REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: A253/2012

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

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DATE SIGNATURE

In the matter between:

LLOYD PITSA Appellant

and

THE STATE Respondent

J U D G M E N T

MASHILE, J:

[1] The Appellant, a 42 year old man, stood before the Regional Court of Gauteng held at Wynberg accused of rape read with Section 51 and 52 of the Criminal Law Amendment act No. 105 of 1997 and assault with intent to do grievous bodily harm. The Complainant was a 26 year old lady well-known to him.

[2] The Appellant who was legally represented throughout the proceedings pleaded not guilty to both charges and tendered no plea explanation. On 13 July 2009 he was nonetheless found guilty on both charges, convicted and sentenced. He was also declared unfit to possess a firearm in terms of Section 103 of the Criminal Procedure Act No. 51 of 1977.

[3] On 20 July 2011 the trial court sentenced him to an effective direct imprisonment of 10 years. The Appellant launched an application for leave to appeal against both conviction and sentence on the same day. Believing that it was possible that another court could find differently, the trial court gave him leave to appeal against both.

[4] The Appellant admits that he had sexual intercourse with the Complainant but denies that such sex came about without the Complainant's permission. Put differently, the sexual intercourse was with the consent of the Complainant. The issue to be determined is therefore whether or not the sexual intercourse was with the permission of the Complainant.

[5] It is trite that the onus of proving the guilt of the accused beyond reasonable doubts rests on the State. Conversely, an accused person will be entitled to an acquittal if his version is reasonably possibly true. See in this regard **S v Trickett** 1973 (3) SA 526 (T).

[6] It is common cause that the evidence of the Complainant is that of a single witness in so far as the actual rape itself is concerned. Section 208 of the Criminal Procedure act No. 51 of 1977 provides that it is competent to convict on the evidence of a single witness provided it is satisfactory in all material respects. See *R v Mokoena* 1932 OPD 79 at 80, *S v ffrench-Beytagh* 1972 (3) SA 430 (A) at 446A and *S v Sauls and Others* 1981 (3) SACR 172 (A). The following paragraph of Leon J in **S v Ganiel 1967 (4) SA** 203 **(N) is also relevant:**

"A Court should approach the evidence of a single witness with caution and should not easily convict upon such evidence unless it is substantially satisfactory in all material respects or unless it is corroborated."

[7] When embarking on the process of discharging its onus, the Respondent called 4 witnesses including the Complainant herself. These witnesses are, the Complainant, her grandmother, D S and Dr CatherineJoan

Knight. The Appellant testified on his own behalf and did not call any witnesses to give evidence in support of his case.

[8] The Complainant testified that:

8.1 She is a twenty-six year old lady with no children. On Monday morning, the 3rd of September 2007, the Appellant visited the Complainant at her home. The Complainant showed him pictures of hair styles and expressed a wish to go to a hair salon in Yeoville. The Appellant suggested a salon in Pretoria, which he said would do a perfect job for the style that the Complainant wanted.

8.2 The Appellant and the Complainant drove to Pretoria in the Appellant's motor vehicle. The Appellant then left her at the salon to do her hair while he went to check on a friend in the area of Pretoria.

8.3 He came back at 19h00 but the two had to wait for his friend for approximately two and a half hours before leaving.

8.4 They drove back into the direction of Johannesburg using Kyalami Road. The Complainant was tired with intermittent

headaches being the after effects of the platting of her hair and was drifting in and out of sleep.

8.5 The Appellant asked her if they could go into the Kyalami Race Track. When she asked him what they were going to do he said that he wanted to chat. Her response was that they could talk while driving home because the road ahead was still long.

8.6 The two nonetheless ended up inside the race track where the Appellant skipped over from his seat to the passenger side where the Complainant sat. He showed aggression as he did so, pushed the seat backwards, locked the passenger door and began to kiss her forcefully.

8.7 When she screamed and tried to resist her he twisted her arm, throttled her and knelt on her thighs causing her unbearable pain to subdue her.

8.8 Using his one hand, he unzipped her fitting jeans ripping them in the process. He also lowered his pants, took out a condom and slid it into his penis and inserted it into her vagina. He had sexual intercourse with her for about 20 minutes.

8.9 The passenger seat was slightly tilted but the Complainant maintains that she was still in a sitting position when the sexual intercourse started and finished.

8.10 The Appellant asked her to supply him with a tissue to wipe off his penis when he finished. She did not have any and the Appellant just pulled out his penis. Thereafter he went outside to throw the condom into a dustbin.

8.11 The two then drove out of the race track and were once again on route to Soweto. The Appellant asked if he could take the Complainant to her boyfriend whereupon she told him to drop her off at home.

8.12 The Appellant left her at home and drove off. He sent her sms messages apologising for what happened. She opened the door and noted that her grandparents were in their bedroom and gave a signal that she was home. She did not tell them about the incident because she did not want to worry them.

8.13 She reported the alleged rape to the Appellant's nephew but apparently he did not want to get involved. She then called D S

but he was on voice mail. She sent him an sms message and he called her back the following morning.

8.14 The following morning she reported her alleged ordeal to her grandmother and then left to lay a charge of rape against the Appellant at the Meadowlands Police Station.

8.15 She was advised to report it at a police station nearest where the incident occurred. The incident having taken place in the area of Kyalami, she went to lay a charge of rape at the Midrand Police Station. She then went to the Sunninghill Clinic where she was medically examined by Dr Catherine Joan Knight.

[9] The second witness who took the stand to give evidence in support of the Complainant was her friend, D S. His evidence was that:

9.1 He is a project consultant for the Department of Health for Global Fund and he is a friend of the Complainant.

9.2 He received an sms during the night but could not see it until the morning because his mobile phone was off. He subsequently received a call from the Complainant. She told him that she was raped by the Appellant.

9.3 The Complainant related how the Appellant came to rape her. The Appellant took her to a hair salon in Pretoria where he left her for virtually the entire day.

9.4 He came back at about 19h00. They drove back to Soweto using short cuts and she was drifting in and out of sleep as she was tired and was experiencing headaches from the platting.

9.5 She told him that the motor vehicle suddenly stopped at a dark spot, a place she did not recognise, but could tell that it was somewhere in Midrand. She demanded to know why he stopped and he told her that he wanted to chat. Her response was that they could do so while the motor vehicle was in motion.

9.6 He insisted on having a word with her and a scuffle ensued as she was not prepared to have any of it. She realised that he wanted to do something and she then said to him that she trusted that he did not want to do what she thought he wanted to do.

9.7 He took off her jeans and began to have sexual intercourse with her without her permission. When he finished they drove to Soweto but prior to dropping her off at her home he went pass Diepkloof to see his friend. Once that was done he took her to her house and left.

9.8 D S did not see any visible injuries on the Complainant.

[10] The third State witness, Dr Catherine Joan Knight, testified that:

10.1 She is a medical doctor having qualified as such from the University of Cape Town. She acquired some experience in the examination of rape victims in 2007 during which year she worked in various casualties around Johannesburg including Union and Sunninghill Clinics. At the time of the examination she was employed at the Sunninghill Clinic. Her qualifications as a doctor were not challenged.

10.2 On 4 September 2007 she examined the Complainant and recorded her findings on the J88. She noted that there was 'increased viability' and tenderness of the opening of the vaginal canal. She also recorded that there were no other physical injuries other than as aforesaid.

10.3 She concluded by stating that her findings correlated with vaginal penetration by the penis of the perpetrator.

10.4 She examined the Complainant from head to toe and did not pick up any injuries whatsoever. She did not notice any bruises

on the Complainant's thighs or throat. She did not note any sore arm.

10.5 She could not remember whether or not the Complainant told her about her sore arm and thighs.

[11] The grandmother was the last to testify in support of the State's case and she stated the following:

11.1 She knows the Appellant because he attended church with her daughter, M. The Complainant is the daughter of G, one of her daughters. The Appellant was a family friend and would visit from time to time.

11.2 She had known the Appellant since 1995. The Appellant told them that he is married and that he used to live in Diepkloof but that he and his wife had since relocated to Pretoria.

11.3 The Appellant used to give the Complainant driving lessons. The Complainant had a boyfriend and his name is Tumi. The relationship with Tumi endured until the rape incident.

11.4 According to her the Complainant and the Appellant were not involved in a love relationship and the two never had sex in her house. She denied that her husband ever discussed 'lobola' arrangements with the Appellant. She was adamant that if he

did, it must have been a joke because such arrangement could only be done with parents of the Complainant.

11.5 She confirmed that on 3 September 2007 the Complainant left for Pretoria with the Appellant and came back at about midnight. She told the trial court that she opened the door for the Complainant that night.

11.6 The Complainant was somewhat distraught when she arrived home that night.

11.7 The Complainant recounted the events of the previous night to her the following day and told her who the culprit was.

[12] Finally the Appellant took the stand and said:

12.1 He visited the Complainant on 3 September 2007. She wanted to do her hair and he suggested and offered to drive her to a salon in Pretoria, which he thought would be the best to produce the style that she showed him.

12.2 He dropped her off but came back later in the day at about 19h00 to pick her up. They drove back to Johannesburg using the Kyalami Road. They spoke about various things but mainly about the Appellant's wife.

12.3 He suggested to her that they could have sexual intercourse since it was quite a while since they last did it. He recommended that they could go inside the race track as it was safe. She agreed but specifically requested that the Appellant should be quick.

12.4 They went through the security check point at the race track, found a secluded area, had sex and left.

12.5 They drove out of the race track and along the way the Complainant remarked that the Appellant was very selfish in that he was very quick to come when she did not.

12.6 She also added that he was happy because he was going home to be welcomed by his wife while she had no one to go to.

12.7 He dropped her off at her grandparents' house and left.

[13] Having heard the evidence of the Complainant the trial court resolved that her evidence, considered in conjunction with the other State witnesses, was sufficient and could therefore be relied upon to find the Appellant guilty on the two counts.

[14] Counsel for the defence ardently argues that the evidence of the Complainant does not bear the hallmarks of the single witness as envisaged

in Section 208 of the Criminal procedure Act No. 51 of 1977 in that it was not satisfactory in all material respects and was not corroborated.

[15] The following emerged from the Complainant's evidence-in-chief and cross-examination:

15.1 The Appellant met with his friend shortly after he had picked up the Complainant from the salon in Pretoria. When cross-examined by the defence Counsel however, the Complainant stated:

15.1.1 the appellant's friend did not turn up;

15.1.2 did not see any person;

15.1.3 could not remember; and

15.1.4 could not recall whether or not the Appellant met with anyone.

15.2 She stated that she fell in and out of sleep and suddenly when she became fully conscious she realised that they were in Kyalami at the race track. For some reason she left out the following:

15.2.1 While driving towards Kyalami the Appellant told her that he did not want to be with his wife whereupon she rendered an advice.

15.2.2 She was awake when she and the Appellant arrived at the Kyalami Race Track and that they went through the security check point when they entered.

[16] I agree with the defence Counsel's argument that the omissions, it would appear, are meant to be congruent with her assertion that she did not know that the Appellant wanted to have sexual intercourse with her. She claims to have been surprised to find out that she was at the Kyalami Race Track when her evidence suggests that she knew precisely where she was.

[17] It is undoubtedly improbable that the Appellant could have successfully penetrated the Complainant sexually in the manner described by her. When one contrasts how she alleges the penetration happened with how the Appellant explains it, the probabilities tilt in favour of the explication proffered by the Appellant.

[18] The Complainant's evidence is that prior to the sexual penetration the passenger seat where she sat was somewhat slanted. All that the Appellant did was to move it backwards. The Appellant then unzipped her jeans and pulled them off tearing them in the process. This occurred while she was in a sitting position and it is in that position that the sexual intercourse took place. It is hard to comprehend how penetration of her vagina took place if she was sitting.

[19] It is improbable that the Appellant with one hand throttling the Complainant could manage to do the following with the other:

19.1 Unzipped her jeans and pulled them off ripping them in the process.

19.2 Took a condom from his pants, pulled off his pants while still holding the condom, opened it and slid his penis into it.

19.3 With one hand, split her thighs and had sexual intercourse with her for about 20 minutes.

[20] The Appellant on the other hand states that the back of the seat was reclined with the whole seat pushed backwards. It was while in that position that the two began kissing, culminating in sexual intercourse to which the Complainant responded. This is a more probable version as it accounts how the Appellant was able to penetrate her vagina and had sex.

[21] Counsel for the defence points out that if the Appellant had a criminal mind it is more unlikely that the Kyalami Race Track would have been his preferred spot. In support of this is the fact that the place has security guards the chances of being caught were more distinct especially if his victim, the Complainant, were to defy his attempt as is her evidence. It is more probable that both chose the spot because it was safe and secure.

[22] The use of a condom also suggests that the parties anticipated that they would at some stage that day engage into sexual intercourse whether at the place where it occurred or at any other. Aberrant and somewhat uncharacteristic of a person who had just viciously went against the wishes of a lady is that he in fact asked for a tissue as he withdrew from her.

[23] I am not suggesting that rapists do not or cannot utilise condoms but this evidence viewed holistically and in conjunction with other evidence of the State witnesses makes it improbable that a rapist would be so considerate.

[24] The Complainant's failure to escape when she was temporarily alone in the vehicle is totally understandable especially to a person who was not familiar with the surroundings. An assailant in the position of the Appellant could easily have caught her again before she reached the security guards and the consequences could have been horrendous. The criticism levelled at her in this respect is rather gratuitous.

[25] It remains strange and of course surprising that she did not alert the security guards when she and the Appellant drove out of the race course later. This is bound to cast doubts on her evidence.

[26] The defence Counsel also points out that her evidence relating to the torn jeans is also not cogent. She admitted that the jeans were made of the normal tough jean material. If that is so it is difficult to envisage how they came to be torn by the Appellant when pulling them down. In any event the

grandmother did not notice any torn jeans when she opened for her, adds the defence Counsel.

[27] Moreover, the Complainant claims to have handed them over to the police but they were not presented to court as exhibit. For this reason the defence Counsel argues that the trial court should have drawn an adverse inference. I cannot but agree with the defence Counsel. If they were indeed ripped, the police's failure to bring them before the trial court is staggering. Needless to add that the evidence was critical and could affect the outcome of this case.

[28] It is settled that naturally one would expect a rape victim in the position of the Complainant to make a first report to people close to her such as parents or siblings or a friend. Her action in this regard leaves one befuddled. Her evidence is that she is quite close with both her grandparents and parents yet, she did not tell her grandmother when she got home that night choosing instead to report to the Appellant's nephew to whom she was not close at all.

[29] Her explanation for this atypical behaviour is that she did not want to worry her old grandparents. Shockingly the very next morning she confided in her grandmother albeit that it was after she had called D S. Similarly, her reason for not telling her parents about her ordeal in the hands of the Appellant is also startling. Her evidence is that her parents were not accessible. There is no evidence of her attempting to reach them at all.

[30] The trial court also overlooked the serious contradiction between the Complainant and her grandmother. The Complainant's testimony is that she opened the door on her own when she arrived home that night. Both her grandparents were in their bedroom. The Complainant's evidence is not corroborated by that of the grandmother. According to the grandmother she opened the door for the Complainant and noted that she was distressed.

[31] The trial court underestimated the significant contradiction in the testimony of these two witnesses and held that the Complainant's omission to report to her grandmother on her arrival could not be a reason to disallow her evidence. The defence Counsel submitted that this material contradiction raises the following:

31.1 The Complainant's failure to report her alleged rape to her grandmother whom she likes and trusts electing instead to report to a male person who is related to the Appellant and who is virtually a stranger to her is perplexing.

31.2 It is also surprising that she did not tell the trial court that her grandmother opened the door for her.

31.3 Her grandmother told the trial court that she noticed that her granddaughter was rather upset yet she never bothered to find out what the problem was. That is also bizarre because one would have expected any concerned parent to have been

inquisitive. Short of this, one would have predicted the grandmother to have been considerate and comforting to her without necessarily becoming intrusive.

[32] The trial court indisputably erred by disregarding the contradictions, omissions and improbabilities in the testimony of the Complainant holding, instead to the contrary, that her evidence was probable and not contradictory.

[33] Notwithstanding that D S would not have been the person to whom the Complainant would have reported the alleged rape, the discrepancies between their evidence is bewildering given that D S was the author of his own statement. It is rather puzzling that the trial court concluded that his statement was a summary of the Complainant's testimony especially in view of the glaring contradictions such as:

33.1 D S's evidence is that the Complainant called him in the morning whereas the Complainant's testimony in this respect is that he called her upon receiving her message.

33.2 The Complainant told D S that the vehicle stopped at a place which she did not know whereas she told the trial court that the vehicle stopped at Kyalami Race Track as she saw a big sign board.

33.3 The appellant was aggressive throwing insults at her when he hopped over from the driver's seat to her side. He then began

to kiss her forcefully, choked her and twisted her left arm to restrain her resistance. D on the other hand told the trial court that a brief fight which was not accompanied by violence took place between the two.

33.4 The complainant did not tell the trial court that they stopped in Diepkloof where the Appellant wanted to see his friend prior to taking her home that night whereas it was D S's evidence that the Complainant told him that she and the Appellant did stop in Diepkloof to see his friend.

[34] The trial court came to the conclusion that the lack of detail in the complainant's report to D does not render it improbable. The trial court held so even on the face of such testimony having been presented principally to demonstrate the complainant's consistency. The trial court clearly erred in this regard.

[35] The evidence of the doctor, Catherine Joan Knight, is of immense significance as it was meant to corroborate forceful vaginal penetration and that the Complainant sustained certain injuries inflicted by the Appellant while in the process of restraining her resistance

[36] Dr Knight noted on the J88 that her finding correlates with 'vaginal penetration by the penis of the perpetrator'. This is only in respect of the alleged rape and she did not record any injuries of whatever nature in so far

as the charge of Assault with Intent to do Grievous Bodily Harm is concerned. This is so even though there was a space provided for the capturing of such information.

[37] When Dr Knight gave evidence however she told the trial court that there could have been forceful penetration in sexual intercourse. Needless to state that this constituted a sharp departure from what she recorded on the J88. She added that she held this opinion because the Complainant's vagina exhibited some increased 'viability' damage

[38] According to her 'increased viability' means inflammation possibly accompanied by some redness that could be caused by forceful sexual penetration. Strangely when Dr Knight was cross-examined she could not state whether or not there was any redness, could not recall precisely what she found and that she only has the findings as captured in the J88.

[39] She told the trial court that it was her hypothesis that the 'increased viability' was caused by forceful vaginal penetration. She also stated that there would be more injuries in a non-sexually active person but could not tell the trial court why there were not more injuries in this specific case. At some point in her evidence she said that she was not really an expert in these types of cases yet she was called in her capacity as such.

[40] The trial court should have discarded her evidence immediately when she confessed that she was not really an expert in these kinds of cases

particularly as she was specifically called as such. The trial court therefore erred in relying on her evidence as that of an expert. The court can only rely on an expert witness's opinion if the witness's reasoned conclusion is based on certain facts or data which are either common course or established by his own evidence or that of some other competent witness. *S v Zuma* 2006 (2) SACR 191 (W) is pertinent in this regard.

[41] Dr Knight having found that there was vaginal penetration it becomes rather illogical to conclude that there was forceful vaginal penetration. The conclusion that she reached was not supported by her findings as recorded in the J88. Her evidence was so flawed that the trial court should have ignored it completely. In fact, there is substance in the defence Counsel' submission that the finding of vaginal penetration and the absence of any other injuries backs up the appellant's version.

[42] In so far as the evidence of the grandmother is concerned, contrary to what the trial court said, it was common cause that the Appellant was a family friend and that the Complainant had a boyfriend known as T. So, it was no corroboration of the Complainant's evidence at all. When asked whether she knew that the Complainant and the Appellant were involved in a love relationship she said that as far as she was concerned the two were not but later stated that she did not know.

[43] It is entirely logical that the nature of the relationship of the Appellant and the Complainant was known only by them or one or two other people. It

could not have been an open relationship for fear that society would look down upon them with disparagement knowing that the parties were cheating on the Appellant's wife and T, the Complainant's boyfriend. Accordingly, the grandmother's lack of knowledge of such relationship makes absolute sense if viewed in that context.

[44] Turning to the evidence of the Appellant. The trial court came to the conclusion that it was improbable that if the Complainant and the Appellant were involved in a sexual relationship, they would have had sexual intercourse only three (3) times in that entire period. The Appellant's evidence in this regard is that they had sexual intercourse at the least not less than three times.

[45] The trial court also found that it was improbable that the Appellant would have been contented with quick and very uncomfortable sexual intercourse. Here the trial court forgot that according to the Appellant the agreement with the Complainant was that the sexual intercourse had to be quick so that they could still get home in time.

[46] The trial court also found it implausible that the sexual intercourse happened in the manner sketched out by the appellant. It expressed this doubt because Dr Knight noted 'increased viability' at the vagina. The finding of Dr Knight as recorded on the J88 is that there was sexual penetration by

the penis of the Appellant and this is in complete harmony with the evidence of the Appellant.

[47] It also did not make sense to the trial court that the Complainant would without any reason falsely accuse the Appellant of this rape. According to the Appellant's testimony the Complainant could have been angry because the Appellant had made it plain to her that he was not prepared to leave his wife overnight. Secondly he also speculated that it could be that he had just bought a motor vehicle for his wife.

[48] The evidence of the Complainant must be approached with great circumspection because it is of a single witness and is not satisfactory in all material respects. The numerous intrinsic improbabilities, omissions and contradictions in such evidence and the lack of corroboration by other witnesses fortify this court's resolve to reject the Complainant's evidence as most improbable. See *S v Teixera* 1980 (3) SA 755 (A) at 761 where the following was stated:

> "*I think I am stating the obvious in saying that, in evaluating the evidence of a single witness, a final evaluation can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities*."

[49] Contrasting the aforegoing with the evidence of the Appellant I cannot but state that his version of what transpired that night is more probable. There were no inherent contradictions and omissions as was the case with that of the Complainant. It must be borne in mind that it will be sufficient to

acquit if the version of the Appellant is reasonably possibly true. See S v Trickett supra.

[50] With regard to the charge of assault with Intent to do grievous bodily Harm, the State failed to adduce any evidence that can sustain a guilty finding at all. The only witness who could have corroborated the testimony of the Complainant in that respect was Dr Knight. Her evidence relating to such injuries was dismally unpersuasive and the least said about it the better. In addition none of the other witnesses noted any visible injuries.

[51] In the circumstances the State has failed to prove the guilt of the Appellant on both counts beyond reasonable doubts. Accordingly the appeal is upheld and I make the following order:

1. The order of the trial court is set aside;

2. The Appellant is discharged on both counts; and

3. The Appellant is declared fit to possess a firearm.

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B MASHILE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree

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SA THOBANE
ACTING JUDGE OF THE SOUTH
GAUTENG HIGH COURT,
JOHANNESBURG

Date Heard: 17 October 2013

Date of Judgment: 8 November 2013

Counsel for the Appellant: Adv. Rene Burger

Instructed by: Emile Viviers Attorneys

Counsel for the Respondent: Adv. MT Mushwana

Instructed by: Office of the Director of Public Prosecutions