# IN THE HIGH COURT OF SOUTH AFRICA

# (GAUTENG DIVISION, PRETORIA)

**CASE NO: A100/15**

## In the matter between:

**ANDREW LOSPER** **APPELLANT**

## And

**THE STATE** **RESPONDENT**

## JUDGMENT
## KEKANA AJ:

[1] The Appellant was charged and convicted of rape, convicted and sentenced to 7 years imprisonment.

[2] The Appellant appeals against the conviction leave to appeal having been granted by the court a *quo.*

[3] The appellant contends that the State failed to prove its case beyond reasonable doubt. The appeal court has to determine whether the court a quo misdirected itself in the evaluation of evidence.

[4] The Complainant testified that the Appellant raped her on the 02nd January 2011. She testified that there was a braai at her house and friends and

families were invited and the appellant also attended. Later that evening her husband asked everybody to leave. The appellant slept in one of the bedrooms. She locked the door after the last guest [S……] left. She went to the bedroom and she and her husband engaged in sexual intercourse in various rooms in the house and went to sleep in their bedroom. Later that evening, she felt someone on top of her and a penis in her vagina. She thought it was her husband. She realized that it was not her husband when her hand touched her husband's chest. She pushed the person away and realized it was the Appellant. The Appellant pulled up his pants and left the room. Complainant then woke up her husband and asked him to open the door for the Appellant. Upon the husband's return, she reported to him that the Appellant had raped her.

[5] Complainant's husband, Mr. [B…..] [P……] testified that after everybody left the party, he and Complainant engaged in sexual intercourse. The Complainant woke him up later to open the door which was locked for Appellant. Upon his return to the bedroom the

Complainant was crying and reported to him that the Appellant raped her.

[6] The Appellant's testimony was that on the 2nd January 2011 he attended a party the residence of the Complainant. He was drunk and laid down on the lawn when the Complainant told him to sleep in one of the bedrooms in the house. Appellant later woke up and asked for food from the Complainant. He ate and went back to sleep in the same room. The Complainant later came into the bedroom he was sleeping in and asked Appellant to have sexual

intercourse with her. The Appellant was concerned about the Complainant's husband but the Complainant assured him that her husband was asleep. They had sexual intercourse and thereafter the Complainant went to the bedroom to wake up her husband to open the door for the Appellant. Some days later, he was informed by Police Officer Mashabela that the Complainant had laid a charge of rape against him.

[7] The learned Magistrate found that the evidence of the Complainant had no improbabilities in it and that the larger part of her evidence was corroborated by the accused himself. He rejected the Appellant's evidence as being untruthful.

[8] Appellant's Counsel, Advocate F J Van der Merwe submitted that the trial court was faced with mutually destructive versions and ought to have considered the inherent probabilities and improbabilities of each version, the contradictions and the general strengths and weakness of each version.

[9] In Monageng v S [2009] 1 All SA 237 (SCA) the court described proof beyond a reasonable doubt as "*evidence with such high degree of probability that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged. An accused's evidence therefore can be rejected on the basis of probabilities only if found to be so improbable that it cannot be reasonably true*[1]'

[10] On my reading of the judgement, the learned Magistrate's reasoning lacks this final and crucial step. Notwithstanding certain improbabilities in the Appellant's version, the reasonable possibility remains that the substance

thereof may be true. This conclusion is strengthened by the absence of any apparent reason why the complainant did not alert his husband of the appellant in their bedroom who was raping her. On the complainant's version, after the appellant left the bedroom, she woke her husband and asked him to go and open the door for the very appellant who had raped her. Complainant testified that after the appellant had been let to go, she accompanied her husband to go and look for the appellant.

[11] Although the learned Magistrate referred to the existence of the cautionary rule of a single witness, he did not properly apply it to the evidence of the complainant.

[12] The learned Magistrate in his judgement also acknowledged that the State must prove the accused's guilty beyond reasonable doubt. He also acknowledged that if the appellant's evidence was considered in isolation, there can be no real criticism levelled against his evidence.

[13] The approach manifested by a court of appeal in considering an appeal against the findings of fact of a trial court is authoritatively summed up in **R v Dhlumayo & another 1948(2) SA 677 (a) 705**

[14] The court a *quo* sees and hears the witnesses and is steeped in the atmosphere of the trial. In addition the trial judge is in a position to take into account a witness's appearance, demeanour and personality. For these reasons a court of appeal would not be inclined to reject the trial judge's findings of fact.

**(S v Robinson & others 1968(1) SA 666 (a) 6759-H)**

[15] Although, courts of appeal are slow to disturb findings of credibility, they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by the witness's demeanour, but predominantly upon inferences and other facts and upon probabilities ( **Minister of Safety and Security (SCA) & others v Craig & others NNO 2011(1) SACR 419**

[16] It is therefore to be determined whether or not the complainant's evidence that she had not consented to sexual intercourse with the appellant could be accepted as true and beyond reasonable doubt.

[17] It was conceded by the respondent's counsel Advocate J J Kotze that there remains to be doubt in the complainant's evidence.

[18] I therefore find that it is unlikely that the appellant would rape the complainant on the same bed with her husband sleeping next to her. Her behaviour after she pushed the appellant away also casts doubt on her evidence that she was raped.

[19] The court a quo misdirected itself in finding that the complainant's evidence proved the appellant's guilt beyond reasonable doubt.

[20] In the result, I make the following orders:

20.1 The appeal is upheld: and the convictiorrKset aside.

**ACTING JUDGE OF THE HIGH COURT**
**S.T. KEKANA**

I agree, and it is so ordered

**JUDGE OF THE HIGH COURT**
**MOLEFE DS**

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APPEARANCES

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| Heard on | 04 February 2016 |
| For Appellant<br>Chris Liebenberg Attorneys | Adv JJ Kotze |
| For Respondent | Adv K Germishuis |
| Instructed by | State attorney Pretoria |