IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A116/2019

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: YES/NO

…… …05 August 2020
SIGNATURE DATE

In the matter between:

GEORGE LODEWYK SCHEEPERS **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

LESO, AJ

INTRODUCTION

[1] Appellant appeals against conviction for an offence of rape in terms of section 3 of the Criminal Law (Sexual Offences and related matters) Act 32 of 2007 as amended, read with section 92(2), 94,256,257 and section 261 of the Criminal Procedure Act 51 of 1977. The Regional Court Magistrate, Mr. K.H Bosch who presided over the matter under case number 14/88/2017, in Tshwane Division, Pretoria, (court *a quo*), found the appellant guilty of the above offence on 17 May 2018 and passed the sentence on 16 November 2018. The appellant was sentenced to eight years imprisonment, which was suspended for a period of five years on condition that the accused is not convicted of rape, committed during the period of suspension. The court *a quo* ordered the accused to submit himself to correction supervision for a period of 36 months. It was ordered that the Correctional supervision shall comprise of house arrest for the full duration of the correctional supervision and the community service for the period of 576 hours.

[2] The State alleged that, on 29 July 2016, at or near Centurion, the appellant unlawfully and intentionally committed an offence of rape by sexually penetrating the complainant without her consent. The appellant was legally represented and he pleaded not guilty to the offence. In his plea statement, he admits having sexual intercourse with the complainant but he denied lack or absence of consent.

GROUNDS FOR APPEAL

[3] The grounds for appeal against conviction briefly turn on the unreliability of the witness and conflicting evidence of the state witnesses. The uncontested evidence of the appellant and the failure of the court *a quo* to exercise caution when dealing with evidence of a single witness. Failure of the court *a quo* to make a credibility finding despite the factual finding that the complainant could have done something to seduce the appellant and that she is a woman of "*losse sedes*"(lose morals). It is contended that the court *a quo* misdirected itself in finding that the appellant was unknown to the complainant in contrast with the overwhelming evidence that the complainant knew the complainant even before the alleged rape. Lastly, it is contended that the court *a quo* rejected the version of the appellant without cause.

SUMMARY OF EVIDENCE

[4] The state relied on the evidence of three witnesses, the first among them being the complainant, Miss S[….] V[….] who testified as a single witness on the events of the alleged rape. The second witness was Mr. J[….] V[….], the complainant's erstwhile husband, whose testimony constituted evidence of first report. The third was Sergeant Mosiwa David Mogoregi, who was the arresting officer and Dr.Sonja Serfontein who examined the complainant and completed the J88 form was the fourth to testify on behalf of the state. The appellant was a single witness testifying in his own defence. Mr. Van Woudt was the expert witness who gave evidence on the cell-phone data recovered from the complainant's phone.

[5] It appears from the record that certain facts are common cause because the parties either agreed or them, or that such facts are not disputed by parties. Appellant and the complainant knew each other from their school days. They re-united at a funeral on 29 July 2016. They, (the Appellant and the complainant), agreed to go to dance at Lyttleton, Centurion in Pretoria. They had agreed that the appellant will fetch the complainant from her house which she shared with her erstwhile husband, (Mr. J[….] V[….]). Mr. Visser was spending the night at his friend's place in Midrand and he was aware of the arrangements between the two. The appellant and the complainant had sexual intercourse and they no longer went out to party. The appellant left at 8:00. Six months later he was arrested for allegedly raping the complainant.

STATE'S CASE

[6] Mr. J. Visser testified that, he was sharing a house and a bed with the complainant although they were not living together as husband and wife. They were undergoing a divorce which was finalised in February 2017. According to this witness, the reason for divorce was that he discovered that the complainant had an extramarital affair. This witness testified that on the date of the alleged rape, sometime between 21hours and 22hours, he received a message from the complainant who communicated that, she did no longer went out and is going to bed. He also stated that the complainant informed him that the appellant," *tried to do something*" and she was not going to tell him what it was because she did not want to upset him. The complainant however gave contradicting evidence by testifying that she does not remember sending a message to the witness on the same day. What she remembers is that she took her sleeping pills and went to sleep. She said that it was only on the morning

that she sent an SMS to the witness. On the following day at 8:00, the complainant sent him a message saying that she was scared; that she is not feeling well and she wanted him to come home. When he got home, he had to "push" the complainant to talk. He said that the complainant eventually told him that the appellant raped her.

[7] The witness testified further that when he got home at 9:30- 10:00, he sent a message to the complainant informing her that he has arrived and requesting her to open the gate for him because the only access and exit in an out of the complex requires one to use of a remote control gadget, alternatively that someone in possession of the remote opens for one. He said that when he tried to open the door, complainant stood by the door to block entrance, and was afraid to open. During cross-examination, the witness could not answer why in his statement he said the complainant opened the door for him whereas he had his keys to the house on him. He said that he found the complainant sitting in a foetal position on the sofa, in a frightened state. He said that he noticed a bruise on complainant's left -hand. He encouraged the complainant to go to the doctor and open a case. During cross-examination, this witness changed his testimony to the effect that, he opened the door, and when he entered the house, the complainant was sitting on the couch crying, and shaking, so much so that she could not talk. He said that the complainant did not tell him that appellant raped her over the first telephonic call she made to him. He testified that the complainant only told him on Saturday, which was a day after the alleged rape. He said that the complainant did not tell him that the appellant undressed her and that she had to put her gown on and accompanied the appellant out of the house. The witness testified that, the alleged rape caused the complainant to

develop an aversion to company of any unfamiliar male person. During cross-examination the witness testified that in October 2018, a year after the incident, the complainant met someone, (a new boyfriend), and the relationship resulted in the complainant being pregnant. The witness confirmed that he gave two different statements to the police.

[8] Evidence of the Complainant is briefly that, the appellant arrived at her place at 17:00 hours and she decided to make dinner before going to the dance. While she was boiling water to make coffee, the appellant approached, grabbed her, and asked her what she was doing. She said that appellant then forced her into the bedroom and closed the door. He pushed her on the bed and while she was lying on her back, the appellant closed her mouth with the other hand; he took off her denim jean, panties, blouse and his jeans with the other hand while she was hitting him with her right hand and kicking her feet about while the appellant was sitting on top of her thighs. She said that she screamed for help. She told the Appellant to stop because she was married and that she did not want to have sexual intercourse with him. She told court that the appellant penetrated her vagina with his penis and ejaculated inside her before he dressed up and left. She said that she got roped in her gown and followed the appellant to the car, telling him that he has not seen the end of it all because she intends to report a case against him to the police. She does not know how the Appellant existed the complex because she did not open the gate, which is always guarded by security officials and which is positioned at a distance of 100 meters from her house. She said that the appellant left at 20:00. She got back into the house and drank sleeping pills whereupon she went to sleep. In the morning, she sent a massage to her husband telling him: "*Wikus het iets*

probeer". She proffered no answer on why she did not tell him, (the witness), that she was raped instead of just saying that something happened. The complainant admitted sending nudes to the appellant however, during cross-examination she denied it. She said that her action was normal and not seductive. Complainant said that she does not remember the massage she sent to the appellant, telling him to delete her massages, the same moment she was making a statement at the police station. She said that she was in the process of divorcing her estranged husband, yet she told the appellant to "stop" during the alleged rape because she was married. She could not explain how the appellant managed to put his hand on her mouth; and took off her jeans and his jeans with the other hand. She denied accompanying the appellant to his car. She denied sending SMS to her erstwhile husband on the alleged rape. She could not account for the hours she spent together with the appellant. Over the testimony she gave during sentencing, she admitted that the child alleged to have conceived with a "*one-night stand"* is actually a child born of the witness, (her erstwhile husband). She considered that both she and her husband lied to court about the fact that the complainant was pregnant with another man's child. She did not dispute the appellant's version that the appellant arrived at 15:00, downloaded a video from the complainant's laptop, and had coffee while the complainant was narrating the story of her life. She said that they both had a bath, had sex and he left to go party at 8:00 after the complainant told him that she was tired and no longer wanted to goal dancing.

[9] Dr. S. Serfontein's testimony is that, on the 30 July 2016, at 15: 25, he examined the complainant and subsequently completed a J88 based on that examination. He stated that he recorded, 'no injuries noted'. He said that lack of

severe injuries does not exclude the following: traumatic sexual assault and the cervix slightly red with small pinpoint bleeding under the mucosa. In conclusion, minimal injuries were noted. Seargent Mosiwa David Mogoregi only testified to the effect that the appellant was arrested six months later on the 16 December 2016.

[10] Appellant's testimony is briefly that, the complainant contacted him to meet for coffee, their conversation was overly inclined onto sexual connotations. Later in the evening, the complainant sent nude pictures of herself. On the 29 July 2016, he arrived at 15h00 whereupon the complainant opened the gate for him. He said that the complainant was wearing a gown. He took the hard-drive and copied some movies from the complainant's laptop and they spoke while drinking coffee where after they had sex. He said that they both went to take a bath and the complainant spoke about her life. He told the complainant that he was not going to sleep over anymore because it was wrong. At 20h00 they had to leave as the dance was starting but the complainant said she is no longer interested in going to the dance. This version was also put to the complainant and it was not disputed. He said that complainant told him that she wanted to be alone and she accompanied him out of the house and opened a gate for him. The complainant denies having opened the gate for the appellant however she could not explain how the appellant exited the security gate without her opening for him. He said that on the following day, he received an SMS message from the complainant saying *"delete assemblief al ons chats*". He tried to contact the complaint but she had blocked him and did not answer his calls. He said that six months later, he was arrested on allegations that he raped the complainant. Appellant denies having had sex with the complainant without her consent.

[11] Mr. Van Woudt testified in respect of the evidence found on the cell-phone data of the complainant. He confirmed that the cell-phone data and the number, that was used to send the SMS to the appellant, is that of the complainant. He confirms that the evidence shows that the complainant sent the appellant pictures in the nude and an SMS a day after the alleged rape. Neither the witness nor the complainant disputed this evidence.

ANALYSIS OF EVIDENCE

[12] In order for the court to grant this application, it must be satisfied that the ground(s) for appeal exists as indicated in the case of *S v Radebe and others 1997(2)SACR 641 SCA 677 A.* In that case, the court stated that, the first question to be determined is whether there are grounds on the basis of which the Court can or should interfere with the judgments or decision conviction arrived at by the Magistrates court. The court shall deal with the appellant's grounds as outlined in the appellant's heads of argument as well as the record before court. When challenging the credibility of state witnesses, the appellant cited the case of *R v Makanjuola and R v Eaten 1995(3) ALL ER 730 CA at 732F*, where the court stated that, if the witness has shown to be unreliable, the court may consider it necessary to exercise caution. In more extreme cases, if the witness is shown to have lied, to have made previous false complains, or to bear the defendant some grudge, a stronger warning may be though appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence.

[13] From the record and the appellant heads of arguments, there is no doubt that the appellant successfully challenged the complainant's version and exposed the improbabilities of the witness's evidence through cross-examination. The evidence of the witness that he noticed bruises on the complainant's left-hand contradicts the doctor's findings as noted on the J88 to the effect that the complainant had slight bruises on her inner right-thigh, right-hand MP3 joint and small bruise on the right-knee there is no record of the left hand bruise. The witness, (Mr. J. Visser), testified that, he was no longer in a marriage relationship since he was in the process of getting divorced from the complainant, whereas the complainant testified that she told the appellant that she cannot have sex with him because she is still married. During cross-examination, the complainant could not explain why she had a date with the appellant and had sexual intercourse with another man on Thursday, 28 July 2016, a day before the alleged rape if she believed that she is not supposed to have sex because she is married. The witness testified that he received an SMS from the complaint at 20:00 to 21:00 on the night of the alleged rape while the complainant testified that she sent an SMS to the witness on the following morning. The complainant contradicted herself regarding the time when the appellant came to her house, how much time she spent with the appellant on the day in question, the communications between her and the witness regarding the alleged rape and how the alleged rape took place. The above contradictions are too material to the state case for any reasonable court to ignore.

[14] The witness gave three different versions concerning what transpired when he got home on the 30th. The first version is that he called the complainant to tell her to open the gate at her home. He said that when he arrived, the

complainant was sitting on a sofa in a foetal position. The second version was that, when he entered the house, the complainant was blocking the door because she was afraid of opening and that she sat on the sofa, crying and he could see she was in pain and uncomfortable. The third version was that when he got home, he opened the door with his key and the complainant told him that the appellant raped him while they were having coffee.

[15] The following improbabilities are noticeable in the witness's version: firstly that the appellant could have exited the security complex without the assistance of the complainant. Secondly that the complainant screamed without drawing the attention of the security officers who were stationed 100 meters from her house. It would mean that she did not use the opportunity to alert the security officers about the alleged rape when she accompanied the appellant to the parking. The evidence of the complainant that, the appellant blocked her mouth with his hand and took off her denim jean, panties and blouse as well as his trouser with the other hand is not probable if not impossible. The complainant could not account for other hours she spent in the company of the appellant and she does not remember communicating to the witness on the day of the alleged rape. The doctor did not note injuries on complainant's wrist which she allegedly notified the doctor about. The witness and the complainant could not explain why the complainant sent a message to the appellant a day after the alleged rape, telling him to delete massages she sent him if she was scared of the appellant. She admits sending phonographic photos and photos of her breast to the appellant because according to her "die photo is mooi". The witness could not explain why he made two contradicting statements to the police officers. In addition to the contradictions, the witness version of events is improbable in all

three scenarios. It is improbable that the complainant could have been found scared and lying in a foetal position while she was opening the door at the same time.

[16] *In S v Mandela 1974(4) SA 878(AD) AT 881E,* the court held that the state must, in order to succeed in obtaining a conviction, negative the evidence of every defence witness tending to prove the innocence of the person charged. It was not the case in this matter. Most of the appellant's version went unchallenged. Neither was the complainant's version corroborated. It is clear that the court *a quo* was not alive to the overwhelming contradictions that clouded most of the state's case. The nature of contradictions cannot be considered to be errors and it calls for the court to evaluate the evidence in its totality and to decide whether such contradictions affect the witness credibility as the court held in the case of *S V Oosthuizen 1982(3) SA 571(T)* at 576B-C, that not every error made by the witness affects his or her credibility. In each case, the tier of facts has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance and their bearing on the other parts of the witness's evidence. In this case, the nature of contradiction, lies and improbabilities of the witness version urges the court to exercise caution.

[17] In the case of *Rex v Dhlumayo 1948 (2) SA 677 (A)*. This court ruled that, the ambit of interference in factual and credibility finding by the trial court is constrained due to reasons that unlike the trial court, the appeal court has no live experience of the actual trial court. The court held that, it will not disturb the

factual finding of a trial court unless the latter had committed a misdirection. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong.

[18] The complainant's evidence calls for a cautionary approach and it is clear that the court *a quo* was not alive to that. The complainant claims non-consensual sexual intercourse while the appellant claims that the sexual intercourse was consensual. The J88 reflects no injuries, either physical or gynaecological and it renders the medical evidence neutral. The medical evidence therefore does not assist either the state or the appellant. The central question is whether the evidence of the complainant, bearing in mind the onus on the state, is such that it renders non-consensual sexual intercourse more probable than the appellant's version to the effect that sexual intercourse was consensual. Evaluation of this crucial aspect of the evidence by the court *a quo* is of particular importance in assessing whether or not the court *a quo* misdirected itself in upholding the version of the complainant.

[19] The complainant's testimony is wanting. Hers and the evidence of her witnesses was not only laden with contradictions against one another, but it also comprised of lies that the court *a quo* should have seriously considered when analysing the evidence before it. The complainant as well as her witnesses' evidence was laden with obvious contradictions that taint their credibility. Part of their evidence if not most, has notable improbabilities that make their version of events implausible.

[20] The reaction of the complainant before and after the alleged rape creates doubt concerning whether sexual intercourse was indeed forceful or without consent. The Respondent's counsel submitted that the complainant's reaction cannot be criticized base on Dr. Olover's remarks that "10% of all women freeze during a rape". Considering what obtains in the case of S v Zuma 2006 2 SACR 191(W), I find that the complainant's reaction was weird in this case. The Respondent's counsel based his argument on the research done by Karin Roelofs at US National Library of Medicine in the Institute of Health and referred to the Belfast trial. I find that none of the authorities explains the conduct of the complainant after the alleged rape, neither does it support the magistrate's findings in this regard.

[21] The court rejects the Respondent's submission that the medical history of the complainant is irrelevant. The court finds that the sexual history of the complainant is relevant to determine forceful penetration and injuries due to forceful penetration. The court found the state witness, who was the husband of the complainant not to be reliable especially on the contradictions in his evidence in chief and the statement he made to the police as well as the events of the day after the alleged rape. The evidence of the Appellant has been consistent while he insisted that he had consensual intercourse with the complainant.

[22] The learned magistrate failed to analyse the evidence in its totality, neither did he attempt to make credibility findings on either the complainant or the

appellant. There is nowhere in his judgement where he dealt with the probabilities and improbabilities of the versions any of the parties, neither did he make a credibility finding on the appellant's evidence. At the least, he should have stated the reasons why he does not believe the version of the appellant or why he finds that his version is improbable.

[23] On page 6 of the record, the witness testified that the complainant informed him that the appellant was a school friend of hers. On page 46 of the record, complainant was asked if she knew the complainant and her response was "*ja, hy was my broer se vriend op laerskool en hoerskool*". On page 179 of the record, the learned magistrate finds that the appellant was unknown to the complainant by saying the following: "*die beskuldigde was egter nie aan hom bekend nie*". The learned magistrate further found that "*die klaagster getuig pertinent sy het nie toestemming gegee nie. Sy het gese nee en sy getuig haar nee is nee*".

[24] The learned magistrate misdirected himself by finding that the appellant was not known to the complainant. It is clear that the Magistrate misdirected himself in a material respect as far as his approach to the evidence was concerned. The judgment does not demonstrate what was determined. The AP Required degree of analysis to the inconsistencies and contradictions in the complainant's evidence.

[25] On the J88, the doctor concludes as follows “minimal injuries noted, the lack of severe injuries does not exclude traumatic sexual assault”. The report further records that date and time of last intercourse with consent was Thursday, 28 July 2016, i.e. the day before the alleged rape. I find that there is a doubt that the minimal injuries noted would be attributed to the sexual intercourse with the Appellant. The doctor’s evidence that the finding overrules the possibilities of minimal injuries cause during sexual intercourse a day before the alleged rape. J88 does not contain conclusive evidence that the minimal injuries noted by the doctor were as a result of the sexual intercourse a day before rape or during rape. The probabilities that the injuries could have been as a result of the sexual intercourse the day before weakens the credibility of this evidence. There is however no conclusive proof that the findings of the doctor emanated from sexual intercourse in one incident or both as the evidence indicates that she had sexual intercourse with different people over two consecutive days.

[26] Dr.. Sonja Serfontein did not give a satisfactory answer to the question whether his observation of the blunt trauma on the cervix was as a result of forceful or gentle intercourse. He answered as follows: “*your worship, it is very difficult for me to speculate, but I would rather go for forceful”*. This is the most important part of evidence that the court *a quo* should have evaluated to determine whether the state discharged the onus of prove on it. Although it has been decided in several rape cases that victims of rape react differently, I am of the view that, the fact that the complainant sent an SMS to the witness stating that the appellant tried something and she did not say the appellant raped her. She was encouraged by the witness to prefer a case against the appellant on the following day. This created doubt about whether the alleged rape occurred in

reality. The state needs to prove beyond reasonable doubt that the appellant is guilty of the rape alleged. The evidence above adduced by the Dr.. creates a doubt that the state has indeed discharged the onus on it.

CONCLUSION

[27] The contradictions in the evidence adduced by the witnesses called by the state are material and so serious that they create doubt concerning their credibility. The state's case is so weak that a reasonable court could not have convicted the appellant on the evidence tendered.

[28] The onus of proof rests on the state to prove its case beyond a reasonable doubt and the court is not convinced that the state has discharged such onus.

[29] The court finds that the version of the appellant to the effect that sexual intercourse with the complainant was consensual is more probable than the version of the complainant that the appellant raped him. Appellants appeal must succeed.

In the result, the appeal against conviction stands to be upheld and I propose that the following order be made:

ORDER.

a] The Appeal against conviction is upheld and conviction is set aside.

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J T LESO

ACTING JUDGE OF THE HIGH COURT

_____

T A MAUMELA

JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

DATE OF THE HEARING: 22 OCTOBER 2019

DATE OF JUDGEMENT: 05 AUGUST 2020

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