1937 AD 370 at 373 the court remarked as follows:

"It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal, and I turn at once to consider what his explanation is."

[20] These sentiments have been stated in our law reports repeatedly. In *S v Shackell* 2001 (4) SA 1 (SCA) at para [30] Brandt AJA (as he then was) put the matter in relation to inherent probabilities as follows:

"Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain improbabilities in the appellant's version, the reasonable possibility remains that the substance thereof may be true." (own emphasis)

[21] To reject a version a court can thus not simply find that the version is both unreasonable and improbable. If it does so the court's

reasoning 'lacks this final and crucial step' being to find that it cannot be reasonably possibly true.

[22] Unfortunately, the learned magistrate neither articulated the improbabilities she found to have existed nor did she identify the facts which she considered unreasonable. This then the misdirection entitling this court to reconsider the facts and legal conclusions.

[23] In *S v Nyembe*, 2014 (1) SACR 105 (GSJ) Van Oosten, J held as follows at para [8] –

“...In S v Sithole

[2012] ZASCA 85 the Supreme Court of Appeal held:

'A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. The correct approach is set out in the following passage from *Mosephi and Others v R* LAC (1980 – 1984) 57 at 59F – H:

The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was

established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.”

[24] Applying the aforesaid principles I am unable to conclude that the state has proved its case beyond a reasonable doubt.

[25] It is unfortunate that Mr Matebula’s evidence was not challenged. In *S v Sebofi*, 2015 (2) SACR 179 (GJ), Sutherland J (with whom I concurred) observed as follows:

“Overview of the evidence

[60] On this body of evidence, presented thus, a court is asked to convict and sentence a man to life imprisonment. The stakes cannot be higher.

[61] Yet what was put before the court does not resonate with the seriousness of the charges. Care is due in any criticism of a given prosecution or a given defence and is not to be glibly made because it is impossible for the critic to know what the instructions were or what enquiries were made that might have produced nothing helpful. Not unmindful of those considerations, there nevertheless remain inadequacies in this trial that are alarming.

[62]

[63] Mokoena is a single witness; her evidence ought to have been scrutinised by a proper investigation that would either corroborate her or undermine her version. Police work is not a spectator sport.

[64] Moreover, it seems to me that the police and the prosecution did not appreciate that a defence case ought not to be dismissed out of hand because they think it seems likely the complainant's evidence is 'good

enough'. It is important to take the defence case seriously and interrogate it. The Appellant's version warranted investigation on several obvious points which, if corroborated, might have contributed to exonerating him. It is not disclosed if any investigation into his version occurred at all. For example:

64.1.

64.2. The allegation about cell phone calls was, ostensibly, not investigated. Alternatively, if it was investigated and the results did not support the state case, why was there no evidence about that? This

criticism applies to both sides. If that evidence was not accessible, why was the court not told? The cell phone record could have thrown a wholly new light on the circumstances and advanced or retarded either version.

64.3. The appellant's apparent alibi should have been investigated. What could his wife say about his presence that evening? What of the other persons present; why did not one testify? Was the appellant unable to call alibi witnesses because they were physically unavailable? Why was the position about their availability not established if an adverse inference was sought to be inferred from their absence? (See: *Leeuw v First National Bank Ltd* 2010 (3) SA 410 (SCA) at [20]; *R v Phiri* 1958 (3) SA 161 (A) at 164H)

64.4.....

64.5.....

64.6. Was there a reasonable prospect that Mokoena is honest but mistaken in her identification of her attacker, at night in the dark? Or, as is suggested by the defence, is the accusation an act of spite? As is well known, there is no such thing as an open and shut case. Why were these aspects not investigated, so as, at least, to try get to the truth?

[65] The calibre of the case presentations, both prosecution and defence, were unacceptable for a case of this seriousness. A prosecutor cannot present a case by just pouring out a jumble of random facts as if one was pouring treacle from a jar. It is unfair to a court and it retards the aim of a fair trial, which apart from other factors, needs to be coherent and orderly. The defence fares little better; the cross examination hardly plumbed the body of evidence and appeared to have no plan or objective and was either blind to or inattentive to several material or potentially material details. The narrative of the testimony refers to relevant aspects which were ignored or overlooked. An adversarial process is founded on proper

preparation and commitment to testing the testimony available, it is not served by treating the process as a clerical chore.

- [66] These disturbing features trouble us. If the forensic standards exhibited in this trial are typical of the Regional Court it begs the question whether the Regional court is a fit forum to hear matters of such a serious nature. A fair trial is one that is fair to both sides and to the public. A citizen is entitled to sleep at night in the reasonable belief that the innocent are not being convicted because of shoddy work by the police and the lawyers. Moreover, victims of rape, as a class of vulnerable people in our society, ought to have a reasonable expectation that their cases are taken seriously enough to be investigated properly and tried at a standard that the guilty do not wriggle free because of un-insightful and superficial attention to details by those who are responsible to protect them. (See the remarks about the role of the police: *F v Minister of Safety and Security & Others* 2012 (1) SA 536 (CC) at [37] [53] – [61])
- [67] In rape cases the most familiar scenario will be that the victim is a single witness. Therefore, it is a foreseeable and generic aspect of such cases. Accordingly, any police officer who is involved, and that includes the officer who receives the complaint, the officer who takes the victim's statement, the arresting officer and the investigating officer ought to appreciate that an axiomatic line of enquiry is what circumstances might offer corroboration or throw suspicion on the truth or accuracy of the complaint. Similarly, when a person accused of rape is confronted, what he says in response, whether it be a flat denial, an explanation, or an alibi, or says nothing whatever, is relevant. (Subject of course to a detained person's rights to fair pre-trial procedures. See, eg the remarks in *S v Orrie and Another*, 2005 (1) SACR 63 (C) at 69 (i) to 70 (c), *S v Sebejan* 1997 (1) SACR 626 (W) at 632(i) – 623(c), *S v Zuma*,
- [1995] ZACC 1; 1995 (2) SA 642 (CC) at [16] and *Makwakwa v S* A409/2013 (unreported, 24 March 2014: GJ))
- [68] Whatever rebuttal he offers must be taken seriously and investigated and reported on in evidence to demonstrate whether it supports or destroys the denial. Medical forensics tests must be properly processed and reported on when they can resolve critical issues and might exclude a suspect of culpability. (See: *State v Gentle* 2005 (1) SA 420 (SCA) at [18]; [30])
- [69] Investigating officers should, ideally, participate in the running and presentation of the evidence to court and should be active in assisting the prosecution. Often versions are disclosed for the first time during cross examination of state

witnesses, or aspects of a witness's evidence requires amplification, or qualification or simply explanation. These matters

need to be followed up and, if needs be, postponements should be sought to investigate the correctness or otherwise of the facts

underlying the testimony in question. It may well be that such a practice is not attainable in every case because of logistical constraints, but in our view, a matter as serious as a rape charge, carrying the drastic sanctions which follow upon a conviction, falls into the category of matters in which an active role for the investigating officer ought to be mandatory in terms of standard prosecutorial and standard police procedures.”

[26] I have emboldened those parts of the judgment, which has equal application in this case. It is unfortunate that the cell phone records of both the appellant and the complainant were not interrogated and that evidence on this feature was not led. Not only

would contact between them as reflected in the telephone records have been dispositive of whether or not a relationship between them existed, but the records of the 17th of November 2008 would also have reflected whether or not calls to Sipho, from the complainant’s phone, had been made, thus supporting or refuting the appellant’s version of events.

[27] All of this aside, the court did not have to reject the evidence of the state witnesses in order to acquit the appellant.

[28] In S v Kubeka 1982

(1) SA 534 (SCA) at 537E - F Slomowitz AJ summarised the correct approach as follows:

"The accused’s evidence did not impress me. It contained various unsatisfactory features. I mention only some of them.....Whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him. It is enough that he contradicts other acceptable evidence. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State.”

[29] The court a quo was required to reject the version of the appellant by finding that his version was not reasonably possibly true. This it failed to do. Having regard to the conspectus of all the evidence and considering ‘the mosaic as a whole’, I am not able to reject the version of the appellant by finding that his version is not reasonably possibly true.

[30] I accordingly make the following order:

30.1. The appeal is upheld.

30.2. The conviction and sentence is set aside.

I OPPERMAN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree

.I MANGENA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Heard: 30 October 2017

Judgment

delivered: 30 October 2017

Appearances:

For the Appellant: Adv AJ Greyling

Legal Aid SA

For the Respondent: Adv BS Masedi

Office of the Director of Public Prosecutions

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