REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

....
DATE SIGNATURE

CASE NO: 2013/ A5043

In the matter between:

SEBOFI, MOTSAGKI Appellant

and

THE STATE Respondent

_____

JUDGMENT

_____

Headnote

Rape conviction and life sentence set aside on appeal - in the interests of justice, appeal court *mero motu* remitting case to the trial magistrate to require further evidence to be admitted – application of sections 304(2)(c)(V), 167 and 186 of the Criminal Procedure Act 51 of 1977

Duty of presiding officer to take initiative to address weak forensic skills of the prosecution and the defence and in a proper case invoke sections 167 and 186 of the Criminal Procedure Act 51 of 1977

Rape victims are usually single witnesses – responsibility of police and prosecution in investigation of allegations and in presentation of evidence to seek for evidential material to corroborate victim or exonerate Accused – essential that these functions are carried out properly

Failure to treat rape victims' allegations seriously and undertake proper investigations unacceptable – rape not to be dealt with as a petty crime

Failure to address an accused's version seriously and consequent failure to investigate it unacceptable – in a serious case it is appropriate that the investigating officer attend the whole trial and be on hand to follow up on queries to facilitate a professional prosecution

The complainant alleges she was attacked at night by the Accused a person she knew by sight, who raped her without a condom - Accused alleging he and complainant were in love but had never had sex – medical examination of complainant included taking test samples from her but the results of test not adduced – trial court on remittal ordered to call for this evidence, which might be pertinent to the Accused's defence

Accused alleging complainant phoned him several times on day of attack – no attempt to adduce evidence of these calls - trial magistrate on remittal ordered to call for evidence of the cell phone records, which might serve to corroborate Accused defence

Calibre of advocacy by prosecution and by defence so poor that if such be typical of the standards experienced in the regional courts the suitability of the regional court as a fit forum to hear serious matters which may result in life sentences is to be doubted

SUTHERLAND J:

Introduction

[1] This is an appeal against a conviction on two counts of rape and a sentence of life imprisonment imposed by the Regional Court, Roodepoort. The judgment deals first, with the merits of the appeal per se, and secondly, examines the way this matter was dealt with by the police, the prosecution, the defence and by the Regional Court itself.

[2] The appellant was charged with having raped Ntswaki Mokoena twice, kidnapping her and assaulting her with intent to do grievous bodily harm. These crimes all occurred as part of one episode. The magistrate acquitted the appellant of the ancillary charges, convicted him of a double rape and sentenced him to one life sentence.

[3] The episode occurred on Saturday 28 July 2012, at about 20h00 or thereabouts. The trial took place in April 2013, about ten months later. On appeal the appellant was represented by an advocate from the Legal Aid board. The appellant was in custody from the day of the alleged crime until trial.

[4] The sole witness to the rape was Mokoena herself. One other state witness was Frans Mtibane. The appellant alone testified.

[5] At the outset, it is appropriate to say that scrutiny of the transcript of the trial in this matter has left us with a grave sense of disappointment about the way the allegation of rape was investigated, the way the case for the State was presented to the court and the way in which the defence was conducted. These concerns are addressed in the judgment. The concerns, in turn, imposed an immense and unfair burden on the presiding magistrate to fulfil her proper role as impartial arbiter. On appeal, we find ourselves unable to be satisfied that a fair trial took place and that justice was accomplished.

THE NARRATIVE

The Evidence of Ntwaki Mokoena

[6] Mokoena said she was 26 years old at the time of the trial. Her evidence was that at about 20h00 her mother sent her to an aunt. Why she was sent, especially at that time, in winter; where the aunt lived, how far apart their homes were, and how she was to get there were not disclosed.

[7] She was on the street when she came across the appellant. Where this spot was, its relation to her home, the aunt's home or the appellant's home was not disclosed.

[8] The appellant was, she said, a man she knew from sight from the neighbourhood. She was not asked to elaborate.

[9] She testified that the appellant took her hand and told her that she ‘is to go with him whenever he wants her to’. She refused and he then slapped her. On what part of her body she was slapped was not disclosed. He then dragged her into bushes. Where this spot is was not disclosed. Ostensibly, there was nothing else said by either of them.

[10] In the bushes the appellant removed her clothes and she was left in only a T-shirt. He dropped his trousers and penetrated her.

[11] When done, the appellant ‘pulled’ her to the Matholesville toilets. The geographic relationship between this ostensible key landmark and any of the other places was ignored. She said that she was dragged along. She resisted. He ‘assaulted’ her, whatever that is supposed to mean. He told her to put on her clothes before pulling her. The distance she was pulled is about 18 metres, as pointed out in the courtroom and estimated.

[12] ‘At the toilets’ (whether this means inside or next to is not disclosed) she said she took off her clothes again on his command. She was ‘assaulted’ because she was making a noise. What the ‘assault’ entailed was not disclosed. He raped her again.

[13] ‘After a while’ (how long this was is not disclosed) she said that he told her he was tired and she must come on top of him. By this it was understood that he wanted her to engage in sex again. It was this manoeuvre that afforded her the chance to escape.

[14] She ran to a shack. How far away the shack is was not disclosed. The appellant was chasing her. She ‘ran into’ the shack. The appellant must have been close behind, because she says he tried to grab her, but the shack door was closed before he could grasp her. The appellant’s hand got caught when the door was closed by an occupant of the shack, Frans Mtibane. When the people inside the shack tried to grab the appellant’s hand he ran away. (This occurrence is contradicted by Mtibane)

[15] She told Mtibane that she had been raped. She said that her sole injury was a swollen face (Mtibane does not mention such an injury)

[16] Mtibane drove her to her mother’s home. Mtibane told her mother that she had been raped and her mother called the police. The police came to the Mokoena home. Thereupon, ‘they all’ went with the police to the home of the appellant. No time frame for these events is disclosed, save that it was the same night.

[17] At the appellant's home, he was found standing outside with a beer in hand. He was arrested. 'They all' went to the police station.

[18] She says, from there, she was taken to the 'Hamburg' (ie Discoverer's) Hospital. She mentions no time. However the J88 medical report records her examination taking place at 9h20 the following day. It is convenient at this juncture to refer to the medical evidence as it appeared on the J88 report which was handed in by agreement, no witness being called to extrapolate on its contents.

[19] The objective medical findings were that her clothing was not torn or stained. It may be assumed that she must have gotten fresh clothes, as there was no evidence that she had recovered her clothes from the Matholesville toilets nor, apparently, was evidence of any effort made by the police to inspect that spot and retrieve them; alternatively, if the police had inspected the spot, it was not disclosed. The impression left by the evidence is that she was with the police the whole time between being collected at her home and visiting the hospital.

[20] There were no abrasions or lacerations seen on her. There was no evidence of alcohol use by her. Whether evidence of alcohol use would have been apparent at an earlier stage was not canvassed in her evidence or that of Mtibane.

[21] Notably, there was no record of a swollen face, in contrast to her evidence. She did not report a sore face. She reported only a painful right arm to the doctor. These discrepancies were not explored.

[22] As to sexual activity, she reported that the rape occurred without a condom. The vaginal examination disclosed no injuries. A 'specimen' was taken and handed to a police officer. What the specimen was is not disclosed. Moreover, no DNA or other test result was adduced at the trial. No explanation is recorded why not. One is left to speculate why a critical piece of evidence, if in existence, was not adduced.

[23] She reported to the doctor that the culprit had been apprehended.

Cross examination of Mokoena

[24] In the cross examination of Mokoena, she said that despite seeing the appellant 'around', she had never previously spoken to him. However, it emerged he was the husband of a woman who runs a crèche where Mokoena had been taking her child to be cared for since January 2012, about six months earlier.

[25] Where she met up with the appellant was 'far from his residence', but where and how far is not disclosed. The spot was next to a school. The spot

where she was accosted was four metres to the bush. She had screamed. No evidence of there being anyone near enough to respond was led. (Mtibane's evidence, as addressed hereafter also omits any useful information about where the spot was, but he testified that she reported the place was near 'where people were passing') None of this information was followed up to establish any useful idea of where the place was and whether succour could have been at hand.

[26] She was asked about her attire. She said she was dressed in a T-shirt, jeans and 'push-in' open shoes. The cross examiner asked why she was so lightly dressed on 28 July at 20h00, a Highveld winter's night. Mokoena's answer was she had just left home and was not feeling the cold. The distance to aunt's house would probably be significant in assessing the probability of this answer and to rebut any suggestion she was scantily dressed at 20h00 on a Saturday night for another purpose, the innuendo of the question. None of this was followed up.

[27] She described the appellant as wearing jeans and a Pirates T-shirt. As always, the value of such an answer is only worth something if the description is given *before* the Accused is arrested. No evidence was adduced that she had given the information at a time when it could be cogent. Moreover, no evidence was adduced about what clothing the appellant wore when arrested, ostensibly, only a few hours later. (The appellant denied wearing a pirates T-shirt that day, and there is no evidence to rebut that assertion)

[28] She said that after the first rape she dressed herself while he told her to hurry. In moving towards the Matholesville toilets, she explained that she was dragged along on her knees. She was uninjured and unmarked however, because, so she said, there were no ‘small stones or pebbles’. The terrain she was dragged over was ostensibly never inspected to ascertain the probability of this explanation.

[29] When the appellant had his hand in the doorway, he was screaming and shouting, demanding they open the door.

[30] She said the appellant stank of liquor but was not drunk. She herself was ‘sober’; but that answer does not mean she had not been drinking. The significance of this ambiguity was, ostensibly, not appreciated and not cleared up.

[31] It was put to Mokoena that she was the appellant’s girlfriend. She denied it. It was also put in cross examination that the two of them had never had sex, despite the alleged relationship.

[32] It was put to her that she and the appellant called each other on their cell phones. She denied it. It was put to her that on 28 July, she continually phoned him with missed calls, wanting a return call. She denied it. It was put to her that the appellant, on that evening, while at home watching football, went outside for

a smoke and saw her with two other women outside his home. She denied it. (This particular evidence about the two women assumed a particular importance because of certain evidence given by Mtibane about a report by Mokoena that she was with a ‘friend’ when she supposedly met up with the appellant. This aspect was not followed up.)

[33] The appellant’s version of their meeting was put to her. It was suggested that Mokoena wanted the appellant to accompany her to Matholesville. Her two women companions left, and she and the appellant then ‘walked along the way’. She asked the appellant to buy liquor which he refused to do, saying he had spent his money on liquor for his friends back at home. They then parted. He went home. This entire episode, she denied.

[34] It was also put to her that the appellant, later on, went with his friends to buy beer but did not get any. Upon returning to his home, the police had already arrived. He was arrested and removed. Her version that he was standing with beer in hand was not explored in comparison with this version. (In his evidence, the Appellant said he was about to leave when arrested) None of these variations were followed up.

Questions by the magistrate

[35] The magistrate then, wholly appropriately, given the poverty of the presentation and the cross examination, made enquiries herself.

[36] The magistrate tried to get clarity on how Mokoena incurred no injuries when dragged along on her knees. Mokoena said that the place was soft soil.

[37] Mokoena also added that she had seen the appellant for the first time in June, ie a month or so before the attack, despite visiting the Crèche since January. This aspect was not followed up.

[38] As to the arrest, it was elicited from Mokoena that the appellant tried to run from the police and said nothing during his arrest, save to ask why he was being arrested; he appeared scared. Also, Mokoena said the appellant's wife spoke, but what she said was not adduced.

[39] Mokoena disclosed she was HIV positive, and the appellant's wife was also HIV positive. She suspected the appellant of infecting her. Mokoena claimed that she was told at the examination the next day that the appellant had infected her. Axiomatically, that could not be true as no test would have given a result that fast, and indeed no such test result existed as yet, an inference to be

made from the record of the J88. The implications of this evidence were not followed up.

The Evidence of Frans Mtibane

[40] The sole corroborating witness, Frans Mitibane testified about Mokoena's arrival at his shack. The shack was said to be in Mathole. He and three others were in his shack watching football. It was about 20h30 when a person he knew by sight, Mokoena, knocked or hit on the door, and entered unbeckoned. She was naked from the waist down. Her top was covered with a jacket, 'or something like that'. (The discrepancy with her evidence of wearing a t-shirt was not clarified.)

[41] The occupants were shocked by her entrance. Someone was behind Mokoena. Mtibane pressed the door onto that person's hand. The others inside said let him in to see what he will do. He kept the person out. He said he did so because of the way the person was behaving; if he let him, he, ie, Mtibane, might hurt him and get himself into trouble. (This is an extraordinary piece of rationalisation, but was not explored further.) The discrepancy between this version and that of Mokoena was not followed up. The person was saying in Sotho, 'I want my wife back'. Mtibane replied by saying 'if she is your wife why do you chase her while she is undressed'. He then released the hand, and the person went away. Mtibane never saw who it was.

[42] When speaking to Mokoena, Mtibane says that she explained to the occupants that she had come from Schoonplaas (this was the first allusion to the locality of her home on record). She had said she had been walking with a 'friend' when they met up with the man, who she said she knew 'from where we stay' who 'hijacked' her. He had dragged her and '..has been sleeping with me all this way'. She said she escaped when she was told to get on top of him. Pressed in cross examination for more information of what was reported, Mtibane said she told them she was raped 'on the road…even where people are passing by' and that she had been raped thrice. The discrepancies between this version and that of Mokoena were not followed up; ie, the friend she was with when coming across her assailant, the notion that she was raped nearby where people were passing by, and the report of three rapes not two.

[43] Mtibane saw no scratches on Mokoena. Importantly, he saw no swollen face. This observation, if not a contradiction of Mokoena, was, at least, a matter worthy of clarification. It was not followed up.

[44] She was hysterical and afraid the person might return. Her psychological condition was important, but no further detail was elicited.

[45] Mtibane gave her a cellphone to call her parents. They were supposed to fetch her but got lost on the way so he drove her home. This evidence suggests

a substantial time must have elapsed and that it must have been a significant distance to the home of Mokoena in Schoonplaas from Mtibane's shack and from the scene of the crime in Matholeville. No evidence was led about this aspect.

[46] Mtibane was not present when the police arrived at Mokoena's home.

The Evidence of Motsegki Sebofi

[47] The allegations of a romantic relationship between Mokoena and the appellant were explored. He said that they knew each other from the Schoonplaas neighbourhood, not as a result of the crèche. He claimed she had been his girlfriend for about six months. Later he put the commencement of the relationship from October 2011, about 9 months earlier. He was HIV Negative. He had never had sex with her. They saw one another several times. Moreover, so he said, there was a person that he 'used to send' to her; what this meant was not clarified. The magistrate herself sought to elicit more details of the relationship from which questions it emerged that he did not know her birthday, he did not look at her manners, and said that there was 'nothing useful that I see from her'. Nevertheless he 'loved' her. They were accustomed to meet out of the Schoonplaas area.

[48] On 28 July, he said he was home watching football. He got a missed call on his cell from Mokoena. It was about 20h00. He went outside to call her. She emerged from around a corner. He went towards her to meet her away from the

‘house’ where his wife was present. He reached her about six metres from his home.

[49] There had been an arrangement that he meet Mokoena earlier to go with her to Roodepoort, but he got there too late to do so and they missed each other. They discussed the abortive liaison. Her two friends had come back from wherever they had been and called her to accompany them; he said this without initially having said there were two companions, but the incoherence was not cleared up. She waved them off. The conversation between the appellant and Mokoena continued. Then he went back inside and she was left alone. She was sober; again an ambiguous statement, not cleared up.

[50] In questioning by the magistrate, her request that he buy her alcohol was revisited; it was pointed out that although the question had been put in cross examination of Mokoena it had not been mentioned by him when he was testifying in chief. He fudged an answer by saying he just answered questions put to him. No mention of the Roodepoort trip had been made in cross examination of Mokoena, but that discrepancy was not followed up.

[51] The next event of note, according to the appellant, was when the police arrived at his home. He did not run from the police. The police said nothing to him. When the police arrived, he said, ‘they’, ie, his friends and he, were about to go out to buy more beers and had empties in their possession. This version was

the reverse of what was put in cross examination; it was not clarified. He did not see Mokoena in the vicinity upon his arrest. A question was put by the prosecutor in cross examination about the time being past midnight, presumably the suggested time of the arrest. No evidence had been led by the State on that point; presumably this snippet came from the docket's police statement. The appellant said he was ignorant of the time of arrest. No time of arrest was ever adduced.

[52] At the time when he was at home, he was in the company of Fader and a person he first described as a Shangaan neighbour, who, in later evidence, he ostensibly named 'Mojela'. They were standing outside with him when Mokoena came by. They were therefore candidates to corroborate his version. These persons were not called and importantly, no explanation given why not.

[53] The appellant denied his wife was ill; presumably a reference to the alleged HIV positive status.

[54] The appellant disputed wearing a pirates T-shirt that day. One of his visitors from Rustenburg wore a pirates t-shirt. He indeed owned several Pirates T-shirts. Later, he said two of his brothers wore his pirates T-shirt that day but they were in Mathole at that time. The significance of this remark to the identification of her attacker, was, ostensibly, not appreciated and no follow up took place.

[55] He had been drinking that day, but ‘not a lot’. Not one question was put to elicit what this could mean, despite its manifest importance.

[56] The appellant denied accompanying Mokoena anywhere. He did not go to Mathole.

[57] In cross examination he said it was a 10 minute walk from his home to that of Mokoena. It is to be inferred both places are in Schoonplaas.

[58] Also, in cross examination, the first hint of a ‘difficulty’ between appellant and Mokoena was mentioned. Asked to explain why he did not walk her ‘half way home’ he said the conversation ‘had not gone well’. No question was asked to follow up on this point. The omission is significant. If there was some basis to allege hostility between them, it needed to be clarified.

[59] The appellant was asked if there were bushes near his home. This enquiry was presumably inspired by the locale of the attack, notwithstanding that, by now, it had already been established as being in Matholeville not in Schoonplaas. The appellant then alluded to there being bush between Schoonplaas and Matholesville. Again, the answer was not followed up to provide usable information.

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] The prosecution announced that two witnesses were being tendered to the defence; ie, Maki Moloi, and the arresting officer, Constable Ramalepe. What Moloi could say is a mystery. However, the arrest and the surrounding events relating to the appellant were plainly important. Why evidence of the arrest and evidence from the investigating officer were not led by the prosecution is not explained.

[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. The appellant claims he never had sex with Mokoena. What happened to the specimen taken at the medical examination? Should the absence of its admission found an inference that it did not connect the appellant? If it was inconclusive, why was that result not disclosed to the court?

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. Why was the evidence of the arrest not led? Might not the appellant's reaction to the allegation be relevant to his alleged innocence? What was he wearing at the time of the arrest? What were his friends wearing?

64.5. Why was the investigating office not led to lay out the fruits of the investigation; ie, to tell the court about the place of the crime, and its relationship with other places and the events that occurred and explain how Mokoena ended up there, on her version of being on the way to her aunt? Where were her abandoned clothes? Is the reason for this omission that no investigation whatsoever took place? Alternatively, did an investigation not turn up facts supportive of the State case?

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 (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 mandatory in terms of standard prosecutorial and standard police procedures.

[70] Despite the powerful corroboration for Mokoena's claim of rape, ie arriving semi-naked and hysterical at the shack of Mtibane, there are aspects of her evidence and that of Mtibane which beg further questions. How could she not

have some injury to her knees if dragged 18 metres across the ground? Why did she say to Mtibane that she was with a friend when attacked? Alternatively, is Mtibane's evidence reliable on that point? Although she was unaffected by liquor at 9h20 the next day what was her condition at 20h00 on Saturday night? Was she drinking at all? In the dark, might she have sincerely believed the appellant attacked her, but be mistaken? These are all aspects that were not dealt with professionally.

[71] In our view, it was proper to find, on this body of evidence, that Mokoena was sincere in her claim of rape and to find that her flight into Mtibane's shack was genuine. Any notion of a spiteful, false and contrived complaint is fanciful. However, the critical issue is *the reliability of identification.*

[72] Although is common cause that Mokoena and the appellant knew each other at least by sight, the degree of familiarity is important to assess the accuracy of an identification. (See S v Mehlape, 1963 (2) SA 29 (AD) at 32H - 33A, R v Sheklelele, 1953 (1) SA 636 (T) at 638G - 639A and R v Dladla, 1962 (1) SA 307 (A) at 310D) Alas, the point was hardly touched upon. Moreover, excluding the possibility that she was under the influence of liquor was very important to her ability to accurately identify her attacker. This aspect was fudged, again and again.

[73] The details of her attack and her reports to Mtibane exhibit several discrepancies. It may well be that she exaggerated aspects; eg perhaps she was not dragged for 18 metres, perhaps the slapping did not cause a swollen face and so on. Also a panic stricken person reporting an ordeal cannot be expected to be coherent. Moreover, Mtibane's recall might be fuzzy, and the danger of innocent reconstruction in which aspects later learnt from reports by others can creep into testimony innocently. We are of the view that none of the variations dent her *credibility* about her experience *per se*; however, it is the *reliability* of her identification that remains the key issue. Because of the unprofessionalism of the police and or the prosecution, the assessment of that issue has to be conducted on the barest of evidential material.

[74] There are plenty of reasons to conclude that the appellant was untruthful. The main examples are mentioned.

[75] There was an opportunity to call alibi witnesses, and although the availability of all the brothers and friends may be uncertain, but what about the wife? Is she hostile because of the so-called chaste affair? Is she too sick to be called? Why she was not called is not explained. Why was evidence about the cellphone calls not adduced? Why was there not an insistence on the specimen being presented?

[76] There are contradictions in the evidence of the appellant and between his evidence and cross-examination: When arrested, was he returning or leaving to get beer? How could the 'trip to Roodepoort with Mokoena' episode be omitted from cross-examination? Why leave out of cross-examination that the conversation with Mokoena turned bad and only mention it when questioned by the magistrate?

[77] There are improbabilities in his evidence. Is it likely that a man with a wife who has a girlfriend on the side has no sex with her during a 9 months relationship? Mokoena was sexually active; she had a child and reported to the doctor that on the Friday before the rape on Saturday she had consensual sex.

[78] However unacceptable the appellant's version, has the reasonable possibility that she is mistaken been ruled out? The onus on the state must be taken seriously. If she was under the influence might she have thought it was the appellant but was mistaken? How do we measure the risk of an innocent mistake? Without reliable evidence that she was really sober can we be confident?

[79] A weighing up of the evidence justifies a conclusion that the appellant's evidence cannot be relied on. Mokoena's allegation of rape can be relied on, even if it might be thought that aspects of her account could be exaggerated. The nub is a reliable identification. Can the conclusion that her identification of

the appellant is indeed reliable be reached without adducing the specimen test or the cellphone records which potentially could exonerate the appellant? The ostensible ineptitude throughout the trial does not afford a reasonable basis upon which to express confidence that this evidence was responsibly omitted.

WHAT TO DO?

[80] We disagree with the verdict given because *on this body of evidence* we cannot be satisfied that a fair trial took place. We express no view on the guilt or innocence of the appellant.

[81] The duty of ensuring, as far as humanly possible, that a fair trial does take place is that of the presiding judicial officer. From the remarks already made, it is plain that the magistrate was not well served by those who appeared before her. She did endeavour to clarify some matters but there seems to have been no grasp of the significance of many dimensions of the case.

[82] In this case, we are of the view that the steps taken by the magistrate to achieve a fair trial and a just outcome, despite the efforts she did make, were insufficient. The duty of a judicial officer in a criminal case has been articulated many times. In Rex v Hepworth 1928 AD 265, dealing with what was termed a 'technical issue' (ie, the oath had not been administered to a witness and this was uncovered after the testimony was given) Curlewis JA held at 277:

> "A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control proceedings according to recognised rules of procedure but to see that justice is done."

[83] In State v Van den Berg 1996 (1) SACR 19 (Nm) the issue was that inadequate evidence had been adduced by the prosecution about whether diamonds were rough or uncut. The trial court had discharged the Accused at the end of the state case. On appeal, the court held that the magistrate ought to have followed up on this aspect pursuant to the powers in terms of sections 167 and 186. The court ordered the trial to be re-opened. In addressing the application of the sections the court approved the dictum in Rex v Hepworth, and at 65g held further:

> "The result is that the South African criminal trial is a compromise between the "accusatorial" and the "inquisitorial" systems. The presentation of evidence is normally left to the parties, but if the Judge considers that the material before him is not sufficient to enable him to arrive at the truth, he may pursue the investigation himself.' It should be abundantly clear that even though our system is a 'compromise' or can be described as 'mixed', the accusatorial element remains the dominant element."

[84] The sections of the Criminal Procedure Act 51 of 1977, referred in that judgment provide as follows:

> "S167: Court may examine witness or person in attendance
> The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case."
>
> "S186: The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case."

[85] In State v Mseleku & Others 2006 (2) SACR 237 (N) the court extensively addressed the duty of a judicial officer to take the initiative to probe and question witnesses especially where inexperienced legal representatives appear.

[86] It has to be unequivocally acknowledged that magistrates are placed in an invidious position when contemplating such steps. They are constantly at risk of being snookered; if they intervene – they might be condemned for interference; if they do not intervene – they might be condemned for not ensuring a fair trial. We are mindful of this dilemma. We do not hold the view that the magistrate in this matter is deserving of condemnation. However, it remains manifest that the

process was seriously flawed, and more ought to have been done by the Trial Magistrate to ameliorate that condition.

[87] In our view the matter should be remitted in the interests of justice to allow evidence on two points to be adduced; the specimen test results, and the cellphone records.

[88] Section 304 (2)(c)(V) authorises a court to do so as part of its review power. That section provides:

> "304 Procedure on review
> (1) …..
> (2)(a)….
>
> (b) ….
> (c) Such court, whether or not it has heard evidence, may, subject to the provisions of section 312-
> (i) ….
> (ii) ….
> (iii) set aside or correct the proceedings of the magistrate's court;
> (iv) generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case in question; or
> (v) remit the case to the magistrate's court with instructions to deal with any matter in such manner as the provincial or local division may think fit; and
> (vi) …..
> (3) ….
> (4) …."

[89] A prospect of a remittal, usually is raised when one or other side applies for it. That has not happened here. (cf: State v De Jager 1965(2) SA 612 (A)

which sets out the requirements.) An order of remittal for further evidence *mero motu* by a court is exceptional, but appropriate where the interests of justice demand it. (See: State v Mafu 1966(2) SA 240 (E) at 241H.)

[90] An invitation was made to us by counsel for the State to consider Sections 313 and 324 and pursuant thereto, set the conviction aside and direct a trial de novo. This is not an option open to us, as the scope of those Sections is limited to matters in which no valid decision could be reached. There is no question of invalidity present in this matter in the sense contemplated by those Sections, which are confined to technical failures.

[91] This matter differs from that illustrated in State v Somciza 1990 (1) SA 361 (AD). In that matter, a trial magistrate's decision to refuse a separation of trials was overturned by the High Court and remitted to the trial magistrate to resume the trial. On appeal against that decision, the Appellate Division concluded that the matter should not have been remitted to the same magistrate because of the credibility finding he had already made, and it was appropriate simply that the conviction be set aside and left to the discretion of the prosecution to re-try the accused. The concern in that matter was a holus bolus re-trial.

[92] In the present matter, the process contemplated is limited to admitting evidence on two points that have the potential to exonerate the appellant, and does not involve a complete re-trial, nor indeed, in the case of the specimen

requires no evidence by him and in the case if the cellphone record requires no more than the identification of the cell number.

[93] The upshot is that we are of the view that the interests of justice require remedial action in the form of setting aside the conviction and remitting the matter for further evidence.

[94] Furthermore, it is appropriate to commend both counsel who appeared in the appeal for their exemplary presentation of their respective cases which has been most helpful to us in deliberating about these issues.

THE ORDER

[95] The verdict of guilty and the sentence is set aside, subject to the further orders made herein.

[96] The case is remitted in terms of Section 304(2)(c)(V) of the Criminal Procedure Act 51 of 1977 to the Trial Magistrate.

[97] The trial is to re-opened and the Trial Magistrate shall in terms of sections 167 and 186 of the Criminal procedure Act 51 of 1977 call for evidence about:

97.1. The specimens taken at the medical examination and the laboratory test results.

97.2. The alleged cell phone communications and such records thereof that may exist.

[98] The Trial Magistrate is directed, as contemplated by Section 304(2)(c)(V) of the Criminal procedure Act 51 of 1977, that after such evidence has been adduced to adjudicate afresh on the charges, and, if necessary, on the sentence to be imposed.

_____

ROLAND SUTHERLAND

I agree

_____

OPPPERMAN AJ

Hearing: Hearing: 15 September 2014
Judgment Delivered: 14 October 2014

For the appellant:
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Instructed by the Legal Aid Board

For the State:
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