IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A649/10

DATE: 4 March 2011

In the matter between:

LUYANDA YAMBE Appellant

and

THE STATE Respondent

JUDGMENT

BINNS-WARD, J

In this matter the appellant comes on appeal against his conviction and sentence on a charge of rape. He was charged with the rape of one Wendy Ncogwana at a house in KTC on 14 March 2009.

The evidence against the appellant at the trial was that of the complainant and her sister. It was common cause that the complainant at the time was in an intoxicated state. The evidence of her sister who it would appear had been sober was that the complainant had returned home in a highly intoxicated state and had asked her sister to prepare some food for her. The complainant according to her sister had fallen asleep in a

dishevelled state on a sofa in a room in the house. Her sister left the complainant in that state to go out to get some money and to buy a cool drink. According to the sister's evidence when she returned, which she said was about three minutes later, she found the door to the house, which she had left open, closed; and on opening it, found the appellant on top of the complainant moving his pelvis in a manner which the evidence suggests might have been consistent with the appellant having been engaged in sexual intercourse. She stated, although her evidence was not clear in this regard, that she saw the appellant removing his penis and putting it into his underpants. She said at that stage she saw what she described as sperm which presumably is a reference to semen.

The complainant herself was able to cast little light on events. She confirmed that she had been drinking heavily on the day. She said that the first she knew of events was when she woke up when water was thrown on her to find various people, including the police, around her and somebody or other covering up her state of nakedness. She described that her panties had been pulled down to about her knees. The appellant at that stage, according to the complainant's evidence, was not in the room at all, he was apparently outside in the police van.

The complainant was medically examined directly after the incident and no signs of sexual assault, or indeed of sexual intercourse were indicated in the medical report. Most importantly, there was no evidence of any semen being found in the complainant's private parts.

The appellant's evidence was that he knew the complainant and her sister from the Eastern Cape; that he had been drinking with the complainant on the day in question; that while he was at the house of the complainant and her sister while they were drinking, the complainant's sister left the house for reasons unknown to him and thereafter, having consumed four beers, he and the complainant fell asleep on the sofa. He said the next he knew of matters was when he was awakened by a policeman and accused of rape and put into the police van outside, where he was later joined by the complainant and her sister.

He said that he suspected that the complainant's sister had made a false allegation against him to secure his arrest because of bad feelings between him and her arising out of the break up of a relationship that he said that he had had with another one of their sisters in the Eastern Cape a year or so earlier. The evidence of the complainant and her sister in this regard downplayed the extent to which they knew the

appellant. In fact, it was suggested at one stage that the complainant's sister did not know the appellant, although she herself said that she knew him by sight. I found in that regard her later evidence when she was asked whether it was true that she did not like the appellant somewhat telling, in the sense that she insisted that she liked the appellant, a person whom she said she did not know at all.

The State case was very thin. If there was a case, it should have been better presented. There should have been evidence by the attending police details as to what they found when they came upon the scene. There should have been evidence by the other people who are alleged to have been there and outraged by what had allegedly happened. The suggestion that the complainant's sister would have left the complainant in this indecently exposed state while the police were summoned and neighbours were called in is inherently improbable in my view. Considering the evidence as a whole I am left in material doubt as to the cogency and reliability of the evidence. The complainant herself was plainly so intoxicated as not to be able to cast much light on the matter; and the medical evidence certainly leaves one in doubt as to the veracity in material respects of the complainant's sister's evidence as to what actually happened.

Ms Galloway for the State rightly pointed out that the only evidence of rape consists of a single sentence on the record, which in the context of the evidence seen as a whole is ambiguous and certainly insufficient to be relied upon as evidence that, even if some form of indecent behaviour occurred, it amounted to rape.

The approach of the magistrate to the evidence as a whole was, as rightly conceded by Ms Galloway, misdirected. The magistrate proceeded on the basis of an evaluation of the State's evidence and a conclusion that the evidence of the two State witnesses was reliable. Against that conclusion she tested the probabilities of the creditworthiness of the appellant's evidence, and on that approach unsurprisingly came to the view or conclusion that the appellant's evidence was improbable.

The correct approach, it is trite, was to look at the evidence as a whole, and, in the context of an evaluation of the evidence as a whole, to answer the question whether the State had proved its case beyond all reasonable doubt. I have already referred to the thinness of the State case, and I have pointed out certain improbabilities in the State case. In the context of those inherent probabilities I am firmly of the view that the court *a quo* should have been left in a reasonable doubt as to

whether it was safe to convict the appellant. There is no basis in my view on which the magistrate could properly conclude that the appellant's evidence could not reasonably, possibly be true. The test is not that the appellant had to be believed, the test is could his evidence reasonable possibly be true. In my view the answer to that question had to be in the affirmative.

In the circumstances I would UPHOLD THE APPEAL AND SET ASIDE THE CONVICTION AND SENTENCE.

JAKUJA, AJ: I agree.

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JAKUJA, AJ

BINNS-WARD, J: It is so ordered.

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BINNS-WARD, J

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