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

CASE NO: A886/13
DATE: 3/4/2014

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

_____ DATE

_____ SIGNATURE

In the matter between:

ERNEST DLAMINI Appellant

AND

THE STATE Respondent

JUDGEMENT

TEFFO J

[1] The appellant appeared in the regional court sitting at Benoni on 3 September 2013 where he faced one count of rape. He pleaded not guilty but was ultimately convicted of rape and sentenced to a term of 10 (ten) years imprisonment. He was also declared unfit to possess a firearm.

[2] The charge against the appellant was that he did unlawfully and intentionally commit an act of sexual penetration with a female person, to wit, A. M. (……..

years) on 20 May 2013 by inserting his penis into her vagina and had a sexual intercourse with her without her consent.

[3] He appeals against his conviction and sentence leave to appeal having been granted by the court *a quo*.

[4] The evidence in this matter is as follows: On 20 May 2013 the complainant attended her boyfriend, T 's 21st birthday party at B's house. She spent the night with her boyfriend at B's house in one of the bedrooms after the party while B. and the appellant occupied the other rooms in the house. In the early hours of the morning of the following day at about 3:00 her boyfriend, T., left B.'s house and went to his homestead to prepare himself for school. She remained sleeping at B.'s house. The appellant who opened the door for her boyfriend, T., when he left B.'s house, immediately joined the complainant where she was sleeping and had sexual intercourse with her. She alleged that the sexual intercourse with him was without her consent while the appellant maintained that she had consented.

[5] According to the complainant after the appellant had joined her in bed he said to her "Don't you want us to warm each other up?" She told him "no, T. was coming soon". The appellant started touching her all over her body. She called out B.'s name. The appellant covered her mouth with a pillow and said if she continues making noise or screaming, he will call B. and they will both rape her. She then promised him money so that he could leave her. He said no he was not dum, he had already served a sentence and that he was going to kill her. He kept on trying to pull her pants down. She was crying and he said he would have sexual intercourse with her by force. She begged him to stop but he did not want to stop. He kept on pulling her pants down while she pushed him away. He eventually managed to put her pants down, completely off, forcefully took off her panties and ordered her to open her thighs. He then took off the boxer shorts he was wearing and raped her.

[6] After raping her he went back to the dining room to sleep. He did not use a condom. In the morning B. came to the bedroom where she was sleeping to put the blankets away. He asked her whether she was fine. She told him no, she wanted to tell him something. Subsequent thereto B. and the appellant left to buy the fat cakes. When they came back the appellant came to her in the bedroom and told her that what he did was a mistake. He requested her to forgive him. He asked her if she had

forgiven him and she did not respond: The appellant then went out to sit with B. in the dining room where she also joined them. B. asked her if she wanted to have the fat cakes and she refused. From there the appellant requested B. to walk him out as he was going to work. They both left and B. locked her inside the house.

[7] She managed to leave B.'s house through the kitchen door and went to an outside room at the back where she reported the incident to Z. who has since passed on. The deceased, Z., phoned B. He came and she told him what happened. She borrowed Z.'s phone and phoned her mother to come and fetch her. Her mother came and they reported the matter to the police. She was taken to Daveyton clinic for medical examination where she was examined by a nursing sister, one Nothando Mbatha who recorded her findings in a J88 that was handed to court and formed part of the record.

[8] Nothando Mbatha corroborated the complainant's evidence to the effect that she examined her on 20 May 2013 at Daveyton Clinic and completed a J88 where she recorded her findings. She also corroborated her evidence about what happened as she was told by the complainant when she examined her. She testified that she did not find fresh injuries on the complainant when she examined her. The complainant was sexually active and she did not find any evidence of anal penetration. She noted a slimy vaginal discharge. She concluded that the fact that there were no injuries did not mean that no rape took place.

[9] The complainant's mother also testified and corroborated her evidence that she phoned her and asked her to come and fetch her where she was. She indeed went to the place and the complainant told her that she was raped.

[10] The appellant's version was that he was the person who opened the door for the complainant's boyfriend when he left B.'s house in the early hours of the morning. After the complainant's boyfriend had left, he conceded that he went to the bedroom where the complainant was sleeping. He had earlier on proposed love to the complainant and she told him that it was not possible for her to be with him as her boyfriend was at the party. He went to her after her boyfriend had left and proceeded from where he had left earlier on. He wanted to have sex with her and she agreed on condition that nobody should know. They slept together and had

sexual intercourse. He disputed that the sexual intercourse was without consent and maintained that she agreed and he could see that she was interested. After this he left her in the bedroom and went back to the dining room where he was sleeping initially.

[11] In the morning he woke up, went to his parental home to have a bath. He then took some money, fetched B. and they went to buy fat cakes for breakfast. B. then woke the complainant up and she joined them for breakfast. Everything was fine when they had breakfast. They had a chat. He then asked B. to walk him out on his way to work. While he was at work, after an hour or so, he received a call that the complainant's mother was making noise that he had raped her. He requested to knock of early. He went to B.'s house but did not find anybody. He then went to his parental home where he was subsequently arrested.

[12] He conceded under cross examination that he took advantage of the complainant's boyfriend's absence and stated that it was good sex as the complainant looked like somebody who was enjoying what was happening.

[13] B. M. (B.) admitted that there was a party at his house of his nephew, T. There were a lot of people who were drinking on the evening of the 19th of May 2013 going into the early hours of the 20th. After the party most of the people left while only a few remained in the house. The appellant slept in the dining room, he slept in his bedroom while the complainant and her boyfriend slept in another bedroom. He was asleep when complainant's boyfriend left around 3:00. He knew that he was going to leave to prepare himself for school.

[14] He woke up in the morning, took the blankets that the appellant was using and put them in the room where the complainant was sleeping. The complainant did not say anything to him. She was still asleep at that time. He went to buy the fat cakes with the appellant. They came back, sat in the dining room and had breakfast with the complainant. He then walked the appellant out to work and when he came back he found that the kitchen door was open. There was also nobody in the house. He went to look at the back and found the complainant with Z. (the deceased). The complainant was crying. He asked her what happened. She told him that the appellant raped her. When he asked her why did she not scream or say something

at the time of the rape, she said the appellant had closed her mouth with a pillow. She then told him that she was going to tell her mother. She called her mother and she came.

[15] The appellant challenges his conviction on the following grounds:-

15.1 That the trial court erred in concluding that the complainant's evidence who was a single witness with regard to the allegations of rape was satisfactory in all material respects.

15.2 He contends that another court might find that the complainant's actions were not consistent with the actions of someone who had just recently been raped.

15.3 B.'s evidence did not corroborate the complainant's version but instead corroborated the appellant's version.

15.4 The appellant's version was in a large part corroborated by the state witnesses. It could not have been rejected as not being reasonably possibly true.

[16] As regards the sentence it was submitted that it was shockingly inappropriate taking into account the personal circumstances of the appellant.

[17] Section 208 of the Act 51 of 1977 ("the Criminal Procedure Act") provides that an accused person may be convicted of any offence on the single evidence of competent witness. It is, however, a well-established judicial principle that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (Stevens v S 2005 (1) ALL SA (1) SCA).

[18] The correct approach to application of the so-called 'cautionary rule' was set out by Diemont JA in S v Sauls and Others 1981 (3) SA 172 A at 180 E-G where he said the following:

"*There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness….The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth had been told. The cautionary rule referred to by De Villiers JP in* R v Mokoena 1932 OPD 79 at 80*, may be a guide to a right decision but it does 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".*

[19] Nugent J in S v Meyden 1999 (1) SACR 447 (W) at 449 C- 450 b said the following:

" Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent. But what is required in order to reach that conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence that incriminates the accused and evidence which exculpates him cannot both be true the one is possibility true only if there is an equivalent possibility that the other is untrue.

…. The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond a reasonable doubt, and the logic corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether to convict or acquit) must account for all the evidence. Some of the evidence might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none may simply be ignored.".

[20] In R v Mokoena referred to *supra* De Villiers JP made the following remarks at 80:

" Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by [the person], but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respects. Thus the section ought not to be

invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc".

[21] In S v De Villiers and Another 1999 (1)SACR 297 the court said the following:

"The principle was that a complainant in a sexual case ought to make her complaint at the first opportunity that it could reasonably be expected of her to do so. The basis of the explanation offered for the delay in casu, namely that the first appellant's alleged threat with a fire arm, had been rejected when the first appellant was acquitted on the charge of pointing a firearm. It was in any event in comprehensible that three young girls, who had been threatened with a firearm, would thereafter on two further occasions leave the safety of their parental homes to expose themselves to such an ordeal".

[22] In S v Hammond 2004 (2) SACR 303 SCA the court held as follows:

" Evidence of a complaint in a sexual misconduct case at the earliest reasonable opportunity is exceptionally admitted only as evidence of consistency in the account given by the complainant claiming to have been assaulted: That is to say, it is admitted as a matter going to the complainant's credit. It is not corroborative. Evidence of the complaint does not amount to evidence of lack of consent, nor its absence to evidence of consent. The complainant's testimony is evidence of lack of consent, and the complaint does no more than support the credibility of the complainant in so testifying.

[23] It is clear from the evidence that the complainant after being allegedly raped at around 3:00 was able to make the first report to the deceased, Z., at around 8h30. One of the requirements to validate the first report is to show consistency. The complainant in a sexual misconduct case must report voluntarily at the earliest reasonable opportunity. What may be the earliest reasonable opportunity may not be the same with another person. A complainant who comes across a male person after the rape may not be comfortable to report the incident to him.

[24] The evidence of the first report is admissible not to corroborate the evidence of the complainant with regard to the incident of rape but to indicate that the complainant is consistent in her conduct (S v Hammond referred to *supra*).

[25] Let us look at the conduct of the complainant after the alleged rape. It is common cause between the parties that the sexual intercourse between the appellant and the complainant took place around 3:00. After the sexual intercourse the appellant returned to the dining room where he was sleeping and left the complainant sleeping in the bedroom alone. She did nothing. She instead continued to sleep. During the rape and at the time the appellant was busy touching her all over her body, trying to pull away her clothes, she testified that she called B.'s name. According to B.'s evidence he heard no screaming nor any calling of his name in the house at the time. She testified that the appellant put a pillow on her mouth. When she told B. about the rape B. asked her as to why she did not scream or do something to alert him that things were not right. She does not tell B. that she called his name. She only told him that the appellant put a pillow on her mouth. There is no evidence that she tried to run away from the house especially if one takes into account that the complainant was meeting the appellant and B. for the first time at the time. They were both strangers to her. No evidence was adduced to the effect that the appellant threatened her with something for her to submit to the sexual intercourse.

[26] It is strange also that after the rape when the appellant had left the complainant where she was sleeping, she still did not do anything. She continued to sleep until the morning. It cannot be explained as to why after the appellant left her and returned to the dining room, she did not try to run away or even woke B. up and tell him what happened.

[27] It is not in dispute that in the morning B. came to the bedroom where the complainant was sleeping to put the blankets that the appellant used. Although according to B. the complainant did not speak to him, the complainant testified that B. asked her whether she was fine and she told him she was not and that she wanted to tell him something. She then said B. then said he was coming back as he was going to buy some fat cakes with the appellant. One would have expected a

victim of rape to speak spontaneously more especially because B. invited her to speak. As to why she did not use that opportunity, is not clear. The complainant could have stopped B. there and then and told him the story.

[28] Further to the above after B. and the appellant had left to buy the fat cakes, she continued to sleep and did nothing. When they returned, B. woke her up and she joined him and the appellant in the dining room where they had breakfast. She still did not tell B. anything. According to the appellant everything was normal. They were chatting. After this B. walked the appellant out as he was going to work and locked the complainant inside the house. That was the time when the complainant managed to leave B.'s house through the kitchen door. In her evidence the complainant does not say what prevented her to run away or alert somebody about the rape when she had the opportunities referred to above to do so.

[29] When the state was asked this question, counsel for the state submitted that people do not react the same way to situations. He further submitted that the complainant found herself at B.'s house with strangers whom she did not trust, more especially because when she called B.'s name at the time the appellant was trying to rape her, the appellant told her that if she continues to make noise he will call B. and they will both rape her. I do not agree with this submission because if that was the situation, the complainant would not have told B. that she was not fine when he asked whether she was fine and she would also not have told him that she wanted to tell him something. Further to the above if that was the case, there was just no reason why she did not run away or open a window and make noise so that people like Z., the deceased, who stayed in a room outside the house could hear her and come to her rescue.

[30] Although B. testified that he found the complainant with Z. as the complainant had testified, there was no first report before the trial court as the record does not show that the state made an application that the first report be admissible under section 3 of the Hearsay Evidence Act.

[31] According to the complainant after she had reported the alleged rape to Z., Z. phoned B. and B. came to them. This evidence differs from B.'s evidence which was to the effect that when he came back after walking the appellant out to work, he

did not find the complainant in the house. He proceeded to the back of the house outside and found the complainant with Z., crying and that was when she reported to him that she was raped.

[32] The J88 does not advance the state's case any further. The complainant slept with her boyfriend a few minutes before she slept with the appellant. No DNA evidence was produced before court to prove the allegations of rape.

[33] The complainant's conduct as referred to *supra* was not consistent with the conduct of a person who has just been raped. There must be something to convince the court that there is an explanation for not reporting the alleged rape immediately.

[34] The complainant herself testified that she consumed alcohol the whole of Saturday and Sunday at the party. It is clear from the evidence that alcohol played a role. Because of the alcohol it is reasonably possible that the complainant could have consented to having sexual intercourse with the appellant.

[35] If one takes all the evidence in its entirety and the conduct of the complainant after the alleged rape, it cannot be concluded that her evidence with regard to the alleged rape was clear and satisfactory in all material respects.

[36] I therefore find that the court *a quo* misdirected itself by concluding that the complainant's evidence was clear and satisfactory in all material respects and therefore rejecting the evidence of the appellant as not being reasonably possibly true. I further find that the court a quo erred when it rejected the appellant's evidence. The appellant's version could have been reasonably possibly true.

[37] The court *a quo* should not have convicted the appellant on the single evidence of the complainant.

[38] In the result I propose the following order:

38.1 The appeal against the conviction and sentence of the appellant is upheld.

38.2 The conviction and sentence of the appellant by the court a quo are hereby set aside and replaced with the following:

‘ The appellant is found not guilty and discharged’

_____

M J TEFFO
JUDGE OF NORTH GAUTENG HIGH COURT
PRETORIA

I agree

_____

R TOLMAY
JUDGE OF THE NORTH GAUTENG HIGH COURT
PRETORIA

On behalf of the Appellant: K.P. Tlouane
Instructed by Pretoria Justice Centre

On behalf of the State: K M Mashile
Instructed by The Director of Public Prosecutions

DATE OF HEARING 17 March 2014
DATE OF JUDGEMENT April 2014