THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 126/2014
Not Reportable

In the matter between

BRADLEY SYSTER **FIRST APPELLANT**

JUSTIN VAN REENEN **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Syster & another v The State* (126/2014) [2014] ZASCA 215 (01 December 2014)

Coram: Bosielo JA, Schoeman and Fourie AJJA

Heard: **25 November 2014**

Delivered: **01 December 2014**

Summary: Criminal appeal against convictions on rape and indecent assault – Complainant a single witness – evaluation of her evidence – the trial court making credibility findings favourable to complainant – whether the appeal court free to interfere with such – consent – whether the evidence sufficient to sustain the convictions.

ORDER

On appeal from: Western Cape High Court, Cape Town (Goliath J and Cloete AJ sitting as a court of appeal):

The appeal is dismissed.

JUDGMENT

Bosielo JA (Schoeman and Fourie AJJA. concurring):

[1] The facts of this case are not only intriguing but appear more fictitious than real. Paradoxically, they are largely common cause between the protagonists. They are succinctly set out hereunder.

[2] The first appellant and the complainant, TS a 19 year old woman are blood cousins. Notwithstanding this they had a secret love affair going on for almost two years. The second appellant is a friend of the first appellant. After midnight on 8 June 2006, the two appellants arrived at TS's home. She opened for them and returned to her bed. She was alone in bed. The two appellants entered her bedroom. The first appellant went and sat on her mother's bed in the same room whilst the second appellant joined her in bed on the pretext that it was cold. They got engaged in some chit-chat.

[3] In no time the second appellant started to touch her private parts. She objected. He then forced his tongue into her mouth. She tried to push him away but all was in vain. The first appellant then joined them in bed. Whilst TS was sandwiched between them, they began to suck her breasts. Once again she protested and tried to push them away. However, they overpowered her and pinned her down. They both forcibly pulled both her trousers and panty off and the first appellant had sexual intercourse with her. After he had ejaculated he dismounted and the second appellant who had been in the bedroom throughout, approached her with his trousers at knee-level, ostensibly to have sexual intercourse with her but he never did. Both the appellants then left her home.

[4] It is common cause that TS did not report this incident to her mother who arrived at home in the early hours of the morning. Her explanation is that she was still frightened and confused and further that her mother had a heart ailment. She feared for her well-being. She however reported the incident to her friend, Rowena Engelbrecht (Engelbrecht) the next day. She was taken to the police station where she laid a charge of rape. She was medically examined by Dr Anneria Lombard on 10 June 2006 who completed a medical report, the J88 detailing her observations and findings. It suffices to state that Dr Lombard concluded that 'pasiënt is waarskynklik teen haar sin gepenetreer agv. vaginale erosies & klein skeurtjies'.

[5] TS maintained that the entire act of cuddling, fondling and kissing by both appellants culminating in the sexual intercourse with the first appellant was not with her consent.

[6] On the other hand, although admitting to all the acts of fondling and kissing and the sexual intercourse by the first appellant, the appellants deny that it was by force. They testified that TS never resisted or protested and that she consented to all the acts.

[7] Emanating from these facts, both appellants stood trial in the Regional Court, Malmesbury on one count of rape and 2 counts of indecent assault. They were convicted on one count of rape and one of indecent assault each. The first appellant was sentenced to imprisonment for 10 years in respect of rape and 5 years for indecent assault whilst the second appellant was sentenced to imprisonment for 8 years for rape and 5 years for indecent assault. The respective sentences for indecent assault were ordered to run concurrently with the sentence imposed in respect of rape.

[8] With the leave of the regional magistrate, both appellants appealed against their convictions to the high court. Their appeal was dismissed on 27 May 2011. The appeal against conviction to this Court is with the leave of the court below.

[9] The gravamen of the appellants' attack against their convictions is that, both regional magistrate and the court below adopted a wrong approach to the evaluation of evidence. It was submitted further that both courts erred in attaching inadequate weight to the fact that TS was a single witness, and further that she contradicted herself as well as the statement which she made to the police. It was furthermore contended that both the regional magistrate and the court below erred in not finding

her version to be improbable as compared to that of the appellants, which it was submitted was reasonably possibly true.

[10] On the other hand, counsel for the respondent submitted that the version of TS was correctly accepted as it was corroborated not only by her friend (Engelbrecht) to whom she reported the incident and Dr Lombard, but importantly, by the version of both appellants. It was contended that the appellants' version when evaluated against that of TS is so inherently improbable that it cannot be reasonably possibly true. Counsel for the respondent submitted that as both the regional magistrate and the court below had made factual and credibility findings in favour of the state, absent any proof that such findings are clearly or demonstrably false, that this court, sitting as a Court of Appeal, cannot interfere with such findings.

[11] At the heart of this appeal is the correct approach to the evaluation of evidence in a criminal trial.

[12] I pause to observe that both the regional magistrate and the court below gave detailed and well-reasoned judgments. Both judgments show clearly that both the regional magistrate and court below were aware that insofar as the actual sexual intercourse is concerned, TS was a single witness; that she did not report to her mother when she arrived home that morning; that there were contradictions between her evidence in court and the statement which she had made to the police.

[13] In dealing with the fact that TS is a single witness, both the regional magistrate and the court below found that her version was amply corroborated by the evidence of both appellants. Save for the issue of consent which they relied on, they both did not dispute her evidence. In addition, support for her version can be found in the fact that she reported the incident to her close friend, Engelbrecht the next day as well as the medical report by Dr Lombard. As a result, both the regional magistrate and the court below found that there is no indication that her evidence was untruthful. I am unable to find any fault with the finding.

[14] Contrary to this, the regional magistrate and the court below found the appellants' versions regarding consent to be so inherently improbable as not to be reasonably possibly true.

[15] It is common cause that in evaluating the evidence, the regional magistrate considered the merits and demerits of both the state's and defences' version as well as the inherent probabilities of the case. Counsel for the appellants criticised the regional magistrate for this approach. In particular, he submitted that the appellants' version could only be rejected if it was found to be false beyond reasonable doubt. It suffices to say that this submission seductive as it may be at first blush is fallacious.

[16] The State relied largely on the evidence of TS, the complainant. Contrary to the submission on behalf of the appellants, she is not a single witness. Her version of the events of that fateful night which forms the subject matter of the charges against the appellants is corroborated by the two appellants themselves. The only aspect of her evidence which they

disputed is her evidence that she did not consent to the actions in issue. Further support of her version can be found in the evidence of Engelbrecht and Dr Lombard, whose evidence was never criticised.

[17] The correct approach to the evaluation of evidence in a criminal trial was enunciated by this Court as follows in *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15:

'The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: *S v Van Aswegen* 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex port facto* determination and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence….'

This salutary approach was also adopted in *S v Trainor* 2003 (1) SACR 35 (SCA) para 9.

[18] Grappling with the perennial debate on the difference between proof beyond reasonable doubt and proof on a balance of probabilities, this Court enunciated the correct approach as follows in *S v Phallo & others* 1999 (2) SACR 558 (SCA):

'On the basis of this evidence it was argued that the State had, at best, proved its case on a balance of probabilities but not beyond reasonable doubt. Where does one draw a line between proof beyond reasonable doubt and proof on a balance of probabilities? In our law, the classic decision is that of Malan JA in *R v Mlambo* 1957 (4) SA 727 (A). The learned Judge deals, at 737F-H, with an argument (popular at the Bar then)

that proof beyond reasonable doubt requires the prosecution to eliminate every hypothesis which is inconsistent with the accused's guilt or which, as it is also expressed, is consistent with his innocence. Malan JA rejected this approach, preferring to adhere to the approach which 'at one time found almost universal favour and which has served the purpose so successfully for generations' (at 738A). This approach was then formulated by the learned Judge as follows (at 738A-C):

"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.

An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."

(See also *S v Sauls and others* 1981 (3) SA 172 (A) at 182G-H; *S v Rama* 1966 (2) SA 395 (A) at 401; *S v Ntsele* 1998 (2) SACR 178 (SCA) at 182*b-h*.)

The approach of our law as represented by *R v Mlambo, supra*, corresponds with that of the English Courts. In *Miller v Minister of Pensions* [1947] 2 All ER 372 (King's Bench) it was said at 373H by Denning J:

"(T)he evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice."'

[19] The combined version of the appellants is that TS consented to both of them fondling her, kissing or sucking her breasts and eventually,

the first appellant having sexual intercourse with her. All this happened in the full glare of all three. This is notwithstanding the fact that the first appellant had a secret relationship with TS, who is her cousin. The second appellant did not know of this relationship. If both TS and the first appellant were so desperate to keep this relationship a secret, is it probable that she would consent to the first appellant having sexual intercourse with her, in full view of the second appellant? The answer should be no as this would be a give-away. Another intractable question is whether it is probable that the first appellant would allow the second appellant to fondle and kiss his girlfriend? Furthermore, is it probable that the complainant would act in this manner whilst her boyfriend was watching? This sounds not only inherently improbable but incredulous. As it was stated in *Mlambo* (supra) the state's evidence is to my mind, 'of such a high degree of probability that the ordinary reasonable man, after mature consideration, can come to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged'.

[20] Another hurdle which lay in the appellants' way is that the regional magistrate made strong credibility findings in this matter. He found TS, Engelbrecht and Dr Lombard to be credible and reliable witnesses. The regional magistrate was not impressed by the two appellants. Evidently this finding was based on his observations of all the witnesses who testified before him. The appellants have not demonstrated that the regional magistrate was demonstrably wrong on the credibility and factual findings which he made.

[21] This Court held as follows in *S v Pistorius* 2014 (2) SACR 314 (SCA) para 30:

'It is a time-honoured principle that once a trial court has made credibility findings an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial was clearly wrong (*R v Dhlumayo & Another* 1948 (2) SA 677 (A) at 706; *S v Kebana* [2010] 1 All SA 310 (SCA) para 12.'

This is so because of the fact that as the trial court was 'steeped in the atmosphere of the trial' it had the advantage of observing the witnesses as they testified which the appeal court never had.

[22] Despite my diligent search I have not been able to find any demonstrable or clear error on the part of the trial court to justify interference with its credibility findings. Nor was one suggested to me by counsel. To the contrary, the record proves that the trial court was correct in its credibility findings. Given the conspectus of the evidence, I am unable to find that the trial court erred in finding that the appellants' versions are so inherently improbable as not to be reasonably possibly true. It follows that the appeal has no merit.

[23] In the result, the appeal is dismissed.

_____

L O BOSIELO
JUDGE OF APPEAL

Appearances:

For Appellant	:	D Filand Instructed by: Hassan & Associates; Cape Town Phatshoane Henney, Bloemfontein
For Respondent	:	E Kortje Instructed by: Director of Public Prosecutions; Cape Town Director of Public Prosecutions, Bloemfontein