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

DELETE WHICHEVER IS NOT APPLICABLE

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

18/4/16
DATE

SIGNATURE

CASE NO: A896/14

18/4/2016

In the matter between:

BEDNOCK PETRUS MTSWENI Appellant

and

THE STATE Respondent

JUDGMENT

Baqwa J

[1] This is an appeal against the judgment of the Regional Court Evander before which the appellant was charged on four counts of pointing a firearm, intimidation, rape and arson.

[2] The appellant pleaded not guilty to all the charges and at the closure of the State case after an application in terms of Section 174 of The Criminal Procedure Act 51 of 1977 the State's case was dismissed in respects of counts 1, 2 and 4 with only the rape count remaining for further prosecution.

[3] The matter proceeded and the appellant was convicted on the rape charge and sentenced to 13 years imprisonment.

[4] An application for leave to appeal was made orally immediately after conviction and upon a reading of the record it is evident that the appellant's legal representative only addresses the application against conviction and he makes no submissions regarding sentence.

Background

[5] The background to the matter is briefly as follows. The appellant and the complainant were lovers and from the evidence theirs appears to have been a stormy relationship which even involved the issuing of a protection order against the appellant.

[6] According to the complainant, she was abducted by two unknown persons on the evening of the day in question and surrendered to the appellant whose vehicle was parked a short distance from the place of abduction.

[7] She was placed in the back seat of the appellant's vehicle and her hands were tied to the front seat of the appellant's vehicle. The appellant was in the driving seat.

[8] The vehicle proceeded to a point which is known as gate 8 whereupon the two individuals alighted from the motor vehicle. The vehicle proceeded further to a lover's lane where the appellant tried to gas the complainant in the motor vehicle by attaching a pipe to the exhaust pipe and leading it into the interior of the vehicle and sealing the windows with the complainant inside.

[9] The complainant appears to have lost consciousness after smelling the fumes which flowed into the interior of the vehicle.

[10] After a while she found herself partially naked outside the vehicle dazed or semi-conscious. The appellant, who according to her was still present, suffocated her nostrils and covered her head with a plastic bag as a result of which she was unable to breathe and again lost consciousness.

[11] The appellant denied the events as testified to by the complainant but admitted to having been with her at the lover's lane. He testified that they had a quarrel after which the complainant exited the vehicle and refused to come back despite his pleas for her to do so. He then left her on that spot.

[12] There are two issues which the court has to determine: firstly whether the complainant was in fact raped and secondly the identity of the rapist.

[13] It is quite apparent from the evidence of the complainant that she does not know whether she was raped or not as she makes no such allegation in her testimony. She seems to have gathered the notion that she had been raped when she, together with the police, came upon a blood-stained condom at the scene of the alleged rape the day after the incident occurred.

[14] This is confirmed in the judgment of the court **a quo** where it is stated: "*She never testified that the accused had sexual intercourse with her.*"

[15] The fact that the complainant had no idea at all about having been raped is confirmed by the '*first report*' account given by her aunt Sedudla Madonsela to whom she mentioned nothing about having been raped.

[16] This is however contrary to the evidence of Sister Malaza, the forensic nurse who examined the complainant who testified that the complainant said she had been raped and thereafter lost consciousness. When confronted about the complainant's own evidence she could not explain the contradiction.

[17] From the J88 form which was submitted by Sister Malaza there seems to be a strong suggestion from the injuries recorded that the complainant was at some stage subjected to non-consensual sexual intercourse.

[18] As part of the evidence tendered by the State there was also pointing out evidence presented by the police. This evidence was correctly declared inadmissible by the court **a quo** as it was not obtained in a procedurally correct manner.

[19] The appellant submits and I accept that the J88 medical report which was confirmed by Sister Malaza contradicts the evidence of the complainant. I also accept that the complainant misinformed the forensic nurse which had the potential of influencing the outcome of the medical examination.

[20] The blood sample found on the condom also confirmed the DNA of the complainant but not that of the appellant.

[21] Based on the misinformation provided to the forensic nurse and the complainant's evidence that she has no recollection of being raped, the medical evidence presented by the State cannot be said to be conclusive. Stated differently, there is a critical link missing between the evidence of the complainant and the medical evidence. Neither is that link cured by the DNA evidence which also does not link the appellant to the rape incident.

[22] The court can also not draw an inference from the blood stained condom that the complainant was raped by the appellant.

[23] With regard to drawing inferences, the cardinal rules of logic were set out in **R v Blom** 1939 AD 188 at 202 – 203 where Watermeyer JA stated as follows:

> "*[1] The inference sought to be drawn ought to be consistent with all the proven facts. If it is not, then the inference cannot be drawn.*
>
> *[2] The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.*"

[24] **In casu**, the complainant lost consciousness twice during her ordeal. She was semi-naked when she regained consciousness on both occasions. She was not aware that anybody had raped her. She was lying in the open veldt in an area frequented by lovers. This raises a number of possibilities and the inferences that could be drawn are myriad.

[25] It is also true that the versions presented by the appellant and the complainant are mutually destructive. In **S v Janse van Rensburg and Another** 2009 (2) SACR 216 (c) the court said the following:

"*[8] Logic dictates that where there are two conflicting versions or two mutually destructive stories, both cannot be true. Only one can be true. Consequently the other must be false. However, the dictates of logic do not displace the standard of proof required either in a civil or criminal matter. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and in the process measure against the probabilities. In the final analysis the court must determine whether the State has mustered the requisite threshold – in this case proof beyond reasonable doubt.*
(Vide: S v Saban en 'n Ander 1992 (1) SACR 199 (A) at 203 j – 204 b; S v Van der Meyden 1999 (1) SACR 447 (w) (1999 (2) SA 79) at 449 g – 450 b; and S v Trainor 2003 (1) SACR 35 (SCA) ([2003] 1 All SA 435) at para 9)"

[26] **In casu**, it does not appear that the court **a quo** applied the requisite standard of proof when it stated as follows:

"*The accused version does not explain to the court how the complainant sustained all these injuries and the things that happened to her. The court is therefore satisfied that the accused's version is not reasonably possibly true. And the court rejects his version as far as it differs from the State's case.*"
[Record page 209 line 14 – 19]

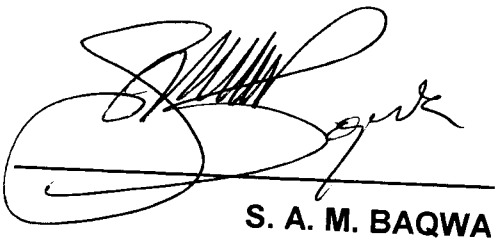
[27] There was no onus on the appellant to explain how the complainant sustained her injuries and what happened to her. I accordingly find that it was a misdirection for the court **a quo** to approach the evaluation of the appellant's evidence as it did.

[28] In the result I propose that the following order be made:

28.1 The appeal against conviction is upheld.

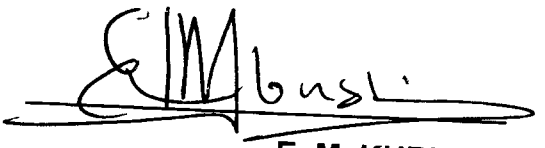
28.2 The conviction of the appellant for rape is set aside.

It is so ordered.



S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree.



E. M. KUBUSHI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Heard on:	18 April 2016
For the Appellant:	Advocate F. van As
For the Respondent:	Advocate J. J. Jacobs