IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A540/15

Coram: Le Grange, Binns-Ward et Schippers JJ

In the matter between:

THANDISIZWE JOHN DIAMOND Appellant

and

THE STATE Respondent

Order (Schippers J dissenting): The appeal against conviction and sentence is dismissed.

JUDGMENT: 13 OCTOBER 2016

LE GRANGE, J:

[1] I have had the advantage of reading the judgments prepared by Binns-Ward, J and Schippers J, respectively. Regretfully I differ with the conclusion reached by Schippers, J. I am in agreement with the reasoning and conclusion reached by Binns-Ward, J. I hereby wish to add the following.

[2] On the objective medical evidence it is not in dispute that the complainant suffered a vicious assault on her person. Some of her injuries were also consistent with forced anal penetration by a penis and or similar blunt object. The complainant was also severally traumatised. The medical doctor who examined the complainant noted her traumatised condition.

[3] The Appellant does not dispute that the complainant was assaulted and raped. The Appellant denies he is the culprit. According to the Appellant he is being wrongly accused as the complainant did not sleep at their shared home (shack) on the night of 14 November 2013 when the incident occurred.

[4] It is not in dispute that the Appellant and the complainant were involved in a relationship and had consensual sex on 12 November 2013. At the time the prosecution put the charges to the appellant he was legally represented and must have been fully aware of the allegations against him.

[5] The proceedings at pleading stage were recorded as follows:

> "***AANKLAER STEL AANKLAG 1 AAN BESKULDIGDE***
> *AANKLAER: Kan ek voortgaan met Aanklag 2 Edelagbare?*
> ***AANKLAER STEL AANKLAGTE 2 EN 3 AAN BESKULDIGDE***
> *HOF: Mnr Diamond, u het gehoor die klagtes soos uitgelees deur die aanklaer vir u getolk. Twee klagtes van verkragting en dan een aanklagte van aanranding met die opset om ernstig te beseer. Verstaan u al drie hierdie aanklagte teen u?*
> *BESKULDIGDE: Ek verstaan U Edele.*
> *HOF: Wat pleit u op hierdie drie aanklagte?*
> *BESKULDIGDE: Op die van die verkragtig U Edele, pleit ek onskuldig, want hierdie person … Ek het saam met hierdie person gebly. En ek het nie vir haar geforseer nie U Edele, want ons het by, met toestemming het ons geslagsgemeenskap gehad.*
> *HOF: Goed. Mnr Diamond, u doen nou Mnr Hartzenberg se werk voor hom. Ons gaan later kom by die pleitverduideliking. Al wat die hof nou by u wil weet. U het vir die hof gesê u verstaan die aanklagte. Die hof wil nou weet, pleit u skuldig of pleit u onskuldig op die aanklagtes?*

BESKULDIGDE: Skuldig aan die aanranding U Edele.

BESKULDIGDE PLEIT SKULDIG OP AANKLAGTE 3

HOF: En op die klagtes van verkragting meneer?

BESKULDIGDE: Ek het nie verkrag nie U Edele.

HOF: Mnr Diamond, beteken dit dat u onskuldig pleit op aanklagte 1 en 2?

BESKULDIGDE: Ek pleit onskuldig U Edele op die eerste klagte en op die tweede klagte, want dis wat ons altyd doen. Ons het geslagsgemeenskap altyd. Ons doen dit U Edele."

[6] Although the Appellant elected to exercise his right to remain silent after these statements were made, he spontaneously admitted to sexual intercourse with the complainant on the date mentioned in the charge, that being the 14th of November 2013. The only aspect disputed by the Appellant was his contention that the sex was consensual.

[7] It is now trite that where an admission is made during plea proceedings which were not recorded as a formal admission, it is indeed evidential material. This so because it was made in court and as such recorded. The practical effect of this is not only that the admission by the accused may be used in cross-examination to discredit him, but also that in an appropriate case it can on its own serve to prove an issue in favour of the state. In this regard see (Butterworths, *Law of Evidence* by C Schmidt & H Rademeyer [Issue 7] at 9-44 and the cases referred to therein.) 'An informal admission is of course not necessarily sufficient proof of any fact, and an accused is always at liberty to lead evidence to refute, qualify or weaken the effect of the admission. See *S v Cloete* 1994 (1) SACR 420 (A) at 424 d-f.

[8] In this instance, the Appellant failed to lead evidence to refute, qualify or weaken the effect of the admission but advanced an entirely new defence.

[9] But, even in the absence of such an informal admission, on a conspectus of all the evidence, this is one of those cases where in considering the merits and demerits of the evidence presented, one must not allow the exercise of caution to displace the exercise of common sense. See: *S v Sauls and Others* 1981 (3) SA 172 (A) at 180 E.

[10] In the result the following order is made:

The Appeal against conviction and sentence is dismissed.

LE GRANGE, J

BINNS-WARD J:

[11] I had the privilege of reading in draft the judgment prepared by my brother, Schippers J, after the first hearing of the appeal. This judgment, in which I set out my reasons for arriving at a different conclusion, was written in response to that draft. The matter was subsequently reheard after Le Grange J was enlisted as an additional member of the court in terms of s 14(3) of the Superior Courts Act 10 of 2013. After the rehearing Schippers J revised the draft considered by me after the first hearing, and recast his judgment as a minority judgment. I have considered his revised judgment in draft. Its content has not required me to alter my originally prepared judgment, save for this explanatory first paragraph.

[12] I agree with my colleague's assessment that the magistrate was misdirected in her treatment of the evidence; more particularly, in appearing to hold that the contradiction of an aspect of the appellant's evidence by one of the witnesses called in his defence afforded a sufficient basis, by itself, to reject the evidence for defence and bring in a conviction. As Schippers J has rightly emphasised, with reference to the principle lucidly expressed in the

oft-cited dicta of Nugent J in *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449j-450c, all of the evidence must be accounted for in the judging process. How the appropriate conclusion is reached in a given case, namely whether it has been proven beyond reasonable doubt that the accused is guilty, or whether it is reasonably possible that he might be innocent and entitled to acquittal, will, as Nugent J observed, 'depend on the nature of the evidence which the court has before it'. There is no empirical formula. The court is required to exercise its judgment on the evidential material before it considered and evaluated holistically. The exercise requires choices to be made and preferences determined. It is critical, however, that they be justifiable in the context of the evidence as a whole.

[13] Indisputable facts and objective criteria, along with any inherent probabilities in the given context, play an important part in determining issues in respect of which there has been conflicting evidence, and also in determining, with reference to the evidence as a whole, whether there is scope for reasonable doubt in an accused's favour. Where there are mutually conflicting versions assistance may be derived from the analytical approach described by Nienaber JA in *Stellenbosch Farmers' Winery Group Ltd & Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5,[1] provided, of course, that in applying it the court

[1] *On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.*

must be mindful and respecting of the more demanding standard of proof in criminal trials and the effect of the presumption of innocence. (Nothing in *Martell et Cie* is in conflict with the approach stated in *S v Saban en 'n Ander* 1992 (1) SACR 199 (A) at 203j-204c referred to by Schippers J. It merely sets out the indicated approach in more detail.)

[14] For the reasons given below, and notwithstanding my endorsement of his criticism of the trial court's judgment and the ineptness of the prosecutor's cross-examination, I have found myself unable, on an assessment of the evidence on the basis summarised above, to agree with Schippers J's conclusion that the appeal against conviction should succeed.

[15] There is no reason to doubt the complainant's evidence that she was brutally assaulted and raped during the night of 14 November 2013. The nature of the assault, as she described it, was corroborated by the findings noted in the medical examination that she underwent at about midday the following day, after she had reported the matter at the Athlone police station early that morning. The only question is whether her implication of the appellant as her assailant was established beyond reasonable doubt.

[16] She had been in a live-in relationship with the appellant (to whom she referred by his nickname 'Donker') for some months at the time. She testified that the appellant had accused her of being unfaithful to him and that despite her denials he had assaulted her and proceeded to rape her, first vaginally, when he had worn a condom, and then anally, after he had removed the condom. She described how the appellant had bitten her breast and then while raping her anally had bitten her on her back.

[17] The medical evidence confirmed that amongst her injuries were three aberrations that were consistent with bite marks. Two on her back and one on the lateral aspect of her chest. She also had five 'fresh' anal tears, three of which were deep, and 'fresh swelling around the

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In a criminal trial, what Nienaber JA called '*the hard case*', the accused would be given the benefit of the doubt, as no doubt also in a case in which 'all factors were equipoised', for in those situations the reasonable possibility of the truth of the accused's version would be starkly evident.

peri-anal area'. The examining doctor opined that the anal injuries were consistent with the consequences of 'recent forcible anal penetration with a penis or an object'. The complainant's other injuries included bilateral peri-orbital bruising and swelling, which would suggest that she had sustained blows to the face in the area of both her eyes. She described to the doctor that she had bled from the nose and the mouth.

[18] It was not suggested to the complainant, or the doctor who had examined her, that the injuries identified in the medical report put in at the trial had not been sustained, as she described, on the night before she was examined. On the contrary the doctor's description of some of them as 'fresh' corroborates the history given by the complainant as to when she sustained the injuries. The doctor testified that the injuries could have been sustained within a 72 hour period preceding the examination, but it may be inferred from the other evidence, which contained no indication, such as would have been expected had the position been otherwise, that the complainant had showed any signs of distress in the early evening of 14 November that she sustained them during the time between then and when she reported to the police early on the morning of 15 November. The examining doctor noted that the complainant had looked 'traumatised'. She indicated that in the case of a sexually active woman like the complainant who had borne children the absence of vaginal injuries was not irreconcilable with a report of forced intercourse.

[19] The complainant testified that the sexual assault had occurred in the shack in which she and the appellant lived in an informal settlement at Vygieskraal in the Athlone area of Cape Town. It was common cause that they shared those living quarters with one Elias Buyane (more often referred to in the evidence as 'Unsotho' or variants of that name), who slept in an area separated by only a curtain from that in which the appellant and the complainant slept. The complainant readily acknowledged that their respective beds were in fact in close proximity on either side of the curtain.

[20] In answer to a standard question in the course of the medical examination, the complainant reported that the last occasion on which she had engaged in consensual sexual intercourse before the rape was on the night of 12 November. The consensual intercourse had been with the appellant. A condom had not been used on that occasion. The factual premise of this aspect of the complainant's report to the examining doctor was not in dispute at the trial. It was not suggested that the consensual intercourse had occurred anywhere else but at the shack where they lived. The complainant made no secret of the fact that Buyane had been present in his part of the shack when she was raped and that, if he had been awake or had cared to listen, he would have been able to hear what was going on. She said that Buyane was always present in the shack at night. Her evidence in this respect was not challenged. It is evident therefore that intimate relations between the complainant and the appellant must have been conducted with a minimum of privacy. Indeed, it emerged in the appellant's evidence that Buyane was also in the habit of engaging in sexual relations with women when the appellant was present in his part of the shack. One can easily imagine that people forced to live in such uncomfortable proximity to each other would develop a tendency to turn a deaf ear to the activities of their cohabitants, if only as a means of respecting and maintaining their respective dignity.

[21] The complainant testified that the sexual assault on her had been perpetrated after she and the appellant had returned to the shack from a nearby shebeen. She said that the appellant had earlier gone by himself to a shebeen after his return from work. Upon his return he had accused her of infidelity and had forced her to go out with him to a shebeen. There, they had sat with some of the appellant's friends, none of whom she knew by name. She said that the appellant had insisted that she drink some wine. Upon their return to the shack, the appellant had instructed her to undress and then proceeded to examine her lower body in the area of her private parts. He had then ordered her to pass a condom to him,

whereafter he proceeded to have intercourse with her. She described the intercourse as abnormal, not as they would ordinarily engage in. The appellant had bitten her. He then removed the condom and penetrated her anally from the rear. He bit her again; this time on her back.[2] She had wept and asked him to desist. After he had finished, the appellant went to sleep. The complainant said that she had tried to find the key to the shack in order to escape, but was unable to find it in the dark. She spent the rest of the night next to the slumbering appellant waiting for it to grow light. As soon as it was light enough to see, she found the key and let herself out. She went to the neighbour's shack where she kept her identity document. Having collected her identity document, she went to the police station where she made a report to Constable Samuels.

[22] Constable Samuels confirmed that the complainant had reported a complaint to him at the Athlone police station early on Friday, 15 November. He said that the complainant had initially stated at the charge office counter that she had been assaulted by her boyfriend, and that it was only after he had taken her aside to take down her statement that she disclosed that she had been raped '*van voor en agter*'. In my view the particular significance of Samuel's evidence was that his description of the complainant's behaviour was consistent with that of a traumatised and embarrassed woman. Had she been intent on falsely charging the appellant with raping her, one would have expected her to be forthright, rather than reticent, in her accusation. (The same might be said of her unwillingness to say anything to her neighbour when she collected her identity document before going to the police station.)

[23] Under cross-examination the complainant was taxed with her failure to have reported the assault to Buyane and to have engaged his assistance. She replied that Buyane was not someone with whom she was able to engage. Apart from language difficulties - the

[2] The judgment of Schippers J sets out a more detailed account of the complainant's evidence concerning the assaults to which she was subjected, including details of when and how the appellant had punched her with his fists.

complainant spoke Afrikaans, whereas Buyane gave his evidence through an indigenous African language interpreter, he was not the sort of person who was given to listening to other people's problems.[3]

[24] The appellant denied having raped the complainant. He maintained that she had not spent the night in their shack. He testified that when he returned from work on the evening of 14 November, the complainant had told him that she was going to visit her aunt. He said that he had gone to a shebeen with a friend and work colleague who lived close by, Nkuseli Magqubushana. He and Magqubushana returned between 10 and 11 p.m. He went to his shack and Magqubushana to his. The door of his shack was locked and Buyane had to let him in. (Buyane had been sharing the shack with him for two to three years, but they were old acquaintances, having known each other since 1996.) The complainant was not present. Buyane told him that she not been there all evening. He and Buyane then repaired to their respective beds for the night. He said that he spent the rest of the night in the shack.

[25] The appellant said that the complainant had returned early the next morning. He said that he was busy with his morning ablutions, sometime before 7 o'clock, when there was a knocking at the door. He opened it to find the complainant there. He said that she had come back to wash herself. According to the appellant, the two of them had become involved in an argument about her absence. She struck out at him and he retaliated by slapping her face once with an open hand. She continued hitting him, to which he then reacted by punching her once with his fist in the face. (When testifying under cross-examination, the appellant

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[3] The relevant passage in the complainant's evidenceA under cross-examination went as follows:
Appellant's attorney: U sien maar dan verstaan ek nie hoekom u nie saggies vir Msotho kon gevra het, luister, waar's die keys nie, siende jy al een is wat die sleutel het, ek moet prober wegkom hierso?
Complainant: Ek wou nie vir Msotho gevra het nie, want Msotho … Hy's *soos* een wat doof is. Jy moet *ook* hard praat. [My italics.)
Attorney: So hy's doof. Jy moet hard praat met hom?
Complainant: Ja. Hy's *kind of*, hy hoor nie wat jy eintlik vir hom sê nie. [Italics in the original.]
I do not understand the complainant to have suggested that Buyane was extremely hard of hearing. The evidence fell to be understood in the context of the complainant's earlier evidence that she did not feel comfortable in confiding to Buyane, with whom she plainly had no sense of affinity, and her expressed anxiety not to do anything that might cause the appellant to wake up.

described the assault differently, stating that he had struck the complainant with both fists. He demonstrated how it had been first with the left fist and then the right. At the conclusion of his evidence, when questioned by the magistrate on the order of the blows he had administered to the complainant, he contradicted himself further by stating that he had struck her first with his fists and then slapped her face with an open hand. In cross-examination of the complainant it had been put to her by the appellant's attorney that the appellant had struck her twice; first with an open hand to the face and then once with his fist to her eye.) He then went off to work with Nkuseli Magqubushana. He mentioned to Magqubushana on their way to work that he had assaulted the complainant.[4] He was arrested after his return from work on 15 November.

[26] It was put to the complainant in cross-examination that Buyane would be called to testify that she had not spent the night in the shack and that only Buyane and the appellant had spent the night there. Buyane was indeed called to testify in the defence case. I shall discuss his evidence presently.

[27] It was also suggested to the complainant in cross-examination by the appellant's attorney that she had initially withdrawn the charges and then had them reinstated when he had refused her requests that they should become reconciled. The complainant refuted this suggestion. She testified that she had not withdrawn the charges. She had in fact been shocked to discover that the appellant had been released. She made enquiries with the investigating officer as to what had happened and had been informed that the police personnel responsible for processing the appellant in the criminal justice system had neglected to do their job properly. Indeed, it would appear that the appellant, having been arrested on a Friday afternoon, was taken to court only on the following Tuesday and thereby detained longer than the Criminal Procedure Act permitted. That would no doubt explain

[4] He used the word 'geskop', which translates literally as 'kicked'.

how the appellant, according to his own evidence, came to be released at court without even appearing before a magistrate. The complainant testified that she had pressed the investigating officer for the charges against the appellant to be proceeded with. In point of fact the appellant was summonsed to appear on the charges more than nine months after his initial release.[5]

[28] The investigating officer, Sergeant De Vries, gave evidence at the trial. No questioning was directed to De Vries by the appellant's legal representative to challenge the complainant's evidence that she had not withdrawn the charges, or that having done so, she had later sought their reinstatement. I would have thought that if the charges had indeed been withdrawn by the complainant that would have been an obvious point to put to the investigating officer when the opportunity presented. The appellant's legal representative also did not seek to elicit any evidence from De Vries to contradict the complainant's evidence that she had enquired of him why the appellant had been released and that she had insisted that the charges be pursued.

[29] Moreover, an indication of any previous withdrawal of the complaint by the complainant would, no doubt, have been evident on the police docket. If there had been any such indication, there would have been an ethical duty on the prosecutor to disclose it in the face of the complainant's denial of the proposition under cross-examination. The position would be indistinguishable in principle from that which pertains where there is a material discrepancy between the evidence of a state witness given in court and the content of a prior statement by the witness in the prosecutor's possession (cf. *S v Xaba* 1983 (3) SA 717 (A) at 728E-730E).

[30] The absence of any cross-examination of De Vries on the point and the silence of the prosecutor both weigh in favour of an acceptance of the complainant's evidence and cast

[5] The record indicates that the appellant's first appearance on the charges was on 5 August 2014.

doubt on the aspersions against her in the evidence of the appellant and the two other defence witnesses. As it happened, the appellant conceded that he was unable to dispute the proposition put to him by the prosecutor that he had been released without appearing in court, not because the charge had been withdrawn, but because he had been detained beyond the statutory time limit.

[31] Turning now to Buyane's evidence. It was only partly consistent with the version put to the complainant in cross-examination. He did indeed say that the complainant had been absent from the shack on the night in question. But he contradicted the appellant's claim to have spent the night there. He testified that after he had let the appellant in during the night of 14 November after the latter's return from the shebeen, the appellant had immediately gone out again and had returned only the following morning shortly before the complainant arrived at the shack.

[32] Buyane's evidence that the appellant had not spent the night in the shack evidently came as a surprise to the appellant's attorney. So much so that the attorney first asked him whether he had been drinking that evening, and then asked him whether he had been drinking the night before he gave evidence. (It is noteworthy in this regard that the prosecutor, during her address at the end of the trial, remarked '*Ongelukkig blyk dit dat mnr Unsotho wel onder die invloed van sommige enige* (sic*) tipe alkohol was toe hy kom getuig het*'. The remark did not attract dissent from either the magistrate or the appellant's attorney.)

[33] Buyane's evidence as to the appellant's arrival back at the shack on the morning of 15 November was also inconsistent. He initially stated (twice) that he had let the appellant in after the appellant had knocked on the door for admission early in the morning. He later stated that he had seen the appellant outside the shack urinating when he went out to get water to wash first thing that morning. and that he had remarked '*O, jy is hier Donker*'. When the appellant's attorney in essence cross-examined his own witness on the

contradiction, Buyane then gave a third version, which was that he had let the appellant in and gone back to bed and then got up shortly afterwards to get water and that it had been when he was returning with the water that he had encountered the appellant outside urinating. The attempt to reconcile the first two conflicting versions was unconvincing; particularly in the context of the aforementioned remark, consistent with what would be said on a first encounter, that he had described having uttered in the context of the second version.

[34] Buyane denied that he was hard of hearing. There was no reason to doubt his evidence in that respect. In my assessment, however, the investigation into Buyane's auditory capacity was misdirected. It arose out of a misapprehension as to the gist of the complainant's statement that he was not a person given to listening to others, in other words not the sort of person to whom she would wish to turn for assistance. The gruffness of Buyane's manner came across in his evidence. For example, he told the appellant's attorney during his evidence in chief, when the latter suggested that his evidence was not clear on a particular point, '*Jy moet nou mooi luister op hierdie manier wat ek vir jou verduidelik*' and then after offering an explanatory clarification rounded it off with '*is dit duidelik*?'.

[35] Buyane often did not give clear and unequivocal answers to questions directed to him in his evidence in chief. So, for example, the following exchange as to the complainant's knowledge as to where the key to the shack was kept:

> *Appellant's attorney: Weet sy waar die sleutels is as u-hulle slap in die aande?* --- *Wie?*
> *Appellant's attorney: Janette [the complainant]?*
> *Buyane: Janette sal praat met haar man oor die sleutel as hy miskien wil oopmaak dan sal hulle praat oor hulle sleutel. Ek het my eie sleutel.*
> *Appellant's attorney: Ek gaan my vraag weer herhaal. Weet sy waar die sleutels is?* --- *Ja, sy weet die sleutel is by haar man. As sy wil oopmaak dan vra sy haar man.*

And about whether he had seen the complainant again after she had reported having been raped by the appellant:

> *Appellant's attorney: Goed. Het u daarna die storie dat hy nou vir haar verkrag het nè, het u vir haar weer gesien? --- Ek het gehoor dat het vir hulle (sic) daar geneem, hulle het vir Athlone toe geneem dit is maar wat ek gehoor het.*
> *Appellant's attorney: Ek gaan my vraag herhaal. Het u haar weer gesien? --- Ek het weer vir haar kom sien toe ons vir haar gevra het wat het gebeur jou en Donker en sy het gesê sy het 'n saak gemaak want hy het vir haar verkrag. Toe sê sy dat sy kan gaan dat hy kan vrygelaat word en toe word hy vrygelaat. Dit is die storie.*

[26] In my view, a close analysis of Buyane's evidence justifies the conclusion that he was a poor witness.

[27] Of striking significance, when the evidence is considered as a whole, is the absence of any indication in the evidence of the appellant or of Buyane as to their alleged encounters with the complainant on the morning of 15 November that she appeared injured or distressed in any way when they say they saw her. The objective indications being that the compliant had been brutally sexually assaulted during the night of 14/15 November, it seems to me extremely unlikely that she would not have noticeably traumatised by the experience and that her traumatised condition would have been evident to anyone seeing her early in the morning of the 15th. Indeed, as mentioned, the doctor who examined her some hours later noted her traumatised appearance. And Constable Samuels' description of her report at the police station gives the impression that she was subdued and inhibited. Those descriptions, which accord with what might have been expected in the circumstances, are irreconcilable with the impression of a defiant and aggressive demeanour conveyed in the evidence of the appellant and his shack-mate concerning the complainant's alleged behaviour. Having regard to the trauma she had just been through, the description of her behaviour early on the morning of 15

November given by the appellant and Buyane is strikingly inconsistent with the inherent probabilities.

[28] The effect of the significant improbability in the version of the appellant and Buyane is compounded by the material conflict between their respective versions. The appellant, consistently with the complainant's evidence, has himself sleeping in the shack overnight, while Buyane was adamant that he had not spent the night there. In the context of both the complainant and the appellant placing themselves in the shack at the material time, Buyane's evidence that neither of them was there had to raise questions about his reliability. The question mark raised in respect of this evidence in this most important aspect fell to be assessed in the context of the incongruent character of his other evidence discussed earlier. And those factors, taken together, had to be seen in the context of his longstanding connection with the appellant, which justified an especially critical scrutiny of his evidence because of the inherent danger in the circumstances that he might be less than impartial, or even susceptible to giving false testimony in support of his friend.

[29] Nkuseli Magqubushana testified that he was a good friend of the appellant. He came from the same area in the Eastern Cape. They had known each other for about six years. He also knew the appellant's mother in the Eastern Cape. He lived in a shack about four shacks away from that in which the appellant lived. He also knew the complainant. He described that she was employed as a domestic worker in Surrey Estate. His evidence in that respect was in contradiction of that of the appellant, who had said that the complainant had not worked during the period that she lived with him in the shack. The appellant's evidence in that respect was consistent with that of the complainant. Magqubushana also contradicted the appellant by stating that the complainant had only stayed over at the appellant's shack now and then (*Afr*. 'partykeer'). That evidence was inconsistent with that given by all the other lay witnesses in the case. It was also contradicted by the investigating officer's confirmation

of the evidence of the complainant that the police had arranged alternative accommodation for her at Saartje Baartman House. That would not have been necessary if she already had somewhere else to live. These inconsistencies call into question the reliability of Magqubushana's evidence.

[30] Magqubushana stated that on the evening of 14 November 2013, after their return from work, he and the appellant had gone to a shebeen together. He recalled that they had been in the company of other friends there, but claimed to be unable to recall who they were. This suggested a selective memory because, curiously, at a remove of two years, he purported to be able to remember that they had consumed six bottles of sweet wine. Magqubushana said that he and the appellant had returned home together at about 10:00 pm. He had gone to his shack and the appellant to the appellant's shack. He went to the appellant's house the following morning to call him to come to work. He said that the appellant was asleep and did not respond to his shouts. He went off to work alone, but the appellant caught up with him along the way. He said nothing about having seen either the complainant or Buyane when he went to the appellant's shack early on the morning of 15 November. He did however relate that the appellant had told him on the way to work that the complainant had not slept at the shack the previous evening and that she had arrived just before he left. He said that the appellant had been arrested when they returned home from work.

[31] Magqubushana's recollection was that the appellant had been released approximately three weeks after his arrest when the complainant had withdrawn the charges. His recollection in this respect was demonstrably incorrect on both counts.

[32] Magqubushana supported the appellant's version that the charges had been reinstituted when the appellant had refused her entreaties to take her back. His evidence in chief in the latter respect was given with a marked absence of corroborating detail and left the impression that it was based on what he had been told, rather than what he had witnessed.

Under cross-examination, however, he claimed that the complainant had told him directly that she had withdrawn the charges. Had this indeed been so, one would have expected the appellant's attorney, who throughout the trial dealt with leading evidence in chief and cross-examination with consistent attention to detail, to have elicited the evidence in chief, and also to have put it to the complainant in cross-examination. He did not. I have already dealt elsewhere with the improbabilities that attend the suggestion that the charges had been withdrawn at the instance of the complainant and the circumstances of their reinstatement.

[33] There is nothing irreconcilable between between Magqubushana's evidence as to events on the evening of 14 November and that of the complainant. She described how she was forced to accompany the appellant to a shebeen after he had come home from the shebeen to which he had gone earlier in the evening on his return from work. Magqubushana did not purport to know what the appellant had done after the two of them had gone their separate ways when they returned from the shebeen.

[34] The magistrate found the complainant to be 'a very good witness'. She also stated that the appellant and Nkuseli Magqubushana were good witnesses, but nevertheless concluded that their evidence and that of Buyane fell to be rejected as 'improbable, mendacious and false'. Unfortunately she failed to explain these on-the-face-of-it contradictory findings. It seems to me that in describing the appellant as a good witness, the magistrate was referring to his demeanour, with which she apparently could not find fault. Appellate courts have cautioned against the attachment of too much weight by trial courts in the determination of cases to the demeanour of the witnesses. They have stressed the importance of rather paying close attention to the content of the evidence and the extent of the coincidence of its content with the probabilities (see e.g. *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) at 979B-I). This would appear to have been what the

magistrate must have done. It is unfortunate, however, that she failed to articulate her reasoning in the judgment.

[35] I can find no fault in the assessment of the trial court that the complainant was a satisfactory witness and in its finding that she had given a truthful account. The complainant bore up well under a long and detailed cross-examination. Her evidence against the appellant was supported by her conduct in reporting the matter to the police at the earliest opportunity and her description of the nature of the assault on her was supported by the objective indicators noted at the medical examination. It was inherently improbable that she would falsely attribute the brutal sexual assault to her boyfriend rather than to the person who had actually assaulted her, which is the implication in the appellant's evidence.

[36] I have already identified various material respects in which the evidence of the appellant and his supporting witnesses was internally and mutually contradictory and improbable. It bears noting that these improbabilities and contradictions were evident notwithstanding that the defence witnesses were hardly cross-examined and that the quality of the superficial cross-questioning that was addressed by the prosecutor was lamentable. (I agree with the observations made by Schippers J about the importance in general of proper cross-examination. In the context of the current case, however, it is difficult to see how a more effective cross-examination could have resulted in the calling by the appellant of further evidence or could have led to a relevant or material qualification by any of the defence witnesses of their evidence. The improbabilities in the defence evidence were innate, the contradictions established and in material respects impossible to reconcile.) The effect is that I have not been persuaded on appeal that the trial court erred in rejecting the evidence of the appellant and Buyane as untruthful.

[37] In the result I would dismiss the appeal against conviction.

[38] The rape offences of which the appellant was convicted were subject to a prescribed sentence of life imprisonment in terms of the Criminal Law Amendment Act 105 of 1997. All three counts (the two counts of rape and a count of assault with intent to do grievous bodily harm) were taken as one for sentence and he was sentenced to 15 years' imprisonment. The magistrate took the following factors into account in determining that there were substantial and compelling reasons to depart from the prescribed sentence: that he was for practical purposes a first offender, that he had already spent ten months in custody, that the commission of the offences had been inspired by alcohol and jealousy, and (without derogating from the seriousness of the offences) that they were not the worst instances of rape with which the court had had to deal. Sentencing is pre-eminently a matter within the discretion of the trial court. I am not persuaded that any basis has been shown upon which this court could hold that the magistrate was materially misdirected in the exercise of her discretion. The sentence imposed is by no means shockingly inappropriately severe. I would therefore also dismiss the appeal against sentence.

[39] In my judgment the appropriate order would be 'The appeal against conviction and sentence is dismissed'.

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BINNS-WARD, J

SCHIPPERS J:

[40] I have read the judgments prepared by my colleagues, Le Grange J and Binns-Ward J. I respectfully disagree with the conclusion to which they have come. In my view, the State did not prove its case beyond reasonable doubt.

[41] The appellant was charged in Wynberg Regional Court with two counts of rape under s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and assault with intent to do grievous bodily harm. The State alleged that on 14 November 2013 and at Athlone, the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant without consent: vaginally (count 1); and anally (count 2); and that he assaulted the complainant by slapping her, hitting her with his fists, and biting her (count 3). The appeal lies only against conviction and sentence in respect of the charges of rape (counts 1 and 2).

[42] The appellant was legally represented. He pleaded not guilty to charges 1 and 2, exercised his right to remain silent and did not furnish a plea explanation. He pleaded guilty to count 3. He admitted assaulting the complainant by slapping her and hitting her with his fists around her eyes, but denied intent to cause grievous bodily harm. His assault on the complainant was recorded as an admission in terms of s 220 of the Criminal Procedure Act 51 of 1977.

[43] I respectfully disagree that the appellant's defence, when he pleaded to the charges of rape, was one of consent; and that he advanced an entirely new defence at the trial. The record shows that when the appellant made a statement to the effect that he lived with the complainant and they had engaged in consensual intercourse, the Magistrate replied, "Ons gaan later kom by die pleitverduideliking". What is clear is that the appellant's attorney informed the court that the plea of not guilty accorded with his client's instructions and that

the appellant had elected to exercise his right to remain silent. That is also how the Magistrate understood his plea, as appears from the judgment.

[44] On 6 August 2015 the appellant was found guilty as charged on counts 1 and 2. On count 3 he was found guilty of assault with intent to do grievous bodily harm by hitting the complainant with his fists and slapping her (the State alleged that he also had bitten her). All three counts were taken together for the purpose of sentence and the appellant was sentenced to 15 years' imprisonment.

The evidence

[45] The state adduced evidence by the complainant, two police officers and Dr A Narula, a clinical forensic medicine practitioner.

[46] The complainant testified that at the time of the incident, she was living with the appellant in an informal settlement in Vygieskraal, Athlone. They lived in a shack with a single room which they shared with Mr Elias Buyane ("Buyane"). They had had a good relationship, but the appellant was very jealous. He had never threatened or assaulted her prior to the incident on 14 November 2013; and two days before that they had engaged in sexual intercourse.

[47] The complainant's evidence concerning the incident, in summary, is as follows. On 14 November 2013 the appellant returned from work, put down his bag and left. Later he returned and accused the complainant of having been with another man that day. He then hit her once with his fist above her eye and took her to a shebeen. There, she said, he forced her to drink wine and refused to let her to go to the toilet. As they left the shebeen, he asked her to be honest (as to whether she had been with another man). When she denied it he again hit her with his fists in her face.

[48] When they got home the appellant locked the door. He asked the complainant to undress, which she did, and again hit her with his fists. He told her to lie down and asked her for a condom, which she gave him. They then had sexual intercourse, in the complainant's words, "*nie soos ons normaal seks gehad het nie*". He turned her on her side, removed the condom and had anal sex with the complainant. She cried and told the appellant and that he was hurting her. He hit her, bit her on her back and banged her head against a cupboard. She said that all she could do was cry. The appellant's sperm ran down her legs and he fell on to his back. Later, she heard him sleeping. She got up to look for the key to the shack but it was dark and she could not find it. She got dressed and sat on the bed. She did not sleep. When it became light she found the key on the cupboard, went to a neighbour to collect her identity document and immediately went to the police. She said that she did not tell the neighbour about the rape because she did not want to talk to anybody about it.

[49] The complainant said that at the time of the incident, she was not drunk. The appellant had consumed alcohol but was not very drunk. Buyane was in the same room (separated by a curtain) and was sleeping. The complainant said that she did not alert Buyane to the rape because they are all afraid of the appellant; that she herself is afraid of the appellant; and that Buyane is like one who is deaf - he does not actually hear what one says to him.

[50] Constable Adriaan Samuels ("Samuels") testified that at about 08:05 on 15 November 2013, the complainant called at Athlone police station to open a case of assault against the appellant. Samuels noticed that her eyes were bruised and swollen. The complainant did not inform him how the assault took place or how the injuries were sustained. Upon further questioning, the complainant informed Samuels that the appellant forcefully had sex with her, as she said, "*van voor en van agter af*". He informed his superior, Lieutenant Helsinger, the

trauma counsellor in the area. The complainant was then taken to the trauma room and later to the district surgeon.

[51] Dr Narula testified that she saw the complainant at 12:15 pm on 15 November 2013 at JF Jooste Hospital in Athlone. The report of her medico-legal examination states that there were some fresh and old external injuries on the complainant's body. She had a fresh aberration on the left forearm; a circular aberration resembling a bite mark on the left posterior shoulder, right posterior shoulder and left of the chest; and periorbital swelling and bruising around both eyes. The complainant also had fresh bruises on her neck and left anterior shoulder; fresh aberrations in the upper and lower inner lip; and old bruises on the left arm. Dr Narula concluded that these injuries were consistent with blunt force trauma and the history which the complainant gave her. Dr Narula did not notice any evidence of drugs or alcohol intoxication at the time of the examination.

[52] Dr Narula's gynaecological examination revealed no fresh tears or bruising of the hymen; no bleeding or discharge; no injuries of the perineum; and no other injuries. Her conclusion was an absence of severe injuries in a sexually active woman with a carunculated hymen, which did not exclude the possibility of forcible vaginal penetration with a penis or an object. The anal examination revealed fresh swelling and bruising around the peri-anal area; and fresh, deep tears at the orifice. Dr Narula concluded that these findings were compatible with recent forcible anal penetration with a penis or an object. She said that the injuries which the complainant sustained could have happened within 72 hours of her examination.

[53] Sergeant Angelo De Vries of the Family Violence, Child Protection and Sexual Offences Unit, Nyanga cluster, testified that he obtained a DNA sample from the appellant with his consent, on 15 November 2014. This sample and a crime kit (consisting of the complainant's underwear and a DNA sample retrieved from her) were sent to the police

forensic laboratory. The result of the forensic analysis is contained in an affidavit by Warrant Officer Michelle Baard, admitted in evidence in terms of s 212 of the Criminal Procedure Act. The affidavit states that the DNA result from the reference sample of the appellant is read into the mixture DNA result of the complainant; and that the most conservative occurrence for all the possible contributors to the mixture DNA result is 1 person in every 130 000 people. In short, it appears that the appellant's DNA was found on the complainant.

[54] The appellant testified in his defence. He and the complainant lived together for nine months. Their relationship ended because the complainant, who was unemployed, used to sleep out and return the next morning. When he would ask where she had been, she would say that she slept over at the home of friends or a certain female friend. On the day of the incident the appellant saw the complainant drinking at the home of a neighbour on his return from work. She returned home after he had washed himself and said that she was going to her aunt. Later that night he left with Mr Nkuseli Magqubushana ("Nkuseli"), a fellow employee, to a shebeen. The complainant had not yet returned home. On the appellant's return home, the door was locked from the inside. He knocked on the door and Buyane opened it. They sleep in the same room in the shack, and their beds are separated by a curtain. He asked Buyane if the complainant had returned. He said no. The appellant closed the door and they went to sleep. As he was getting ready for work before 7 am the next morning, there was a knock on the door. It was the complainant. He asked where she had been, but she scolded and slapped him. He hit her with his fist, slapped her and told her to leave. He went to Nkuseli and they left for work. On returning home he was surprised to hear that the investigating officer had been looking for him in connection with a rape case. About 10 minutes later he was arrested.

[55] At the police cells the investigating officer told the appellant that the complainant had laid a charge of rape and assault against him. The appellant denied raping or biting the

complainant, but admitted assaulting her before he went to work that day. He said that she did not sleep in the shack on the night that the alleged rape occurred; that he does not know where she was that night; that he did not at any time have anal sex with the complainant; and that Buyane is not deaf and can hear very well. The appellant spent that weekend in the police cells and was subsequently taken to Wynberg Magistrate's Court where he was later released. The appellant returned to the site where he had been working. He said that he was not given any reason for his release.

[56] The appellant testified that about six weeks later the complainant approached him at another house and wanted them to get back together. He refused because she had sent him to jail. Subsequently she returned on more than one occasion and asked him to resume their relationship. However, when she saw that he was involved with another woman he received a notice at work advising him to report to Wynberg Magistrate's Court for the rape case. That happened about three months after his first arrest.

[57] The appellant's evidence was not really challenged in cross-examination. It comprises only 7 pages. He was asked about his relationship with the complainant which he said lasted for nine months. He maintained his innocence and admitted that he assaulted the complainant on 15 November 2013, when she returned home. He disagreed with the DNA result, stating that the complainant had not slept with him on 14 November 2013. (It is common ground that they had engaged in sexual intercourse two days before.) He said that Buyane can hear very well. The appellant also said that he had his own key to the shack.

[58] Nkuseli testified that he knows both the appellant and the complainant who lived together. He worked with the appellant. After they returned from work on 14 November 2013 the appellant went to Nkuseli and from there they went to drink at a shebeen in the informal settlement. The complainant did not drink with them. They returned home at about 10 pm that night. The next morning they left together for work. Nkuseli said that after the incident

he saw the complainant but could not remember how many times. He confirmed the appellant's version that after the case had been withdrawn, the complainant returned and again wanted to live with the appellant, who refused.

[59] Buyane testified that on the night in question, the appellant and Nkuseli went drinking. At around 10 pm the appellant returned, but left again. When he locked the shack that night, the complainant was not home. The uncontradicted evidence was that Buyane did not drink at all that night. As to what happened the next morning, Buyane said:

> "Die oggend toe het Donker geklop aan die deur. Ek het my sleutel en hy het hom sleutel, want ek het toegemaak aan die binnekant. Ek het vir hom oopgemaak en hy het ingekom. Hy het vir my gevra of hierdie vrou nog nie daar gekom het nie, ek het gesê nee ek het nog nie vir haar gesien nie. Ek het water loop skep en toe ek terugkom toe is die vrou al terug, toe is sy daar. Toe wil sy gewas het met hierdie water. Toe stry Donker nou met haar, toe stry hulle twee. Toe wil Donker weet waarvan af kom sy. Die vrou het toe gesê dat sy kom van iewers af. Ek het my sak geneem en toe is ek maar weg, want ek sien nou hulle stry, laat ek my sak vat en werk toe gaan. Ek het toe vir hulle gesê albei van julle het fone julle kan mos vir mekaar bel en jy sê toe vir die vrou hierdie ding doen jy altyd om nie terug te kom nie, dan sal jy in die oggende hiernatoe kom en dan wil jy kom en was."

[60] What is clear from Buyane's evidence is that neither the appellant nor the complainant slept at the shack on the night of 14 November 2013, and that the appellant was first to arrive the next morning. He also said that he has no difficulty hearing and in fact pointed out that he had no hearing problem in court. Buyane said that he had no problem with the complainant.

[61] As in the case of the appellant, Buyane was not cross-examined, if at all. His cross examination comprises 2 pages of the record. He was adamant that neither the complainant nor the appellant slept in the shack on 14 November 2013. He shares a room with them. He confirmed that the appellant has his own key to the shack and that the appellant did not drink

with the complainant on the night in question - he had been drinking with Nkuseli. Buyane also said that generally the appellant and the complainant had a good relationship; that they sometimes argued; and that there were times when he intervened to stop them from fighting.

Did the State prove its case beyond reasonable doubt?

[62] The Magistrate came to the conclusion that the complainant was a reliable and credible witness; that there were guarantees of her reliability in the findings of Dr Narula; and that Buyane's contradiction of the appellant's evidence was a further indicator that the appellant's version was untrue. Consequently she found that the State had proved its case beyond reasonable doubt.

[63] Before considering whether or not the Magistrate was correct, the dictum of Nugent J (as he then was) in *Van Der Meyden*,[6] bears repetition:

> "The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."[7]

[64] The central issue is whether the State proved beyond reasonable doubt that the complainant's version that the appellant raped her in the shack at Vygieskraal, Athlone, on 14 November 2013, is objectively true. Where, as in this case, the versions of the State and the defence are contradictory, before a finding can be made as to the objective truth of the one

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6 *S v Van Der Meyden* 1999 (1) SACR 447 (W).
7 *Van Der Meyden* n 1 at 449j-450b.

version and the falsity of the other, not only the honesty, but also the reliability of the version must be considered. The State, which bears the onus, must prove the truth of its version and not merely the honesty of the witnesses who presented that version.[8]

[65] Applying these principles, the Magistrate, in my view, erred in finding that the complainant's evidence was reliable and consistent, in failing to consider the evidence in its totality and in concluding that the State had proved its case beyond reasonable doubt.

[66] In my opinion, the record shows that the complainant was an unreliable witness. To begin with, her story that the appellant took her to a shebeen before the incident and forced her to drink alcohol there, is not true. Both the appellant and Nkuseli denied that she had been drinking with them at the shebeen. The Magistrate found that both the appellant and Nkuseli had made a good impression on her and that neither's evidence had been contradicted in material respects. The complainant's version as to what happened in the shack is improbable. According to her evidence the appellant had hit her on her back, bitten her, banged her head against a cupboard and she was crying. When it was put to her that Buyane must have heard the commotion, she said that most of the blows inflicted on her could not be heard. This is impossible. Buyane's evidence was that he would have heard the commotion. Her explanation for not asking Buyane for help, was that he was deaf and afraid of the appellant. This also is not true. The evidence plainly shows that Buyane is not deaf and that he had on previous occasions intervened when the complainant and the appellant had argued. And there is no evidence, in my respectful view, that Buyane was under the influence of alcohol or that he turned a deaf ear to what was happening. When asked why she did not leave the shack after the incident, the complainant said that she could not find the key. When it was put to her that she knew where the appellant's key was, she replied that the appellant never had his own key to the shack.

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8 *S v Saban en 'n Ander* 1992 (1) SACR 199 (A) at 203j-204c.

[67] Then there is the evidence by Samuels that the first report of the incident was that the complainant had been assaulted. It was only after he questioned her that she said that she had been raped. It is improbable that having been vaginally and anally raped, and sat up most of the night, the complainant would have reported simply an assault. Further, the fact that she was only assaulted ties in with the evidence of the appellant and Buyane: she had returned home that morning, there was an argument about where she had been the night before and the appellant assaulted her.

[68] The evidence of Dr Narula takes the State's case no further. She could not say whether the bite marks were sustained within 72 hours prior to her examination. The complainant's version that she had sustained the bite marks the night before, is thus insupportable. Dr Narula's finding that there were no severe injuries in a sexually active woman and that forcible vaginal penetration with a penis or object was not excluded, is equally consistent with the common cause fact that the complainant and the appellant had engaged in consensual intercourse 2 days prior to the alleged rape. And the medical evidence regarding the anal penetration is also inconclusive: no semen (not even contaminated semen) was found in the anal area, and those injuries could have happened at any time within a 72 hour period. The DNA evidence is also inconclusive. In this regard Dr Narula testified that semen can remain for up to five days in the cervix; and even if there had been semen in the anal area, it would have been contaminated by bacteria very quickly.

[69] There is accordingly reasonable doubt as to when, where, in what manner and under what circumstances the injuries referred to in Dr Narula's report were sustained. The appellant is entitled to the benefit of that doubt.

[70] I come now to Buyane's evidence. It was not challenged at all in cross examination. The Constitutional Court has said that cross-examination is not only a right but also imposes certain obligations. Generally, when it is intended to suggest that the witness is not speaking

the truth on a particular point, it is essential to direct the witness's attention to that issue, by questions put in cross-examination and to give the witness an opportunity, while still in the witness box, to furnish an explanation. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.[9] The Court went on to say:

> "The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed."[10]

[71] In effect then, Buyane's evidence must be accepted as correct. In light of his evidence that the complainant was not at the shack at all on the night in question, her evidence as to the alleged rape cannot be true.

[72] Aside from this, Buyane's evidence is reliable. First, he confirmed that the complainant had not been drinking with the appellant and Nkuseli prior to the alleged rape. It should be noted that the Magistrate accepted Nkuseli's evidence that the complainant was not with them at the shebeen before the rape.

[73] Second, Buyane got on well with the complainant: there was no reason to falsely testify against her. Third, he did not lie for his friend: he said that the appellant had also not slept at the shack that night. Fourth, there is nothing to gainsay his evidence that the complainant often was absent from the shack overnight. And why would Buyane invent such a story? In my respectful view, there are no material inconsistencies in his evidence.

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9 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 at para 63.

10 *SARFU* n 4 para 63 footnotes omitted.

Further, the appellant's evidence that the complainant had often not slept in the shack and returned the next morning was not challenged.

[74] There was thus no basis for the Magistrate to reject Buyane's evidence. But the record shows that the Magistrate *also accepted Buyane's evidence* as a material and critical reason for rejecting the appellant's version that he (the appellant) slept in the shack on the night in question. This, immediately after finding that the appellant had made a good impression on her; that he gave a detailed description of the events on the night in question; that he did not deviate from his version; and that his version was not broken down in any material respect. In these circumstances, and the absence of any adverse comments on his demeanour in the witness box by the Magistrate in her reasons, the rejection of Buyane's evidence is neither logically nor legally defensible.

[75] Finally, the Magistrate also paid insufficient regard to the evidence that the charges against the appellant were reinstated because he refused to take the complainant back after he had been arrested the first time. Buyane and Nkuseli confirmed the appellant's version on this score. In this regard, Nkuseli's evidence - which was not challenged - reads:

> "[Mnr Hartzenberg] En het u vir haar weer gesien na die insident?
>
> --- Die dame?
> Vir Janette? --- Ja, ek het weer vir haar gesien.
> Hoeveel keer omtrent? ---Ek kan nie meer onthou nie, ek het nie opgelet nie.
> Het sy na die saak nou, of nadat Donker nou weg is met die polisie en na sy nou gesê het dat sy het hierdie saak teruggetrek, weet u of sy en Donker in daardie tyd saamgebly het? --- Nee, hy wou nie weer vir haar gehad het nie.
> Hoekom sê u so? ---Sy het weer die saak loop maak nadat sy die saak teruggetrek het, toe gaan sy weer terug om die saak te maak.
> En wanneer het dit gebeur? --- Ek kan nie meer so mooi onthou nie.
> En hoe weet u dat sy het weer die saak gemaak nadat sy dit teruggetrek het? --- Sy het

> die saak oopgemaak en Donker was vrygelaat en toe sê sy mos sy het die saak teruggetrek teen hom, Donker is vrygelaat. Sy het teruggekom en sy het gesê sy wil weer met Donker bly en toe sê Donker, nee, ek kan nie meer met jou bly nie. Toe eindig dit nou daar."

[76] It is common ground that the appellant did not appear in court after he was arrested and taken to the cells at Wynberg Magistrate's Court. It was put to him by the prosecutor that he did not appear in court (and was released) because the 48 hours within which he had to be brought before a court, had expired. The appellant replied that he could not dispute this. But that is not the point. The appellant's testimony was that the complainant had asked him on numerous occasions to resume their relationship, and that when he refused to do so, the complainant proceeded with the charges. Here too, the evidence supports the appellant's version. Both Buyane and Nkuseli referred to the withdrawal of the rape charge and Nkuseli confirmed that the complainant wanted to get back with the appellant. The appellant said that he was charged with the offences some three months after he had been released the first time. The record shows that the appellant's first appearance in court was on 5 August 2014 - nearly nine months after the alleged rape - and then on warning.

[77] So far from indicating that the appellant's version was untrue, when the evidence is considered as a whole, Buyane's testimony casts serious doubt on the credibility, reliability and veracity of the complainant's version. Further doubt is cast by the evidence of Nkuseli.

[78] In conclusion, on the totality of the evidence I am of the opinion that the State did not prove its case beyond reasonable doubt; and accordingly, the appeal in relation to counts 1 and 2 must succeed.

[79] What remains is the charge of assault with intent to do grievous bodily harm (count 3). The appellant admitted, in terms of s 220 of the Criminal Procedure Act, that he hit the complainant with his fists around her eyes and that he slapped her. He confirmed in evidence

that he did so on the morning of 15 November 2013. Dr Narula testified that the complainant sustained swelling and bruising around the whole of both eyes. These are not insignificant and superficial injuries. They were caused by considerable force and the only reasonable inference to be drawn is that the appellant intended to cause grievous bodily harm. The trial court rightly found that the appellant had the requisite intention to injure the complainant seriously.

[80] The trial court took all three counts together for the purpose of sentence and therefore the sentence which it imposed must be set aside. As to an appropriate sentence, the mitigating factors are that the complainant was assaulted during an argument; that the appellant effectively admitted guilt; and that practically, he is a first offender - although he has one previous conviction of assault with intent to do grievous bodily harm in 1993. However, he assaulted a defenceless woman as a result of which she not only sustained significant injuries, but also a violation of her dignity: two black eyes are clear signs of an assault. Given the particular circumstances of this case and the fact that the appellant has already served part of his sentence, the only appropriate sentence, it seems to me, is a period of imprisonment, backdated to the date on which he was sentenced by the trial court.

[81] I would make the following order:

(a) The appeal is upheld, and the convictions on the charges of rape (counts 1 and 2) are set aside.

(b) The appellant’s conviction of assault with intent to do grievous bodily harm (count 3) is confirmed.

(c) The sentence imposed by the trial court is set aside, and replaced with the following:

"*On the charge of assault with intent to do grievous bodily harm (count 3), the appellant is sentenced to four (4) months imprisonment, antedated to 23 September 2015, the date on which he was sentenced by the trial court.*"

SCHIPPERS, J