IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A855/2013

Date: 15 May 2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

15/5/2014 Pretoria
DATE SIGNATURE

In the matter between:

PATRIC SBISISO MASANGO Appellant

And

THE STATE Respondent

JUDGMENT

PRETORIUS J,

[1] The appellant was convicted of the crime of rape, read with the relevant provisions of the Criminal Law Amendment Act 105 of 1997. He was sentenced to 10 years imprisonment by the magistrate at Siyabuswa Regional Court. He was legally represented at the trial.

Leave to appeal to the High Court was dismissed, but leave to appeal against conviction was granted on petition to the High Court.

[2] The appeal court has limited powers to interfere with a decision made by a magistrate. Counsel for the appellant argues that the magistrate misdirected himself when finding that the state had proved its case beyond reasonable doubt.

[3] In this case the state relied on the evidence of a single witness, the complainant. Her evidence was that she and her boyfriend had both attended a party on 2 October 2010. They went to sleep thereafter at the appellant's parents' house. They were both drunk when they went to bed. They were both sleeping on the same bed.

[4] She subsequently woke up and found the appellant lying on top of her and he was raping her. Her evidence was that he had been raping her for a period of 30 minutes, it could also have been for an hour. She took out her cellphone and switched it on so that she could see the perpetrator in the light of the cellphone. She saw the appellant and asked him "what are you doing"? He got up, put on his trousers and ran away.

[5] Her boyfriend then woke up and chased the accused. He had not noticed anything before. He apprehended the appellant and assaulted

him. The defence objected to the J88 form being handed up to court and the prosecutor indicated that he would call the doctor, which was never done. The state chose not to call the boyfriend of the complainant, although he could have corroborated the complainant's evidence and was present at court. The state thus relied on the evidence of a single witness.

[6] The defence handed in the result of DNA tests, to which the state had no objection. The conclusion by the Forensic Science Laboratory was:

> *"The donor of the reference blood sample "P Masango" (05D4BB8558MX) was excluded as the donor of the DNA on the exhibits (09D1AD5464XX)."* Thereby the appellant was excluded.

[7] The appellant denied raping the complainant. In **S v Sauls 1981 (3) SA 172 (A)** at 180 E – G Diemont JA held:

> *"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 referred to by DE VILLIERS JP in 1932 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.***" (Court's emphasis)

[8] The appellant's evidence was that he had gone to sleep at his parental home, when the complainant asked him what he was doing. He went out of the room and found the complainant and her boyfriend in the passage. The boyfriend asked him what had he done and assaulted him. The appellant denied raping the complainant.

[9] In the judgment the magistrate relied on the fact that the appellant confirmed that the complainant had told her boyfriend of the rape. The magistrate did not make any adverse finding that the state failed to call the boyfriend to corroborate her evidence as to where and when the boyfriend had seen the appellant the first time that night. The finding that:

"To me she appeared to be a credible witness who was straightforward, despite being cross-examined she stuck to what she knows and what happened." is in contrast to what had taken place while she was giving evidence where the magistrate, on more than one occasion, had admonished her not to *"beat about the bush"* and to *"be specific, be specific."*

[10] The finding that the doctor, would only have been able to give evidence as to whether there had been penetration cannot be the reason for accepting that it was not necessary to call the doctor. It is even more of a problem where the DNA evidence is that it was not the appellant's DNA which was sent to the forensic laboratory and further samples from more people were requested.

[11] In **S v Nyabo 2009 (2) All SA 271 (SCA)** at paragraph 22 Heher JA held:

> *"A complainant in a rape case who is a single identifying witness needs and deserves close attention from police and prosecution. Unless she is given it her chances of obtaining due justice are diminished. In this case both services failed her.* ***Both lacked insight into what was required for a successful prosecution.***" (Court's emphasis)

[12] This dictum applies in the present case. Here both the police and the prosecution failed the complainant.

[13] It is common cause that the complainant was drunk at the time of the incident. According to her the appellant had raped her continuously for 30 minutes. The court finds this highly improbable. It is also highly improbable that her boyfriend did not notice anything whilst she was lying on the bed next to him, being raped for 30 minutes.

[14] There is no indication on record that the magistrate had taken into consideration that the complainant was a single witness and that he had found her evidence clear and satisfactory in all material respects. The magistrate did not indicate that he was dealing with a single witness and that he was aware that he had to deal with a single witness with caution. This court finds that the magistrate evaluation of the evidence was wrong and that the magistrate had misdirected himself when finding that the state had proved its case beyond a reasonable doubt.

[15] In this instance there was other evidence which should have been lead by the state to corroborate the complainant's evidence. There are no objective, corroborating facts to consider and to confirm the complainant's evidence. The evidence of her boyfriend could have corroborated her evidence as to where the accused was, the assault on the boyfriend and the conditions in the bedroom. It is even more important where the DNA evidence did not link the appellant to the rape at all.

[16] The court finds that the state had not proved its case beyond a reasonable doubt.

[17] I propose that the appeal be upheld.

[18] The following order is made:

1. The appeal against the conviction is upheld;
2. The conviction and subsequently the sentence of the appellant is set aside.

Judge C Pretorius

I agree,

Judge NB Tuchten

Case number	: A855/2013
Heard on	: 12 May 2014
For the Appellant	: Adv RS Matlapeng
Instructed by	: Legal Aid
For the Respondent	: Adv
Instructed by	: Director of Public Prosecutions
Date of Judgment	: 15 May 2014