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**IN THE HIGH COURT OF SOUTH AFRICA (NORTH GAUTENG
HIGH COURT)**

Case Number: A393/2013

In the matter between:

H T M

APPELLANT

VS

THE STATE

RESPONDENT

***Coram:* TLHAPI J AND MALINDI A3**

JUDGMENT

MALINDI AJ

1. The appellant, H T M, was convicted by the regional Magistrate's Court of Tabamoopo.
2. In the judgment and in the reasons for judgment furnished by the Magistrate on 28 February 2013 he relied on the complainant's identification of the appellant. In particular he pointed out that the victim and the appellant had known each other for a long time as neighbours in the same village; had spoken to each other a day before the incident; she had made use of the light emanating from her cellular telephone to identify her assailant; the identification was at close range while the attacker was pinning her down; and that she had observed him through the window after he had jumped out of the window and was dressing outside and when he walked out of her yard.
3. The complainant gave evidence and the appellant and his friend, E M gave evidence in his defence.
4. The question in this case is whether the identification of the appellant is reliable and whether his alibi is reasonably possibly true.
5. It is common cause that on the morning of 29 September 2008 the complainant met the appellant while he was on his way to court and she asked him to fend her his broom. He gave her the key to his house and asked her to give it to his aunt so that he could let himself into the house when he

returned later.

6. Upon his return about 19h00 he went to his aunt's house but the complainant had not delivered the key. He then went to the victim's house but she was not in.
7. The appellant testified that he decided to visit M where he decided at about 20h00 to go to sleep at M's house. He left M and another friend outside while they listened to music on the radio.
8. He testified that M and M later joined him and they all slept in the same bedroom and on the same bed. They all woke up about 07h00 the next morning and he and M walked together to collect the key to his house from the victim. However, they did not reach her house because on the way they came across women who told him that the police were looking for him as it is alleged that he raped a woman. He decided to go to his house instead and wait there for the police.
9. M testified and corroborated the appellant's evidence.
10. The complainant's evidence is that while asleep with her 3 year old child she woke up to discover that a man had slipped into her bed. The man was brandishing a knife and shown a torch into her face. Whilst he was struggling to pin her down she grabbed her cell phone and switched it on.

It gave her enough light to see the attacker. She says that it was the appellant.

11. She testified further that she could see that it was him again when she looked through the window after he had jumped through it and while he was putting his clothes on outside and when he walked out of the yard.
12. This matter revolved around the question whether the identification of the appellant is reliable.
13. In *S v Mthethwa 1972 (2) SA 766 (A)* it was stated that the reliability of identification evidence must be tested against factors such as lighting, visibility, eye sight, proximity of the witness, opportunity for observation and the extent of prior knowledge of the accused, the mobility of the scene, corroboration, suggestibility of the accused's face, voice, built, gait and dress.
14. Of these factors only lighting, visibility, proximity and the extent of prior knowledge were canvassed in evidence.
15. The complainant was surprised by the attack and had a torch light shown into her face. It is common knowledge that torch light does not illuminate light on the person holding the torch. The torch light cannot be relied upon for lighting in this case. The attack took place at about 3h00 and there is no evidence of

greater visibility other than the light that the complainant switched on in the kitchen after the attacker had left. Regarding the cell phone light that she used while being attacked it is not clear for how long she managed to keep the light on the attacker's face. There was no further identification evidence to support the factor of prior knowledge of the appellant such as voice, built, gait or special facial features.

16. In the light of the above, and weighing that against the appellant's evidence, the evidence of the identification is unsatisfactory.
17. It is trite that if the evidence of the accused is reasonably possibly true he/she is entitled to an acquittal. *S v Liebenberg 2005 (2) SACR 355 (A) at 359 C-E.*
18. The Appellant's alibi is corroborated by M. Both were not shown to be lying about the appellant spending the whole night at M's house.
19. In light of the totality of the evidence and the probabilities it cannot be said that the complainants identification of her assailant is reliable.
20. In *S v Charzen and Another 2006 (2) SACR 143 ()* it was stated that in addition to the factors stated in *S v Mthethwa*, objective evidence would put identification beyond doubt. Unfortunately in this case although the complainant testified that the rapist ejaculated into her and she immediately was examined, there was no DNA evidence presented. Nor was any fingerprint

evidence presented although the evidence is that the rapist must have broken in through the window. The court is left to only speculate whether the absence of this evidence is as a result of police incompetence or whether such evidence could not be obtained.

21. In the circumstances, the state has failed to furnish proof beyond reasonable doubt on the issue of identity (See *S v Ngcina 2007 (1) SACR 19 (SCA) [19]*).
22. In the circumstances, the appellant's appeal stands to be upheld and the trial judgment set aside.
23. Accordingly the following order is made.
 1. The appeal is upheld.
 2. The judgment and order of the Magistrate is substituted as follows:
 - 2.1. The accused is acquitted.

MALINDIJu

Acting Judge of the High Court I

agree

TLHAPI 3

Judge of the High Court