



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable

Case no: 579/2022

In the matter between:

ABEL SEKOALA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Sekoala v The State* (579/2022) [2024] ZASCA 18 (21 February 2024)

Coram: MBATHA, CARELSE and MABINDLA-BOQWANA JJA and
NHLANGULELA and SIWENDU AJJA

Heard: 18 September 2023

Delivered: 21 February 2024

Summary: Criminal law and procedure – appeal against rape conviction – whether the evidence of the complainant, a single witness, was correctly accepted as credible – whether the appellant’s version is reasonably possibly true – whether the State proved the guilt of the appellant beyond reasonable doubt.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Baloyi-Mere AJ with Davis J concurring, sitting as a court of appeal):

- 1 The appeal is upheld against the convictions and sentences.
- 2 The order of the high court is set aside to the extent indicated below and replaced with the following:
‘The first appellant’s appeal succeeds.
The convictions and resultant sentences in respect of accused 1 are set aside and replaced by the following order:
Accused 1 is found not guilty of all 11 counts of rape.’

JUDGMENT

Mbatha JA (Nhlangulela AJA concurring):

Introduction

[1] The appellant, Mr Abel Sekoala, and his erstwhile co-accused, Mr Ramasa Johannes Rathebe, were arraigned in the Regional Court, Pretoria North, Gauteng (the trial court) as accused 1 and accused 2 respectively. They were charged with 11 counts of rape, in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007¹ (the Sexual Offences Amendment Act). They pleaded not guilty to all charges, but, were nonetheless

¹ Section 3 provides:

‘Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of rape.’

convicted. Each accused was sentenced to 10 years' imprisonment, three (3) of which were suspended for a period of three years on condition that they were not convicted of any offence involving violence committed during the period of suspension. They were effectively sentenced to 7 years' imprisonment. In addition, the trial court, in terms of s 103(1)(g) of the Firearms Control Act 60 of 2000, declared them unfit to possess a firearm.

[2] Mr Sekoala, (who was accused 1 in the regional court) together with Mr Rathebe, sought leave to appeal against their convictions from the trial court, which was dismissed by the trial court. On 3 November 2016, they petitioned the Judge President of the Gauteng Division of the High Court, Pretoria (the high court) in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA) for leave to appeal only against their convictions on all counts. On 31 May 2017, De Vos J and Van der Westhuizen AJ granted them leave to appeal against their convictions and sentences.

[3] Subsequently, Neukircher J gave notice to Mr Sekoala and Mr Rathebe that the sentences imposed may possibly be increased in the event the appeal against the convictions were not upheld in terms of s 309(3) of the CPA. This led to the postponement of the hearing to 23 August 2021. The appeal served before Davis J and Baloyi-Mere AJ (the high court) on 17 February 2022. The appeal against convictions were dismissed and albeit there was no leave sought on sentence, the high court nevertheless set aside the sentence and increased the sentence to 20 years.

[4] Dissatisfied with the outcome of the appeal before the high court, only Mr Sekoala petitioned this Court for special leave to appeal against both his convictions and sentences. This Court granted him special leave to appeal on 29 April 2022.

Background facts

[5] Mr Sekoala and the complainant were in an intimate relationship for a few years. Mr Rathebe, who was a friend of Mr Sekoala, was well known to the complainant. At the time of the alleged incident the complainant and Mr Sekoala were no longer in a relationship. They last saw each other in December 2009. On 20 February 2010 a telephonic conversation took place between the complainant and Mr Rathebe. It was disputed as to who called who and who invited the complainant to Mr Sekoala's house. It was also in dispute whether later on that day Mr Sekoala called the complainant or whether she called him. Nonetheless, in the early evening on the day of the incident, the complainant arrived at the place of residence of Mr Sekoala.

Evidence adduced by the State

[6] The complainant's evidence was that she had been invited by Mr Sekoala to discuss the state of their relationship. She testified that upon her arrival, Mr Sekoala requested her to cook mealie meal porridge as the main dish, as the accompaniments had already been cooked. Thereafter Mr Sekoala, who had been socialising outside with his friends, entered the house and borrowed money from her. She showed him the only R100 she had in her possession. In response, Mr Sekoala said that if she wanted to remain in a relationship with him she should have brought more money with her. Mr Sekoala then grabbed her by both arms, and pushed her out of the house. She cried in pain. Upon hearing her screams Mr Rathebe intervened and discouraged Mr Sekoala from chasing the complainant away, as it was late at night. Later, the complainant and Mr Rathebe accompanied Mr Sekoala to drop off his friends at their homes with his motor vehicle. According to the complainant the main reason for Mr Sekoala's aggression was that she did not have sufficient money on her to give Mr Sekoala.

[7] Upon their return to Mr Sekoala's house, he told her that he no longer wanted a relationship with her, the person who was interested in her was Mr Rathebe. Mr Sekoala then went to his bedroom and left her and Mr Rathebe in the sitting room watching television. A few minutes later, Mr Sekoala invited Mr Rathebe to his bedroom, where they chatted surreptitiously. Mr Rathebe returned to the lounge where they all watched television. Later on, Mr Sekoala said that he was retiring to bed. About five minutes later, Mr Sekoala emerged from his bedroom naked and took the complainant to another bedroom where he ordered her to take off her clothes, when she refused, he grabbed her, tore the buttons from the 'overall' she was wearing, pushed her onto the bed, and undressed her. When she screamed, he covered her mouth with his hand, overpowered her and continued to undress her. He then forcefully had sexual intercourse with her without her consent until he ejaculated.

[8] When he finished raping her, he grabbed her and called Mr Rathebe who at his invitation entered the bedroom. Mr Sekoala then held the complainant down so that Mr Rathebe could also rape her. Both men took turns in raping her using a condom, whilst the other held her down. The complainant estimated that she was raped by each one of them for about five or six times. At the end of her ordeal, which lasted until sunrise, Mr Sekoala took her to his bedroom where he continued to rape her without a condom. Thereafter, Mr Sekoala admonished her not to tell anyone about what they did to her. The admonishment was repeated again in the presence of Mr Rathebe. She said that she had no choice but to agree not to tell anyone, because she was locked in, as the keys were hidden in the house. The following morning when the housekeeper arrived she managed to escape.

[9] Mr Sekoala pointed out which taxi she should take. She believed that he wanted to ensure that she took the taxi that was going to town, and not a local taxi

that would take her to the local police station. She did not tell anyone about what had happened to her. She cried a lot because she loved Mr Sekoala. Later that day, Mr Sekoala called her to tell her that she had showed him genuine love by participating in the sexual intercourse with his friend. The following day, she felt she could not live with what had happened because it would hurt her for the rest of her life. She decided to open a case of rape against Mr Sekoala and Mr Rathebe which led to their arrest. The complainant was examined by a medical doctor on 22 February 2020, who completed a J88 medical form.

[10] In cross-examination she admitted that when she visited Mr Sekoala, they were no longer on good terms. According to her, Mr Sekoala requested her to come to his house so they could talk things over. When she arrived at his place he told her that he had another girlfriend. She was heartbroken because she loved him but accepted it. She testified further that, while at Mr Sekoala's house, she called her neighbour Ms Susan Baloyi (Ms Baloyi), who was aware of her relationship with Mr Sekoala. This call happened before Mr Sekoala took away her cell phone. She told Ms Baloyi that they were not on good terms but did not inform her that Mr Sekoala was chasing her away.

[11] Ms Baloyi confirmed that she was the complainant's neighbour. The complainant called her at approximately 19h00 on 20 February 2010 and informed her that she was going to visit her boyfriend. She called her again at about 21h00 and reported that she and Mr Sekoala were fighting and he was chasing her away. The following morning at about 08h00 she received another call from the complainant. The complainant was crying, accusing Mr Sekoala and his friend of raping her. Ms Baloyi asked the complainant where she was and requested Mr Sekoala's home address because she (Ms Baloyi) wanted to direct the police to where the complainant was kept. The complainant said she would call again. The complainant called Ms Baloyi again at 10h00 and told her that Mr

Sekoala allowed her to leave. The complainant asked her to come to her place so she could explain what transpired but she could not make it. During re-examination, she testified that when the complainant visited Mr Sekoala, they had already broken up.

[12] The J88 medical report was handed in by agreement between the parties. The injuries recorded were:

‘1. Bruises purplish in colour measuring 1.5 diamet[re] right arm (biceps area)’ and ‘2. Bruises x 3 on the left upper bicep[s] region, fading and purple in colour, measuring 1.5/3 cm width respective.’

The medical doctor who completed the J88 medical report was not called as a witness either by the State or the defence. I will deal with this evidence at a later stage.

Evidence adduced by the defence

[13] Mr Sekoala denied raping the complainant and asserted that the two of them had consensual sexual intercourse. He further denied that he took turns with Mr Rathebe to rape the complainant. His version was that the complainant called around 17h00 and informed him that she was in a taxi on her way to his residence, which baffled him, since they were no longer in a relationship. The uninvited complainant arrived at his residence and found him in the company of his two friends and Mr Rathebe. They were all sitting outside his house. The complainant, did not greet them but went straight into the house. He immediately followed her into the house and asked what she wanted. She told him that she wanted to talk about their relationship as they could not end it the way they did.

[14] Upon entering the house Mr Sekoala unequivocally told the complainant that she was not welcome and instructed her to leave his house. The complainant fell on her knees, crying, grabbed his hand and told him how much she loved him.

He grabbed her by the elbows and tried to push her out of the house. She held onto the stove and other pieces of furniture as Mr Sekoala pulled her in an attempt to shove her out of the house. The complainant screamed, which caught the attention of Mr Rathebe and his friends. Mr Rathebe came in and enquired what was going on. Upon seeing the complainant crying Mr Rathebe reprimanded him. He pleaded with him not to chase the complainant away at night.

[15] Mr Sekoala testified that later on that evening he, Mr Rathebe and the complainant drove one of his friends to his place of residence. On their return home, Mr Sekoala proceeded to his bedroom, whereupon he summoned Mr Rathebe and the complainant to his bedroom. He called Mr Rathebe to be his witness as to what he intended to convey to the complainant. He then informed the complainant that the intimate relationship between them was over. The complainant asked Mr Rathebe to talk to Mr Sekoala as she did not want the relationship to end. The complainant cried and told him that she loved him. Mr Sekoala then requested Mr Rathebe and the complainant to leave his bedroom, which they did.

[16] It was Mr Sekoala's evidence that the complainant kept on crying. He then went to the dining room and found the complainant crying. He showed her where she had to sleep, ushered her to the spare bedroom and left for his bedroom. The complainant called out to him. He returned and entered through the open door of the room where the complainant was. The complainant requested to have further discussions with him about their relationship.

[17] The complainant told him that she understood that it was better to separate but requested 'one thing', and that was to have sexual intercourse with her one last time. The complainant, now in her underwear, grabbed his hand, gave him a hug and whispered to him 'make love to me now'. He responded by saying he

had ended the relationship. She said ‘that is not yet a problem, we are enjoying having sex. . .’. She said it was the last time they would be having sexual intercourse together and that she wanted them to enjoy the moment. He then took out a condom from the wardrobe and they had sexual intercourse.

[18] Thereafter they cuddled. She searched for more condoms and asked if they could have sexual intercourse again with her on top of him. She took out a condom and fitted it herself and they made love again. She asked him why he wanted to stop such a ‘romantic thing’. She did not mind being his mistress as she enjoyed being intimate with him. She begged him to give her ‘one last round’ that she would remember him with.

[19] They had sexual intercourse for the third time and he kissed her on the forehead, left for his bedroom and fell asleep. He then felt someone touching him. When he opened his eyes he saw the complainant who professed her love ‘for his private parts’. He told her that he wanted to make love to her but she said she was satisfied.

[20] The following day, a Sunday, Mr Sekoala testified that he woke up at about 10h00. The complainant, who was awake, enquired if there were any chores that she could do for him as she had finished other household chores. He asked her for the R60 she had, which she gave him. He then asked if she could help him with R100, as he was short of petrol money. The complainant offered to bring the money to his place of employment the following day. She left in the early afternoon, and he assisted her to board the correct taxi to her place of residence. It was his testimony that when the complainant arrived at her flat, she called him and promised to bring the money to his place of employment the following day. To his surprise, the complainant instead came with the police. He was informed that the complainant had laid a charge of rape and he was arrested.

[21] Mr Rathebe testified that the complainant sent him a text message while he was at work. When he called her back, she told him that she wanted him (Mr Rathebe) to talk to Mr Sekoala not to terminate their relationship. Mr Rathebe told her that he could not, because Mr Sekoala did not like talking about his personal issues. On the day of the alleged incident, the complainant called him to say she was going to Mr Sekoala's place of residence. Corroborating Mr Sekoala, Mr Rathebe said that the complainant arrived at approximately 17h00 while Mr Rathebe and Mr Sekoala sat outside with two of their friends. The complainant walked past them without greeting and entered Mr Sekoala's house. Mr Sekoala, immediately followed her into the house. After a short while he heard a noise coming from the house. Upon inspection he found Mr Sekoala holding the complainant's upper arm, and telling her to get out of the house. He intervened and reprimanded Mr Sekoala.

[22] Mr Sekoala left the house and joined his friends again. The complainant sat next to him. They then took one of his friend's home in Mr Sekoala's vehicle. When they returned, Mr Sekoala called him to his bedroom and spoke to him in the presence of the complainant. Mr Sekoala asked him to be a witness to the effect that he and the complainant were no longer in a love relationship. The complainant was crying, stating that she did not want to end the relationship. Mr Sekoala then requested him and the complainant to leave his bedroom. Mr Rathebe left to go to the sitting room and watched television. The complainant came to sit next to him on the couch, crying, stating how much she loved Mr Sekoala and that she did not want to lose him. She asked him to plead with Mr Sekoala on her behalf. Mr Rathebe fell asleep on the couch while the complainant was still crying and talking.

[23] When he woke up the next morning he found himself alone in the sitting room. He left to buy beer and when he returned, he found the complainant inside

Mr Sekoala's bedroom ironing. She was also cooking in the kitchen. The complainant left in the afternoon and was accompanied by Mr Sekoala to board a taxi. He denied raping the complainant.

The trial court and the high court's findings

[24] In convicting Mr Sekoala and Mr Rathebe, the trial court accepted the version of the complainant against their versions. It also accepted the evidence of Ms Baloyi, as corroboration of the complainant's version. In addition, it found that the medical evidence confirmed that the complainant had been raped.

Submissions by Mr Sekoala on appeal

[25] It was submitted on behalf of Mr Sekoala, that his guilt was not proven beyond a reasonable doubt because the trial court misdirected itself by: (a) finding that the first report witness' evidence was not contradicted; (b) failing to approach the evidence of the complainant with caution, as it was the evidence of a single witness; (c) finding that the injuries were consistent with the evidence which indicated absence of consent; (d) not considering Mr Sekoala's version; (e) not giving reasons for preferring the evidence of the complainant over that of Mr Sekoala; and (f) failing to state why they found Mr Sekoala's version to be so improbable that it could not have been reasonably possibly true.

Submissions by the State on appeal

[26] On the other hand, the State contended, inter alia, that although the trial court did not pronounce on the word 'caution' in its judgment, it approached the complainant's evidence with caution and that the absence of fresh injuries could not rule out recent penetration. In that regard, it should be taken into account that the complainant was examined by a doctor two days after the incident and that she already had four pregnancies and deliveries. The State therefore submitted

that both the trial court and high court were correct in finding that the State had proved Mr Sekoala's guilt beyond a reasonable doubt.

Evaluation

[27] The question is whether the guilt of Mr Sekoala was proven beyond a reasonable doubt. In doing so, it has to be determined whether the trial court committed any irregularities during the trial, and whether those irregularities undermined Mr Sekoala's right to a fair trial. In criminal proceedings the State bears the onus to prove the accused's guilt beyond a reasonable doubt. Furthermore, the accused's version cannot be rejected solely on the basis that it is improbable, but only once the trial court has found on credible evidence that the accused's explanation is false beyond a reasonable doubt. The corollary is that if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. It is also trite that in an appeal, the accused's conviction can only be sustained after consideration of all the evidence including the accused's version of events.

[28] At the heart of this appeal, is the determination of the correct approach to the evaluation of evidence by the courts below. It is trite that an appeal court can only interfere with the factual findings of the trial court where there has been a material misdirection. In the evaluation of the elements of the offence in the crime of rape, the onus rests on the State to prove all the elements of the crime, including the absence of consent and intention. This is so even where the version put to the complainant is a denial of any sexual contact with the complainant. In *Vilakazi v The State*,² this Court quoted with approval what was said in *S v York* in relation to the absence of consent that:

² *Vilakazi v The State* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA) para 47.

‘It is always, of course, for the prosecution to prove the absence of consent. This entails that even if the defence, as here, is that no intercourse took place, the court must, in the adjudicative process, be alive to the possibility that there might have been consent nonetheless.’

In *casu* the only issue in dispute is whether the complainant was raped by Mr Sekoala or whether the sexual intercourse was consensual.

[29] It is common cause that the evidence of the complainant is evidence of a single witness and needs to be treated with caution. In terms of s 208 of the CPA, an accused may be convicted on any offence on the single evidence of a competent witness. In *S v Mafaladiso en Andere*,³ this Court held that where there are material differences between the witness’ evidence and their prior statement, the final task for the judge is to weigh up the previous statement against *viva voce* evidence, to put all the evidence together and to decide which is reliable and whether the truth has been told despite any shortcomings. This means that the court is enjoined to consider the totality of the evidence to ascertain if the truth has been told.

[30] It is clear from the record that there are two conflicting versions on how the events unfolded on the day in question. Therefore, the question which needed to be considered by the court *a quo* was whether on the totality of evidence it can be said that the State proved its case beyond reasonable doubt. The test to be applied as set out in *S v Van Der Meyden*⁴ is as follows:

‘The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 at 373 and 383...’

³ *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) at 584.

⁴ *S v Van Der Meyden* 1999 (1) SACR 447 (W) at 448.

[31] The trial court accepted the version of events as described by the complainant, without giving reasons for such a preference. The high court followed in the same path. In doing so, both courts accepted facts which are irreconcilable with the version of Mr Sekoala. His version shows that from the time of the complainant's arrival, he could not stand the sight of her. This is shown by his harsh reaction to her arrival at his home. This reaction is not consistent with a person who had telephoned the complainant to visit him to discuss the status of their almost non-existent relationship. Furthermore, the complainant testified that when she got to his house, Mr Sekoala was initially receptive, he even asked her to cook, but things only took a turn when he asked for the money she did not have. This version should be considered in relation to the kind of physical hostility exhibited towards the complainant, coupled with him telling her that he no longer wanted to be in a relationship with her but Mr Rathebe was the one interested in her. The complainant's own witness, Ms Baloyi, testified that the complainant called her on the same night and told her that Mr Sekoala was chasing her away and that things were not fine between them. It is not clear why the trial court rejected his version.

[32] Additionally, the probabilities indicate that the complainant could not have received an invitation from Mr Sekoala, because Mr Sekoala did not move in with her in December 2009 as agreed between the two of them. Also, the complainant knew that he had a new girlfriend and for almost three months he had not contacted her. The trial court gave no reason as to why it rejected the undisputed evidence of Mr Rathebe that the complainant would call and request him to intervene on her behalf with Mr Sekoala. And that his response to her had always been that Mr Sekoala resented friends who interfered in his personal affairs, hence he refused to assist. The aforementioned uncontested fact confirms that she could not have been at Mr Sekoala's place at his invitation.

[33] The court below also failed to appreciate that the complainant's visit was planned as she arrived uninvited. She testified that she arrived at about 19h00 because in the past she used to visit Mr Sekoala at night. The only inference to be drawn is that she did not expect to be chased away by Mr Sekoala, as she was keen to resolve the issues between the two of them. Mr Sekoala's version that when he chased her away, she cried and asked him not to end the relationship is supported by both the complainant's and Mr Rathebe's evidence. Furthermore, his version as to how they ended up having sexual intercourse cannot be rejected as being unreasonable.

[34] It is important that I should highlight this part of the evidence, where the complainant upon being questioned by Mr Sekoala's counsel, said the following: '[The complainant]: ...and he earlier phoned me and asked me money, he requested money and I said I do not have it.

[Mr Moruwa]: Did accused 1 attempt to chase you from his house?

10 --- [The complainant]: [I did not get that]

[Mr Moruwa]: Did he try to chase you away from his house? --- [the complainant]: No.

[Mr Moruwa]: Did he assault you in any manner whatsoever? --- [the complainant]: He was just talking to me in a harsh manner.

[Mr Moruwa]: Did he touch you or grab you? --- [the complainant]: Yes, he grabbed me when he requested money from me.

[Mr Moruwa]: Where on your body? --- [the complainant]: on my arm.

[Mr Moruwa]: Arm or arms? --- [the complainant]: He was just pulling me around, I cannot say where, he was just pulling me.

Mr [Moruwa]: I see, and you said accused 1 took away your phone? [the complainant]: 20 -- Yes, he took it.

Mr [Moruwa]: at what time was your phone taken away? --- [the complainant]: I cannot remember what time.

[Mr Moruwa]: When was the phone returned back to you? --- [the complainant]: in the morning

[Mr Moruwa]: So you did not have the phone for the whole night? --- [the complainant]: before he took it, I phoned Susan, my neighbour.'

This is significant because her version was that she was deprived of communication with the outside world before being raped, but again in the morning she was given the phone back just to do that. This version is in direct conflict with the reason given by the complainant as to why she was deprived of her phone.

[35] Had the trial court been alive to the fact that it was dealing with the evidence of a single witness and had treated the complainant's evidence with caution, it would have noted that she gave different versions as to what exactly happened on the night in question. One version was that after Mr Sekoala had finished having sexual intercourse with her, he invited Mr Rathebe, who also had sexual intercourse with her whilst Mr Sekoala was holding her down. She proffered another version that Mr Sekoala after raping her, left her in the bedroom and returned later on. These versions are materially different. These glaring inconsistencies and contradictions in her version were ignored by the courts below, though they found her evidence to be reliable. Had the trial court applied the necessary caution, it would have led to the rejection of the complainant's evidence on the grounds that it was not clear and satisfactory in all respects as required in terms of s 208 of the CPA.

[36] I am not persuaded, as the State suggests, that the trial court treated the evidence of the complainant with caution. The fact that the trial court did not allude to this trite principle nor evaluated the evidence in line with the principle, confirms that it was not applied. In fact, the trial court failed to assess the factual evidence. This was a material misdirection. The trial court restated the evidence in great detail but failed to evaluate it. It also failed even to establish if the complainant might have any bias adverse to Mr Sekoala and his erstwhile co-accused, Mr Rathebe. The trial court should not have ignored the fact that Mr Sekoala and the complainant were in a love relationship and that the complainant was not ready to part ways with him. The evidence shows that the complainant was a jilted lover who still had very strong feelings for Mr Sekoala.

[37] It behoves me to restate the trite principles applicable in a criminal case when evaluating evidence. This Court in *S v Chabalala*,⁵ set out the approach the court should adopt in the evaluation of the evidence in a criminal case. It held that the approach is to weigh up all the elements that point towards the guilt of the accused against all those that are indicative of his innocence; taking proper account of inherent strengths and weaknesses; weighing probabilities and improbabilities on both sides; and, having done so, decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.

[38] The trial court and the high court ignored the principles set out in *S v Trainor*⁶ where this Court held that a conspectus of all the evidence is required; that evidence which is reliable is to be weighed alongside such evidence as may be found to be false; that independently verifiable evidence, if any, should be weighed to see if it will support any of the evidence tendered; that in considering

⁵ *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

⁶ *S v Trainor* [2002] ZASCA 125; [2003] 1 All SA 435 (SCA) para 9.

whether the evidence is reliable the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any; that evidence must be evaluated against the onus on any particular issue or in respect of the case in its entirety; and that a compartmentalised and fragmented approach by the trial court is illogical and wrong.

[39] The unchallenged evidence of Mr Rathebe, which materially corroborated the version of Mr Sekoala, was completely ignored by the courts below. Mr Rathebe's unchallenged evidence that he did not participate in the rape was also not considered by the trial court. His evidence was that he did not know why the complainant implicated him on the alleged rape. The State Prosecutor, in addressing the trial court, also submitted that there was nothing that he could challenge on the credibility of Mr Rathebe as a witness. Though the court is not bound by the concessions made by the State Prosecutor, it could also not point out any shortcomings in the evidence of Mr Rathebe.

[40] At the risk of repeating what has been alluded to, I am constrained to highlight the following discrepancies in the State case:

- (a) Regarding what transpired upon the complainant's arrival at Mr Sekoala's home, their versions are diametrically opposed. Mr Sekoala's version was that he was not happy to see her and he physically pushed her out of his house. The complainant did not dispute that she was manhandled. However, her evidence was that she was manhandled for not having brought sufficient money with her.
- (b) In her evidence-in-chief the complainant testified that she had shown the appellant the R100 note, but in cross-examination she testified that Mr Sekoala grabbed her hand and proceeded to find the R100 note in her pocket, where after she was asked why she did not bring sufficient money. Mr Sekoala grabbed her by both arms and she screamed in pain. This completely contradicts her later testimony that the appellant requested R100 from her and she promised to deliver

it at his place of employment. Logic dictates that Mr Sekoala would not have asked for the same amount of money which she claimed had been grabbed from her hand by Mr Sekoala for which he had chased the complainant out of his home, after having taken it forcefully from her.

(c) That when Mr Sekoala pushed her out it is common cause that Mr Rathebe intervened on her behalf. It is difficult to reconcile this attitude and behaviour with the complainant's allegation that Mr Rathebe then later participated in her alleged gang rape.

[41] The complainant's version was that she was raped by the two men for the whole night until sunrise, approximately 11 times allowing her no break except when they were switching roles. This could not have been humanly possible, the exaggeration of her evidence became apparent when she was interviewed for a pre-sentencing report where for the first time she proffered that condoms were stuffed in her vagina. This never appeared in her statement to the police, in her report to the doctor, evidence-in-chief nor under cross-examination. The appeal court is not precluded in having regard to the totality of the evidence as it considers the entire record of the proceedings. This was the case in *Y v S*⁷ where this Court took into account the evidence communicated by the complainant to her foster care parent after the conclusion of the trial. That evidence was adduced at the sentencing stage.

[42] I am mindful of the trauma attendant on victims of sexual assault. I have taken great care to assess the evidence adduced during the trial, however, the inconsistencies, the contradictions and the overall unsatisfactory nature of the evidence by the complainant had to be carefully examined. In that regard the trial court erred in convicting Mr Sekoala on evidence that was unsatisfactory in so

⁷ *Y v S* (537/2018) [2020] ZASCA 42 para 66.

many respects and ultimately unreliable. Equally, the high court, in finding that the complainant was consistent and frank and in dismissing the appeal, erred.

[43] The high court found that the medical form (J88) corroborated the evidence of the complainant as a single witness. It erred in this regard because such evidence is non-existent and neutral. The bruises on the complainant's arm did not exclude the reasonable inference that they could have been caused by the manhandling of the complainant by Mr Sekoala at the time of her arrival at his place. It could not be, as found by the trial court, that the only inference that could be drawn was that she sustained the bruises during the alleged rape. In *MM v S*⁸ this Court stated that 'it is trite that wherever the implications of the doctor's observations are unclear the doctor should be called to explain those observations and to guide the court in the correct inferences to be drawn from them'. In that regard the trial court was at liberty to have called the medical doctor as a witness. This would have assisted the court in comprehending the conclusions reached by the medical doctor, in particular as she sustained no vaginal injuries and the implications of the complainant of having given birth to four children. The J88 refers to the scarring of the vagina and there was no explanation as to the cause and nature thereof.

[44] In conclusion I find that the high court failed to appreciate that an accused person's version can only be rejected if the court is satisfied that it is false beyond reasonable doubt. A court is entitled to test an accused person's version against improbabilities. An accused person is entitled to an acquittal if there is a reasonable possibility that his or her version is reasonably possibly true. The trial court failed to point out any improbabilities in Mr Sekoala's version. In that regard, it cannot be said that the State proved its case beyond a reasonable doubt against him. He was therefore entitled to an acquittal.

⁸ *MM v S* [2012] 2 All SA 401 SCA para 24.

[45] For reasons unknown to us, Mr Rathebe did not bring an application for special leave to appeal against his conviction and sentence before this Court. However, due to the positive outcome of Mr Sekoala's appeal, it is imperative that this judgment be urgently brought to his attention. It will be in the interest of justice that the legal aid counsel be appointed for Mr Rathebe to bring an application for special leave to appeal on an expedited basis to this Court for the consideration of his appeal. This matter will be brought to the attention of the Registrar and the President of this Court.

[46] In the light of the aforesaid, I therefore make the following order:

- 1 The appeal is upheld against the convictions and sentences.
- 2 The order of the high court is set aside to the extent indicated below and replaced with the following:

‘The first appellant’s appeal succeeds.

The convictions and resultant sentences in respect of accused 1 are set aside and replaced by the following order:

Accused 1 is found not guilty of all 11 counts of rape.’

Y T MBATHA
JUDGE OF APPEAL

Mabindla-Boqwana JA (Carelse JA and Siwendu AJA concurring):

[46] I have read the judgment of my colleague, Mbatha JA (the first judgment). I agree with the order but take a different approach to how the evidence in this matter should be approached. I am grateful for the summary of the evidence set out and would need only repeat it to the extent that it differs with the approach I propose.

[47] I do not quarrel with the legal principles set out as applicable. I, however, wish to highlight those relevant to my assessment. There are conflicting facts on the material aspect of rape. It is not in issue whether sexual intercourse took place. The issue is whether it occurred with or without consent. Both versions have strengths and weaknesses. In my assessment of the evidence, on balance, the complainant's version was not materially shaken and could hardly be said to have been discredited and similarly in relation to Mr Sekoala's version.

[48] As to how the complainant got to visit Mr Sekoala's home is neutral to the question of whether she consented to sexual intercourse with Mr Sekoala. If anything, the evidence points to puzzling and inconsistent behaviour by both. When Mr Sekoala chased her away, she left but was persuaded by Mr Rathebe to stay because it was late. Her version that they had later travelled together in Mr Sekoala's vehicle to drop off his friends is difficult to reconcile with what was alleged to have occurred before. It was never disputed.

[49] The discrepancies noted in her evidence were not material. One related to whether the complainant showed Mr Sekoala a R100 note she had in her possession, or whether he grabbed it out of her hand. The point is, Mr Sekoala confirmed that at some point he had asked the complainant for money. Although this concession by Mr Sekoala is incongruent with someone who no longer wished to pursue a relationship with the complaint, it seems consistent with her

testimony that Mr Rathebe called her to invite her over, at Mr Sekoala's behest. Her testimony was that she had insisted Mr Sekoala be the one who calls her. According to her, he indeed called and asked her to bring money with her. This was never disputed or challenged. Equally odd in her version is Mr Sekoala chasing her away on her arrival for only having R100 in her possession, when she had already told him while in the taxi that, that was the amount she had.

[50] Her evidence relating to how the interchange between the two men occurred during the alleged rape, was not properly examined. She stated that the ordeal was a continuous event, the two men may each have had sexual intercourse with her five to six times each, the whole night but she did not count. In my view, it may be unfair to draw an inference of exaggeration against the complainant when she was not asked to clarify how this occurred or challenged on whether this was humanly possible.

[51] The statement in the pre-sentencing report about the alleged stuffing of condoms in the complainant's vagina appeared after the conviction. The trial court cannot be criticised for failing to take this into account as a discrepancy in convicting the accused persons. Moreso, this would obviously not have been put to the complainant to deal with at the trial.

[52] I differ with the first judgment as regards the several inferences drawn against the complainant as they are, in my view, not supported by the evidence. There is no evidence that Mr Sekoala could not stand the sight of the complainant. His version is that he chased her away because he no longer wanted to be in a relationship with her. Nevertheless, he still allowed her to stay at his home, showed her where to sleep, and later agreed to have sexual intercourse with her. He allowed her to cook a meal for him in the morning, borrowed money from her and took her to a taxi. This may raise questions as to why Mr Sekoala would change from being a person who wanted nothing to do with the complainant to

end up having consensual sexual intercourse with her. Indeed, both versions have weaknesses and strengths.

[53] As regards the complainant's version, it is surprising that a person who allegedly called her to discuss their relationship, suddenly chased her away so aggressively. Relationships may be complex. Caution should therefore be exercised, and inferences should be drawn from the proven facts. The reality is that rape can take place even between people who are in an intimate relationship. Extraneous conduct of the parties aside, the key question in this case is whether sexual intercourse was consensual or not on the night in question.

[54] While I have reservations about the criticisms levelled against the complainant as stated above, the State's version was that of a single witness, which should be treated with the exercise of caution. Although this is hardly the reason not to cross examine the complainant fully, it is clear from the record of the proceedings that she was distressed as she recounted the events. Proceedings had to be adjourned. An application in terms of s 158 of the CPA was launched and granted by consent to enable her to testify via closed circuit means. That, however, is not a determining factor to the question of whether rape was proved, beyond reasonable doubt.

[55] In *S v Singh*⁹ the court discussed the approach to be followed when there is a conflict of fact in a criminal matter. It said the following:

‘. . . it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: *because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and demerits of the State and the defence*

⁹ *S v Singh* 1975 (1) SA 227 (N) at 228E-H.

witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt.’ (Emphasis added.)

[56] What the court said in *S v Radebe*¹⁰ is also useful:

‘A criminal court does not judge an accused’s version in vacuum as if only a charge-sheet has been presented. The State case, taking account of its strengths and weaknesses, must be put into the scale together with the defence case and its strengths and weaknesses. ... Taking into account the State case, once again it must be established whether the defence case does not establish a reasonable alternative hypothesis. *That alternative hypothesis does not have to be the strongest of the various possibilities (that is, the most probable) as that would amount to ignoring the degree and content of the State’s onus.* The State’s case must also not be weighed up as an independent entity against the defence case as that is not how facts are to be evaluated. Merely because the State presents its case first does not mean that a criminal court has two separates cases which must be weighed up against one another on opposite sides of the scale. ... The correct approach is that the criminal court must not be blinded by where the various components come from but rather attempt to arrange the facts, properly evaluated, particularly with regard to the burden of proof, in a mosaic in order to determine whether the alleged proof indeed goes beyond reasonable doubt or whether it falls short and thus falls within the area of a reasonable alternative hypothesis. In so doing, the criminal court does not weigh one “case” against another but strives for a conclusion (whether the guilt of the accused has been proved beyond reasonable doubt) during which process it is obliged, depending on the circumstances, to determine at the end of the case: (1) where the defence has not presented any evidence, whether the State, taking into account the *onus*, has presented a *prima facie* case which supports conclusively the State’s proffered conclusions; (2) where the defence has presented evidence, whether the totality of the evidentiary material, taking into account the *onus*, supports the State’s proffered conclusion. *Where there is a direct dispute in respect of the facts essential for a conclusion of guilt it must not be approached: (a) by finding that the State’s version is acceptable and that therefore the defence version must be rejected; (b) by weighing up the State case against the defence case as independent masses of evidence; or (c) by ignoring the State case and looking at the defence case in isolation.*’ (Emphasis added.).

¹⁰ *S v Radebe* 1991 (2) SACR 166 (T) at 167I-J and 168A-H.

[57] Further, in *S v Mbuli*,¹¹ the Court made the following important remarks:

‘It is trite that the State bears the *onus* of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that *he is entitled to be acquitted if there is a reasonable possibility that he might be innocent...* [I]n whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, so too does not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. *Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. ... “Those doubts may be set at rest when it is evaluated again together with all the other available evidence.* That is not to say that abroad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees”.’ (Emphasis added.).

[58] Against these principles, on the evidence presented, it is common cause that the complainant went to Mr Sekoala’s house on the day(s) of the alleged incident. She spent the night and left the following morning.

[59] It is common cause that, at that stage, their relationship was in a troubled state. The complainant’s evidence was ambivalent as to whether it had terminated before she went to visit Mr Sekoala or they simply had problems. Her neighbour, Ms Baloyi, however, testified that before the complainant’s visit to Mr Sekoala’s house, the relationship between the complainant and Mr Sekoala had ended. It is also common cause that not too long after her arrival, Mr Sekoala chased the complainant away, and aggressively so. According to her, she surmised that it was because she only had R100 in her possession, which angered him.

¹¹ *S v Mbuli* 2003 (1) SACR 97 (SCA) at 110C-E and G-H.

[60] The events that unfolded on the night in question are in dispute. It must be remembered that ‘no *onus* rests on the accused to convince the court of the truth and of any explanation he gives. *If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable; but that beyond any reasonable doubt it is false.* If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.’¹² (Emphasis added.).

[61] It is common cause that sexual intercourse took place between Mr Sekoala and the complainant, the issue in dispute is consent. Mr Sekoala told her that he had another girlfriend in the presence of Mr Rathebe. The complainant was hurt by the fact that Mr Sekoala wanted to end the relationship. She still wanted the relationship to continue because she loved him. Based on the version of Mr Sekoala, she cried and pleaded with him not to end it. Mr Sekoala told her and Mr Rathebe to leave his bedroom and they went to sit in the lounge.

[62] Although the complainant testified that she had been prepared to sleep on the couch, in the context of the facts relayed above, Mr Sekoala’s version that he went to the lounge where the complainant was and took her to the bedroom in which she would be sleeping and left, contradicted the complainant’s materially. His evidence was that she called him stating that she still wanted to talk about their relationship, whilst crying. She pleaded with him to have sexual intercourse with her one last time, to which he acceded. According to him, consensual sexual intercourse occurred several times until the morning.

[63] The complainant’s evidence that she was raped by both Mr Sekoala and Mr Rathebe must be considered along with the explanation given by both accused. Mr Rathebe’s version is wholly exculpatory. He denied any sexual

¹² *R v Difford* 1937 AD 370 at 373.

intercourse with the complainant. He confirmed his knowledge about the troubled relationship Mr Sekoala and the complainant had. This was also confirmed by Ms Baloyi. His version was that the complainant asked him to talk to Mr Sekoala on several occasions about their relationship, prior to the night in question, which he refused to do. On the night in question, he intervened when Mr Sekoala manhandled the complainant, trying to chase her out of his house. He was present when Mr Sekoala told the complainant he wanted to end their relationship. After Mr Sekoala told them to leave his bedroom, he and the complainant went to the sitting room, where she was sobbing. He fell asleep and when he woke up the next morning, the complainant was not there. He later saw her doing some chores in Mr Sekoala's bedroom.

[64] The evidence of Mr Rathebe, is important in the scheme of how events unfolded on the night in question. The trial court considered the complainant's evidence in isolation. When the strengths and weaknesses of both the State and Mr Sekoala's version are considered, Mr Sekoala's version does not strike as one that could be viewed as being false beyond reasonable doubt. If there is a reasonable possibility of his version being true, he is entitled to an acquittal. The court does not need to be convinced that he is telling the truth. Mr Sekoala's evidence is supported by Mr Rathebe's, whose evidence was hardly disturbed in cross examination.

[65] As regards the bruises found on the arms of the complainant, the trial court concluded that they were sustained during the rape incidents when the two accused held her down. This was not the only reasonable inference that could be drawn from the proven facts. The bruises could equally have resulted from the aggressive manhandling by Mr Sekoala when she was being chased out of the house. Unfortunately, this was neither explored with any witness during the trial, nor was the doctor who examined the complainant called to explain which

scenario would be consistent with the bruises. Whether the bruises could only have been sustained when the complainant's arms were held to the ground whilst she was being raped was not tested. The trial court erred by finding that they were consistent only with her version of rape by the two men. Since the holding down of the hands while being raped was not the only reasonable inference to be drawn from the bruises on the arms, the trial court materially misdirected itself. The accused ought to have been given the benefit of the doubt.

[66] Apart from the failure to examine the evidence of the witnesses properly by both the legal representatives, the quality of the record as well as the level of interpretation leaves much to be desired. The transcribed record was indistinct on crucial aspects of the witnesses' answers. A few times the interpreter had to be reprimanded by the court about the standard of interpretation of the evidence. It is apparent in some instances that the interpreter was not as proficient as to be expected. This is something that should be looked into as it is frequently observed in a number of trial records in criminal matters. This does compromise the effective administration of justice, with grave consequences for both the State and the defence.

[67] I echo my colleague's view that this judgment be brought to the urgent attention of Mr Rathebe for an expedited process to be considered and attended to, in view of the outcome of this appeal.

N P MABINDLA-BOQWANA
JUDGE OF APPEAL

Appearances

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