REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: A756/2013

4/4/2014

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

04/04/14
DATE

SIGNATURE

In the matter between

SIBUSISI VICTOR SEMELANE **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

Date of Hearing: 25 MARCH 2014
Date of Judgment: 2014

KUBUSHI, J

[1] The appellant a 27 year old man was arraigned in the regional court held in Oberholzer of having raped a 47 year old woman. He pleaded not guilty and gave a plea explanation of intercourse with consent. The trial court returned a verdict of guilty. During the plea proceedings the trial court confirmed that the prescribed minimum sentence legislation was applicable in the circumstances of this case. However, having concluded that there were substantial and compelling circumstances warranting deviation from the said prescribed minimum sentence, the trial court sentenced the appellant to imprisonment for 8 years and declared him unfit to possess a firearm. The appellant is before us leave to appeal having been granted against the conviction and the sentence.

[2] The state's case is that the complainant was on the day in question accosted by the appellant whilst taking clothes which she had removed from the washing line into the house. The appellant who was naked identified himself to the complainant and then asked her to keep quiet and to undress herself. He then grabbed the complainant and a struggle ensued, but eventually managed to undress her and had sexual intercourse with her without her consent. Immediately when the appellant left, the complainant screamed and a neighbour who heard the scream rushed to her assistance. The matter was reported to the police and the complainant was also examined by a medical doctor. With the consent of the defence the state handed in the DNA results report and J88 medical examination report (the J88 report).

[3] The appellant's version is that he had sexual intercourse with the complainant with her consent. The complainant borrowed R50 from him to buy matches and candles and promised to repay her by having sexual intercourse with her.

AD CONVICTION

[4] The main ground of appeal is that the trial court erred in accepting the version of the state and rejecting that of the appellant. The appellant's counsel contends that the trial court should not have accepted the respondent's version which consisted of the evidence of the complainant who was a single witness. According to counsel the complainant's evidence was not satisfactory in all respects because of the discrepancies in it and it was not corroborated. He referred us to the following discrepancies in the evidence which according to him made the complainant an unreliable witness:

[5] Firstly, the information provided by the complainant to the doctor who attended to her after the incident in paragraph D.10 of the J88 report is that she had consensual sexual intercourse on the 15 October 2010 which was sixteen days before the current incident. However, the DNA result report shows a mixed result with the appellant being one of the donors. The counsel's contention is that this information cannot be relied on because the semen would not have lasted for long. In this regard he referred me to the judgment in **S v Maqhina** 2001 (1) SACR 241 (T).

[6] Secondly, the complainant informed the doctor that the appellant threatened to kill her if she did not stop making noise. This evidence was not tendered in court neither did the complainant inform the police that the appellant threatened to kill her.

[7] Lastly, the complainant's evidence is that she struggled with the appellant and that the appellant strangled her with a T-shirt during the incident. Yet during examination the doctor did not note any injury which is indicative of the struggle or of being throttled.

[8] The crisp issue before us is whether or not the trial court was correct to accept the respondent's version which was based on the evidence of the complainant as a single witness to the commission of the offence and to reject that of the appellant as not reasonably probably true.

[9] The state in proving its case relied on the evidence of the complainant who the trial court, correctly so, considered a single witness. The appellant's contention is that the trial court should not have relied on that evidence since it was not satisfactory in all material respects and was not corroborated.

[10] It is trite that an accused may be convicted on the evidence of a single competent witness. The evidence of a single witness will normally be accepted if it is satisfactory in every material respects and is corroborated. There is no rule of thumb test or formula to apply when it comes to the consideration of the credibility of such a witness. The test in the final analysis is whether the court after proper consideration of the evidence with the caution required in law is beyond all reasonable doubt satisfied that the story told is essentially true. **S v Sauls & Others** 1981 (3) SA 172 (A) at 180C – F and **S v Miggel** 2007 (1) SACR 675 (C).

[11] In determining whether the evidence is satisfactory the trial court's approach to such evidence is with caution. When applying the cautionary rules courts should warn themselves of the dangers inherent in such evidence and should look for safeguards like corroboration in the evidence reducing the risk of wrong conviction. By corroboration is meant other evidence which supports the evidence of the complainant and which renders the evidence of the accused less probable on the issues in dispute. The safeguard need not consist of corroboration, but, if corroboration is relied upon as a safeguard, it must go the length of implicating the accused in the commission of the crime. See **S v Avon Bottle Store (Pty) Ltd And Others** 1963 (2) SA 389 (A) at 393F – G and **S v Gentle** 2005 (1) SACR 420 (A) para [18].

[12] It is common cause that the complainant in this instance was a single witness in regard to the commission of the offence. The trial court had to treat her evidence with the required caution. The best indication that there was proper appreciation of the risks is naturally to be found in the reasons furnished by the trial court. The trial court must demonstrate that it heeded the warning and that it was well aware of the dangers of wrong conviction by its treatment of the evidence. See **R v Manda** 1951 (3) SA 158 (AD) at 163 E – F.

[13] It is apparent from the trial court's reasons for judgment that it was aware that it ought to approach the complainant's evidence with caution. It looked for safeguards in the form of corroboration in the evidence of the complainant's neighbour and rightly so, found none. The trial court was correct to have concluded that the evidence of the complainant was not corroborated by that of her neighbour. The complainant's evidence is that she screamed immediately the appellant left the house. On the contrary, the evidence of the neighbour is that she heard a scream coming from the yard of the complainant and she immediately went to investigate. She found the complainant lying near the door of her shack crying and she told her that Sibusiso raped her. This evidence in my view does not confirm the evidence of the complainant that the appellant had sexual intercourse with her without her consent. There are some unexplained occurrences surrounding this specific incident. It is not clear from the evidence at what stage the complainant screamed. According to her she screamed immediately when the appellant left the house. If this is so, she must have screamed whilst still in the house. However, her neighbour says that the scream came from the yard. She rushed to the complainant's assistance immediately she heard the scream and found the complainant lying next to the door of her house. The evidence does not say why the complainant came to lie where her neighbour found her nor is there an explanation why she was lying there. These aspects were not canvassed during trial. This testimony does not in my view go the length of implicating the appellant in the commission of the crime.

[14] The trial court, however, wrongly so, accepted the complainant's evidence on its conclusion that the neighbour's evidence can disprove the defence of consent. This conclusion, in my opinion, is factually groundless. The complainant's neighbour testified that she did not see the act itself and did not know the circumstances surrounding the rape and I have already ruled out the scream as evidence implicating the appellant in the commission of the crime. It was therefore incorrect of the trial court to have accepted the respondent's version based merely on this conclusion.

[15] I should also state that there was no evidence of injuries which could have perhaps corroborated the evidence of the complainant that the sexual intercourse was without her consent. It is common cause that according to the doctor's testimony and the J88 report, no injuries were noted when the complainant was examined. The complainant did not sustain any physical injuries, defence type injuries or genital injuries. His evidence, therefore, does not confirm the complainant's case that there was a struggle between her and the appellant or that she was throttled or eventually raped. I have taken note and am in agreement with the submission by the respondent's counsel, that lack of injuries to the complainant's genitals is in the circumstances of this case a neutral factor – the complainant at 47 years is an adult and sexually active. However, genital injuries would have provided the necessary corroboration.

[16] From the record it is clear that the complainant's evidence was not satisfactory in every material respect. There are discrepancies between the information noted in the J88 report read together with the DNA results report and the evidence she tendered in court. The discrepancies were succinctly stated by the appellant's counsel and appear in paragraph [5] to [7] of this judgment. I shall therefore not repeat them here.

[17] The J88 report was handed in court by the respondent. It should be accepted therefore that the prosecutor admitted the correctness of what was stated therein. It is thus not open to the respondent's counsel to challenge, as she sought to do during the hearing, the weight to be given to the contents of the J88 report at this late stage. Any

challenge to the contents of the report should have been taken up with the doctor at the time he tendered his testimony, but it was not done. Even so this testimony was tendered by the respondent. It is indeed so that the complainant must have been lying by informing the doctor that she had consensual sexual intercourse sixteen days before this incident. If it was so, the DNA result report would not have shown a mixed result. The semen of the 15 October 2010 could not have lasted for that long in the complainant's vagina. On this issue see the unreported judgment in **S v Tau** case number KS 3/2012 (Northern Cape High Court Kimberley) dated 11 September 2013 at para 26. Consequently, as it now stands, the J88 report shows the complainant as an unreliable witness. This is a serious discrepancy because the evidence was taken into account during trial when determining the reliability or otherwise of the complainant's evidence.

[18] The contradiction between the complainant's evidence and that of the doctor who testified that the complainant told him that the appellant threatened to kill her if she did not stop making noise renders her version unacceptable as well.

[19] The submission by the respondent's counsel that the discrepancies do not exonerate the appellant or suggest that the complainant is not telling the truth does not take the respondent's case any further. The *onus* is on the respondent to prove its case beyond reasonable doubt and that burden in my view was not discharged. When compared with that of the appellant, the appellant's evidence is more satisfactory as there are no discrepancies in his evidence.

[20] The probabilities favour the appellant as well. The complainant wants this court to believe that she was raped by the appellant yet there are various unexplained occurrences in her story as I have already stated in paragraph [13] of this judgment. Even though it is acceptable that it was at night when the incident occurred, however, the story that the appellant approached the complainant and also left her house without any clothes on appears far-fetched. It seems unlikely that the appellant would have

undressed outside the house and also went to dress up outside. It also does not make sense that the appellant, if he intended to rape the complainant, would have provided her with his correct name.

[21] In the antithesis the conduct and/or behaviour of the appellant after the incident is not indicative of a person who committed an offence. He continues to go to work. He voluntarily contacted the police and took positive steps to inform the Street Committee about the incident. His evidence, which is unchallenged, is that he first learnt from one Sibi that he is wanted by the police for the rape of the complainant. He goes to Sibi's mother to confirm whether Sibi was telling the truth. He requests Sibi's mother to accompany him to the complainant to go and verify the allegation. Sibi's mother advised him to report the matter to the Street Committee. He goes together with Sibi's mother to report the incident. The first time they did not find the Street Committee member to whom he was to make the report. The following day after work he goes to fetch Sibi's mother and goes with her to the Street Committee where he reported the matter. He was at a later date summoned to the Street Committee where he met the complainant and was given the telephone number of the detective who was handling the matter. He also received about five messages on his cell phone from someone he did not know who turned out to be the police officer handling the complainant's case. He phoned her back and made arrangements to meet with her. He indeed kept the appointment and that is when he was arrested.

[22] The contention by the respondent's counsel that the appellant's version is suspect because he did not disclose his defence to Lieutenant Mashiane does not blemish his version at all. There is no duty on the appellant to prove anything his version should only be reasonably probably true.

[23] In this instance, the probabilities are stacked in favour of the appellant and he should in my view be given the benefit of the doubt. It is said that the natural sympathy which one has for a woman who says she was raped cannot be allowed to play any role in deciding whether the *onus* of proof has been satisfied. In this instance it has not been satisfied and the appeal ought to succeed.

[24] Considering the evidence on record as a whole, my view is that the trial court misdirected itself in accepting the version of the respondent and rejecting that of the appellant. This misdirection is of a sufficiently serious nature to constitute an irregularity leaving this court at large to reconsider the conviction afresh. And having concluded that the complainant's evidence, on which the respondent based its case, is uncorroborated and is not satisfactory in all material respects, it should be rejected. The guilt of the appellant was not proved beyond reasonable doubt and as a result the conviction falls to be set aside.

[25] I therefore make the following order:

a. The appeal is upheld.

b. The conviction and sentence are set aside.

E. M. KUBUSHI
JUDGE OF THE HIGH COURT

I concur

P. L. C. MASETI
ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant:	Mr J Van Rooyen Instructed by: **PRETORIA LEGAL AID** 2nd Floor, FNB Building Church Square PRETORIA 0001
On behalf of the respondent:	Adv S D Ngobeni Instructed by: **DIRECTOR OF PUBLIC PROSECUTIONS** Presidential Building 28 Church Square PRETORIA 0001