THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case No 156/03

In the matter between:

PETRUS LIEBENBERG **Appellant**

and

THE STATE **Respondent**

Coram:	FARLAM, JAFTA AND MLAMBO JJA
Heard:	19 MAY 2005
Delivered:	31 MAY 2005
Summary:	Evidence – adequacy of proof - accused raising an alibi entitled to acquittal if there is a reasonable possibility that alibi evidence is true.

REASONS FOR JUDGMENT

JAFTA JA/

JAFTA JA:

[1] This appeal was heard on 19 May 2005 and at the conclusion of the hearing the following order was made:

'1. The appeal is allowed

2. The order of the High Court is set aside and replaced by the following:

(a) The appeal is allowed.

(b) The convictions and sentences are set aside.'

It was stated at the time the order was made that the reasons therefor would follow. These are the reasons.

[2] The appellant was convicted of rape and robbery by the regional court at Tulbagh. He was sentenced to eight years' imprisonment for rape and two years' imprisonment for robbery. An appeal to the Cape High Court was dismissed but the appellant was later granted leave by the court *a quo* to appeal against conviction to this Court.

[3] As the appellant raised the defence of an alibi, most facts were not in dispute. It was common cause that the only point in issue was the identity of the complainant's assailant.

[4] The facts of the case may be summarised as follows. On 12 May 1995 the complainant (a 47 year old female) was walking alone on a street at Obiqua Crescent in Tulbagh when she was suddenly grabbed from behind and a knife was placed on her throat by a male person who threatened to

rape and kill her. The assailant touched her bosom and took a sum of R157,00 which she had kept there.

[5] The assailant raped the complainant three times and sodomised her once. He also forced her to perform indecent acts on him. After raping her and while she was looking for her trousers the assailant urinated on her before leaving the scene. He left with the money he had earlier taken from her, her own jacket, a telegram card and a sum of R12,50 which were in the jacket. The incident occurred at 21h40 and it took about 20 minutes.

[6] The complainant could not find her trousers and she went to her home dressed only in a T-shirt and underwear. She remained there for about four hours before she went to the police station to lay a charge. As she did not know the assailant she gave a detailed description of him to the police. She said he had a deep rough voice, he was shorter than her in height, dark in complexion with a handsome face. She further said he had a wing-shaped nose (‘n vlerkieneus) and a posture which slightly bent forward. Regarding his clothing, she said he wore a green jersey, a light-coloured pair of trousers, white running shoes and a small white hat.

[7] At the police station the complainant first spoke to a male officer who referred her to a female officer for the purposes of obtaining a detailed statement about the incident. Meanwhile constable Manie Baron had left to look for the suspect after indicating that he knew the person who fitted the

description given by the complainant. About 15 minutes later and while the complainant was still making her statement to sergeant Lillian Lottering (the female officer), Baron came back with the suspect. At that stage the complainant and Ms Lottering were in an office near the charge office where Baron had brought the suspect. When the complainant heard the suspect's voice, she peeked in the direction of the charge office and identified him to Ms Lottering as her assailant.

[8] Apart from the complainant's evidence, the prosecution led evidence of Ms Lottering, Baron and sergeant Kamfer. They confirmed that the complainant gave them the description referred to above in respect of her assailant. They also stated that she arrived at the police station at 07h00. Baron said he found the appellant lying on a bed and dressed in clothes similar to those described by the complainant. He said the white running shoes were placed near the bed. Ms Lottering stated that she visited the scene with the complainant and they recovered her trousers (mangabroek).

[9] The appellant vigorously protested his innocence from the time he was arrested. He told Baron that he was in the company of his girlfriend, Ms Ann Jumat. Shortly after his arrest he demanded that samples be taken from him for medical examination with a view to determine whether he committed the offences in question. Saliva and blood samples were taken

but no evidence relating to them was led at the trial. He also demanded that an identification parade be held but this was not done.

[10] At the trial the appellant denied having been at the scene when the offences were committed. He called Ms Jumat who confirmed his alibi. She stated that at about 21h40 she and the appellant were at a place described as Nico's place together with other people. They left that place after 22h00 and went to various other places. She only parted from the appellant at about 01h00, long after the commission of the offences.

[11] The trial court found that the defence version could not be rejected as false but went on to find that the appellant had the opportunity to leave Ms Jumat's company unnoticed and during that time he went to rape and rob the complainant before coming back to rejoin her. In this regard the trial court said:

'Ek verwerp nie sy getuienis dat hy en sy meisie die aand saam was nie, dit doen ek allermins. Wat ek doen, is dat ek hier bevind dat die beskuldigde laat die aand inderdaad toe hy by Eerstelaan was, 'n geleentheid gehad het om vir 'n tyd lank weg te glip, vir 10 tot 20 minute, en in daardie tyd het hy dan by Obiekwalaan, wat naby die dansplek in Eerstelaan was, die klaagster verkrag. Ek bevind dus dat sy weergawe met gemak verwerp kan word, in die lig van die sterk getuienis aan die kant van die Staat.'

[12] The key findings made by the trial court are confusing and to a large degree ambivalent. On the one hand, it found no basis for rejecting the alibi evidence and yet it found that in the light of the strong evidence led by the

prosecution, the alibi could easily be rejected, on the other. It also found that despite a reasonable possibility of the alibi evidence being true, the appellant left his companions and went to commit the offences before he rejoined them.

[13] In my view, there is no factual basis for the findings made by the trial court. If Ms Jumat's evidence is accepted, as it should be, it was impossible for the appellant to have left for the scene, commit the offences and come back to rejoin his companions. Ms Jumat said the appellant was out of her sight for about three to five minutes at the stage he went to buy drinks, whilst they were at a place called Henkas in First Avenue. Consequently, he could not have gone away for more than 20 minutes when making allowance for the time he would have spent in going and coming back from the scene. Even if it is accepted that the appellant did leave at that stage (which I do not), it was long after the commission of the offences at 21h40.

[14] The approach adopted by the trial court to the alibi evidence was completely wrong. Once the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality,

of the nature that proved the alibi evidence to be false. In *S v Sithole and others* 1999 (1) SACR 585 (W) the test applicable to criminal trials was restated in the following terms at 590g-i:

'There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken.'

See also *S v Van Aswegen* 2001 (2) SACR 97 (SCA).

[15] Where a defence of an alibi has been raised and the trial court accepts the evidence in support thereof as being possibly true, it follows that the trial court should find that there is a reasonable possibility that the prosecution's evidence is mistaken or false. There cannot be a reasonable possibility that the two versions are both correct. This is consistent with the approach to alibi evidence laid down by this Court more that 50 years ago in *R v Biya* 1952 (4) SA 514 (A). At 521C-D Greenberg JA said:

‘If there is evidence of an accused person’s presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.’

[16] Alive to the difficulty presented by the alibi evidence, counsel for the State argued that the complainant made a mistake as to the exact time during which the offences were committed. She urged us to determine the correct time by calculating time backwards from 07h00 which was the approximate time at which the complainant arrived at the police station. She submitted that if it is accepted that the complainant spent about four hours after the incident before she went to lay a charge, then she must have been attacked at 03h00 in the morning.

[17] The approach proposed by counsel is not without difficulties. The complainant was adamant that the offences were committed at 21h40 and that she arrived at the police station at 02h00. She only conceded that she arrived there at 07h00 when it was pointed out to her that the other witnesses say she arrived at that time. Moreover, the medical report which was handed in by consent and the contents of which were admitted as correct reflected that the complainant was examined by the doctor at 05h15.

[18] Of importance is the fact that a change in respect of the date and time would substantially alter the case which the appellant faced at the trial. It

may well be that had the appellant's attention been drawn to the fact that the offences were committed at the time suggested by counsel, he could have produced evidence showing that he was not at the scene even at that time. If the change is effected now, he would be denied that opportunity. This would unquestionably prejudice him and render the whole trial unfair. As a result his right to a fair trial would be violated.

[19] Before concluding this judgment I deem it necessary to comment on the delays implicit in the prosecution of this appeal. Although this Court issued the order that led to the appellant's release immediately after hearing the matter, the time taken by his appeal to get to this Court is unacceptably long. The appellant was tried within a reasonable time from the date on which the offences were committed. He was convicted and sentenced on 22 September 1995. His unsuccessful appeal to the Cape High Court was prosecuted shortly thereafter and on 9 February 1996 that court delivered its judgment thereon. In his application for leave to appeal, the appellant alleges that he only became aware of the judgment of the Cape High Court three months after it was delivered. It is not clear why it took three months to inform him of the outcome of his appeal.

[20] After becoming aware of the Cape High Court's decision, the appellant states that he sought advice from the registrar of that court who referred him to the advocate who represented him at the appeal. On the

advice of his former advocate, he contacted the Legal Aid Board ('the Board') seeking assistance in pursuing a further appeal. He states that he tried to contact the Board without success for a period of four years. He then contacted the Director of Public Prosecutions who referred him back to the registrar. He directed a written request for leave to appeal to the registrar. It appears that an advocate was appointed to act for him at the request of the court. Eventually his formal application for leave to appeal was lodged with the court *a quo* on 22 May 2002 and heard on the next day. He was there and then granted leave to appeal.

[21] It appears from the date stamp that the record of the proceedings was only received by the registrar of this Court almost a year later, on 24 April 2003. The appeal was set down for hearing on 19 May 2005. There is no explanation for the delay in lodging the record. Nor is there any explanation for the delay in prosecuting the appeal. It may be pointed out that at the hearing of the appeal before us, the appellant was represented by an advocate appointed by the Board. We were also informed by the registrar of this Court that the cause for the delay in setting the matter down for hearing was that no heads of argument were filed on behalf of the appellant until 16 November 2004. As soon as the heads of argument were filed, the matter was set down for hearing.

[22] The inordinate delays involved in this matter are not only unacceptable but are also a serious breach of the appellant's constitutionally entrenched right of appeal to a higher court. Without an explanation for the delays which occurred after May 2002, it is impossible to determine who was responsible for them and whether any fault can be attributed to such person.

[23] In the circumstances the conviction could not be upheld and for these reasons the order referred to in para 1 above was issued. When the matter was heard we were prepared, in the special circumstances of this case, to condone the late filing of the record and the heads of argument. By oversight this was not reflected in the order issued which is accordingly amended by the addition of a further paragraph that reads as follows:

'3. The late filing of the appeal record and the appellant's heads of argument is condoned.'

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C N JAFTA
JUDGE OF APPEAL

Concur:

Farlam JA
Mlambo JA