**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: A121/2019**

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

**[7 FEBRUARY 2020]** ..... SIGNATURE

In the matter between:

**MORELETSA, TANKISO** **APPELLANT**

and

**THE STATE** **RESPONDENT**

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**J U D G M E N T**

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**MUDAU, J:**

[1] The appellant in this matter was convicted in the Protea regional court of assault, kidnapping and rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[1] read with the relevant provisions of section 51 (1) and (2) of the Criminal Law Amendment Act.[2] He was subsequently sentenced to six months, four years and 10 years respectively. The regional magistrate ordered that the sentences in respect of

[1] 32 of 2007
[2] 105 of 1997

counts one and two run concurrently with the sentence of 10 years imposed on the rape charge. Effectively, the appellant, then 26 years of age with a proven previous conviction of rape, was sentenced to 10 years imprisonment.

[2] The charges against him were that on the date and place referred to in the charge sheet, the appellant assaulted and kidnapped the complainant (then 15 years of age), and raped her. The appeal against conviction only, is with the leave of the regional court magistrate. The essential issue for determination by this court is whether sexual intercourse with the complainant was consensual as alleged by the appellant.

[3] A brief outline of the state's case is the following. The appellant admitted having had sexual intercourse with the complainant. His defence was consent. The complainant testified as well as her mother, to whom she had made the first report of having been raped. The medical doctor who examined the complainant and also compiled the J88 report also testified. The complainant's evidence was taken through an intermediary and via closed-circuit television. Briefly stated the complainant testified that she knew the appellant by sight and by his nickname, 'Top Dog'. On 22 December 2014 at about 5 PM, he forcefully took her from the street as she walked with her friend, after slapping her on her face with open hands. The appellant was in the company of a male companion, Noki, whom he instructed to leave the scene.

[4] The appellant grabbed her by her hand and she concluded he wanted her cellphone. She then handed her cellphone to her friend (aged 16) at which point the appellant slapped her with open hands. Thereafter, he directed her friend to leave the scene amidst her protests. He took the complainant to an unknown shack, and after unlocking the door with a key which he had taken from an old car outside, took her inside after which he locked the door. There he threatened her with a screwdriver and ordered her to undress and lie on the bed. When she refused he assaulted her with open hands and also kicked her on her back. Thereafter he pulled off her trousers and panties. The appellant inserted a condom on his penis. He threatened to kill her in the event she made noise and proceeded to rape her once. In the process of the rape she grabbed his chain which he had around his neck and it came off and

fell on the bed. Once done he ordered her away. This was around 20:30. She dressed up and left with his chain.

[5] She arrived home at about 21:30 and found her mother. Her mother usually arrives home at about 22:00, but this time was home earlier as she had been trying to reach her on her cellphone as she had been told by her friend what had transpired. She reported the rape incident to her mother and showed her the accused's chain, followed by her statement to the police after which she was taken to Baragwaneth hospital for medical examination.

[6] The mother of the complainant testified and confirmed that she was at work that evening. She called the complainant, but someone else answered the cellphone instead. She left her workplace early upon receipt of the report that the appellant had forcefully taken her daughter. She also confirmed the report made to her about the allegations of rape as well as the neck chain that she received from her daughter. The complainant's friend did not testify as she could not be traced by the time the matter went to trial.

[7] Dr Dawood who completed the J88 report also testified and confirmed her report. She further testified that the complainant's left third middle finger had an abrasion which was fresh, reportedly sustained during the struggle with the perpetrator. According to the J88 report, this was not the complainant's first sexual encounter. The gynaecological examination revealed that the complainant had abrasions and was bruised on 5-6 o'clock positions. The walls of the vagina were bruised. She concluded that the injuries in the complainant's genitalia were inconsistent with consensual sexual intercourse. Penetration was according to Dr Dawood, forced.

[8] The appellant testified that he met the complainant in the street on the day of the alleged incident. She was by herself. They had already been in a love relationship for about 2 to 3 months, having met in the street. He did not know her home address. Neither did he know her age. The complainant did not know his physical address as well. On the 22nd of December 2014 when they met, he addressed her by her pet name 'baby', after she had complained that she often heard of his visits in the neighbourhood, but he failed to see her. Their argument became "heated". He then gave the address of his friend's

place, Lwazi. They parted ways. He proceeded to his friend's place and made arrangements for a key to access the shack. She later arrived and they had consensual sexual intercourse after which he accompanied her home. This was their first and only sexual encounter. He confirmed that the room was locked at the complainant's request. He denied that he had any neck chain but earrings.

[9] During cross-examination, it transpired that, according to accused, he did not know if the complainant had a cellphone. Neither did he know the complainant's friend as alleged. Lwazi Ntshangase testified as a defence witness. At the time of his testimony, he was in the same correctional facility as the appellant. Lwazi stated that the complainant and the appellant were in a relationship. However, he did not know the complainant's proper names. On his own version, he was not present when the complainant arrived on the date of the incident with the appellant. On his version, he met the complainant for the first time when she arrived the next morning in the company of her father after the case had been opened with the police.

[10] The complainant was criticized for testifying that she was a virgin whereas the J88 report reflected that she was not. The introduction of the complainant's 'sexual history by the appellant's legal representative during cross-examination is impermissible. Section 227 (2) of the Criminal Procedure Act 51 of 1977 (the CPA) specifically provides that 'no evidence or question in cross examination regarding such sexual experience or conduct, shall be put to such person , the accused or any other witness at the proceedings before the court unless - (a) the court has , on application by any party to the proceedings, granted leave to adduce such evidence or to put such questions; or (b) such evidence has been introduced by the prosecution.'

[11] The appellant contended that his version was reasonably possibly true and that the version of the complainant should have been rejected. Before us, counsel for the appellant was constrained to concede that he had difficulty in pointing out parts of the appellant's version which made it reasonably possibly true.

[12] It is trite that the state carried 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.[3] In *S v Chabalala*[4], the following was held concerning the approach to be adopted in the determination of a case:

> '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 a failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.'

[13] It is trite that the principles according to which a court of appeal should consider the case are set out in *R v Dhlumayo*.[5] This court on appeal must bear in mind that the trial court saw the witnesses in person and was better placed to assess their demeanour. If there was no misdirection regarding the facts found by the trial court, the point of departure is that its conclusion was correct. In *S v Hadebe*[6] the Supreme Court of Appeal (the SCA) reiterated this principle and held that the credibility findings and findings of fact of the trial court cannot be disturbed unless the recorded evidence shows them to be clearly wrong. The regional magistrate, to her credit was alive to the fact that the complainant was a single witness whose version had to be approached with the necessary caution. She was satisfied that the complainant was a credible witness whose version could be relied upon.

[14] It is trite that a court is entitled to treat a single witness with a certain amount of caution. This does not elevate the position to that of applying the cautionary

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[3] *R v Difford* 1937 AD 370 at 373
[4] 2003 (1) SACR 134 (SCA) at para 15
[5] 1948 (2) SA 677 (A)
[6] 1997 (2) (SCA) 641 at 645 G–H

rule.[7] The court need only find that the evidence was trustworthy and that the truth has been told. See *S v Sauls*[8] where it was held that: 'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness.... The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule...may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded".... It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

[15] In *S v Artman*,[9] Holmes JA held as follows:

> 'She was, however, a single witness in the implication of the appellants. That fact, however, does not require the existence of implicatory corroboration: indeed, in that event she would not be a single witness. What was required was that her testimony should be clear and satisfactory in all material respects....'

[16] In *S v Mahlangu*,[10] the SCA said the following:

> 'The court can base its finding on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect, or if there is corroboration. The said corroboration need not necessarily link the accused to the crime.' (Emphasis added)

[17] The fact that the appellant did not know the complainant's physical address, age, and her contact details, makes his version of a love relationship for the period as alleged suspect and highly improbable. Had he accompanied her home, he would have known where she lived and met with her mother as she was already home at the time of the complainant's return. The complainant's version that she had the cellphone with her that day was not challenged in cross examination. It was importantly corroborated by her mother.

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[7] See *S v M* 1999 (2) SACR 548 (SCA).
[8] *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G.
[9] *S v Artman and Another* 1968 (3) SA 339 (A) at 341A-B.
[10] *S v Mahlangu* 2011 (2) SACR 164 (SCA) at 171B.

[18] There was moreover, no reason for her to have reported the incident to her mother and the police later that evening and moreover to subject herself to a medical examination. The complainant's previous sexual history is irrelevant. Lastly, the appellant's version cannot be reconciled with the medical evidence. Lwazi's evidence was irrelevant as he never met with the complainant at the relevant time. To compound matters he did not know her names. His evidence was correctly rejected as false by the court *a quo*. It follows that the appellant was correctly convicted.

[19] In the result the appeal is dismissed.

**T P MUDAU**
**[Judge of the High Court,**
**Gauteng Local Division,**
**Johannesburg]**

**I agree.**

**S WEINER**
**[Judge of the High Court,**
**Gauteng Local Division,**
**Johannesburg]**

APPEARANCES

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| Date of Hearing: | 28 January 2020 |
| Date of Judgment: | 7 February 2020 |