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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

NOT REPORTABLE

Case No: CA & R 186/2019

Date heard: 6 May 2020

Date delivered: 23 June 2020

In the matter between:

THABANG NTANTISO

Appellant

AND

THE STATE

Respondent

JUDGMENT

Goosen J:

[1] The appellant was convicted in the Magistrates' Court at Aliwal North on a charge of kidnapping and rape, in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act¹. He was sentenced to 5 years' imprisonment on the kidnapping charge and life imprisonment on the rape charge. The appeal, with leave of the trial court, lies against both conviction and sentence.

[2] The appellant pleaded not guilty at trial. He admitted, however, that on the night in issue, 9 February 2018, he had had sexual intercourse with the complainant with her consent. He denied that he had deprived the complainant of her liberty by locking her into his bedroom and not allowing her to leave when she wanted to.

[3] The complainant's evidence was that on the night of 9 February 2018 she had been looking for her boyfriend. The appellant was well-known to her being a friend of her boyfriend. She stated that she regularly confided in the appellant and sought his protection when her boyfriend mistreated her. She testified that she had come across the appellant outside of his house. She was crying. He had enquired about whether her boyfriend had hurt her. He invited her into his house. She remained there in his company drinking ginger beer. Later that night when she wanted to leave he refused. He locked the door to his room. He produced a knife and instructed her to go to the bedroom. He instructed her to remove her clothes whilst she lay on the bed. He then penetrated her vagina and had intercourse with her. According to her testimony after the appellant had had sexual intercourse with her he left the room to smoke dagga. He smoked the dagga immediately outside the bedroom door. When he returned he again had sexual intercourse with her. She stated that the appellant had sexual intercourse with her several times during the night. The following morning she left and went to her home and slept. According to the complainant, the appellant had threatened her by saying that if she should tell anyone he would know where her child was attending school.

¹ Act No. 32 of 2007

[4] The complainant stated that when she arrived home her older sister was at home. She later reported to her paternal aunt, N[...], that she had been raped. She had also told her neighbour.

[5] In cross-examination the complainant conceded that there were other persons present at the appellant's house, namely the appellant's mother, sister and a certain Molife. They were all drinking together. Molife and his sister left and later the appellant's mother went to bed. The complainant conceded that the appellant's mother was present in her room throughout the night. The house consisted of two rooms.

[6] Her explanation for not attempting to raise an alarm by calling out to the appellant's mother was that she feared the appellant would stab her with the knife he had in his possession.

[7] The state's evidence included that of Ms M[...], the neighbour to whom the complainant had made a report about being raped. Her evidence was that early on the morning of 9 February 2018 she had seen the complainant standing at the gate to her property. She was crying. She invited her into the house. The complainant told her that she had been raped by the appellant. Ms M[...] asked her why she did not go to report the matter to the police. To this, the complainant said that the appellant had threatened to kill her if she told anyone. The complainant then said it would be better if she committed suicide. She started walking towards the complainant's sister's son to go after her to bring her back from the river. Ms Mkhonto herself assisted in bringing the complainant back from the river.

[8] The appellant's testimony was that on the evening in issue he had arrived home to find the complainant already at his house in the company of his mother, his sister and M[...]. According to him the complainant was in a "*jolly mood*". He stated that the complainant's boyfriend was his friend. He said that the complainant had

regularly confided in him about poor treatment she received at the hands of her boyfriend. He stated that after M[...] and his sister had left and his mother had gone to bed, he had “*proposed love*” to the complainant. She had accepted and had agreed to spend the night with him. They had consensual intercourse. When they awoke the following morning he had left for work. He stated that his mother had seen him and the complainant together before they left the house. He said that the complainant left his house and then went to the house of a woman she regularly visited. He had gone to work.

[9] The magistrate convicted the appellant on the basis of a rejection of the appellant’s version as not being reasonably possibly true. In coming to this conclusion it was accepted that the evidence of the complainant, as a single witness in relating to the critical question of consent, was satisfactory in all material respects.

[10] It is appropriate to set out a few passages of the magistrate’s judgment which serve as a summary of the basis for the conviction of the appellant. I shall then address the particular aspects raised therein. The magistrate, in dealing with a criticism levelled against the complainant about her failure to disclose the presence of other persons in the house on the night and that she had failed to raise an alarm, stated:

“And then suggesting that she should have cried for help, yes, sure, you know I – so the past couple of weeks I found myself quite frequently having to address this issue. Where it is very easy to sit back as an armchair critic and independently, outside a stressful situation like that, look back in on a situation and tell somebody; you should have done that when you were not faced yourself with those situations.”

[11] Then, in regard to the appellant’s evidence that he had propositioned the complainant and that she had accepted, the magistrate held:

“Sir, this lady told the Court that on past occasions you told her that you loved her but every time she told you that she does not love you. She shot you down every time, now you, in a way, sort of confirmed this yesterday because I specifically asked you. You said you loved this woman, only this evening or prior to this, though you denied that you told her. But sir there is no way this woman would have known that because there was no close relationship in a love relationship, even a pretended propose feeling between the two of you prior to this if you did not tell her this.”

[12] The evidence regarding the appellant having previously expressed his romantic interest in the complainant was not presented by the complainant in her evidence-in-chief. Nor was it addressed in cross-examination. The evidence originated from a question posed by the magistrate to the complainant. This issue was then further explored by the magistrate in extensive questions directed to the appellant during his testimony. The magistrate premised her findings on the improbability of the appellant’s version on this very issue. She found that:

“It is highly improbable that that young woman on that evening in question now suddenly if you now went to the elaborate story of proposing love to her as you now came out with the version during your evidence-in-chief, would have accepted your proposal. She was still heartbroken about her boyfriend. That is why she came to you for help.”

[13] In regard to this latter aspect there is no evidence to suggest that the complainant was “*heartbroken about her boyfriend*”. Indeed the sum total of the evidence presented by the state in relation to the circumstances giving rise to the complainant being at the appellant’s home that evening is the following:

“Ms M[...]: I was on my way from looking up for my boyfriend.

Prosecutor: And then:

Ms M[...]: My boyfriend ignored me.

Prosecutor: What time of the day, ma-am, was it?

Ms M[...]: Late in the evening.

Prosecutor: Your boyfriend ignored you, then what happened?

Ms M[...]: I went up the road screaming.

Prosecutor: And then?

Court: Sorry. If she says screaming, was she shouting or was she crying?

Ms M[...]: I was crying, Your Worship.”

[14] In weighing the probabilities of the respective versions the magistrate concluded as follows:

“You know one of the nice things of practising law is that we do not deal with speculation we deal with hard facts, we deal with evidence, and I can find no motive for this young woman to falsely implicate you in the commissioning of these offences.

Sir, the facts of this case the probabilities flies directly against your version, it makes your version highly improbable and it makes it beyond reasonable doubt false. I reject your version *in toto* that she consented to this sexual intercourse. I find that the State proved beyond reasonable doubt on this evening in question you did, in fact, kidnap her by then refusing her to leave your house, locking the house, keeping her there under protest that night and then having sexual intercourse without her consent with her more than once.”

[15] It has repeatedly been emphasized that the test for determining the guilt of an accused person does not posit separate consideration of the version of the accused i.e. whether that version is reasonably possibly true. As noted by Nugent J in **S v van der Meyden**²,

“It is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is 'completely acceptable and unshaken'. The passage seems to suggest that the evidence is to be separated into compartments, and the 'defence case' examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence.

² 1999 (1) SACR 447 (W) at 449h-450b; see also S v van Aswegen 2001 (2) SACR 97 (SCA) at 101a-e

Although the dictum of Van der Spuy AJ was cited without comment in *S v Jaffer* 1988 (2) SA 84 (C), it is apparent from the reasoning in that case that the Court did not weigh the 'defence case' in isolation. It was only by accepting that the prosecution witness might have been mistaken (see especially at 89J-90B) that the Court was able to conclude that the accused's evidence might be true.

I am not sure that elaboration upon a well-established test is necessarily helpful. On the contrary, it might at times contribute to confusion by diverting the focus of the test. The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond 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."

[16] In assessing the credibility of the complainant and the reliability of her evidence, the trial court accepted that caution was to be applied. The magistrate correctly noted that a conviction may follow upon the evidence of a single witness provided that such evidence is clear and satisfactory in every material respect or is corroborated.

[17] In this instance there is no corroborating evidence. The evidence as to the medical examination of the complainant is inconclusive and provides no support for the contention that the sexual intercourse was without consent or that multiple penetrations had occurred. The only evidence tendered by the state to support the complainant's version was that relating to her subsequent reporting of the rape. This is, of course, not corroborating evidence save in relation to those aspects relating to the report made by the complainant.

[18] Insofar as this is concerned the evidence presented by the state was vague. Although the complainant stated that she reported the rape to Ms M[...] (and to her paternal aunt) no detail was provided as to when this had occurred, nor was evidence tendered as to what was reported. Ms M[...]’ s evidence differed from that of the complainant both in relation to what the complainant told her and in respect of the effect that the alleged rape had had upon her.

[19] The magistrate conducted no assessment of the complainant’s credibility as a single witness and with reference to whether her evidence was clear and satisfactory in every material respect. Instead, the magistrate focussed upon the inherent probabilities or improbabilities found to be present in the appellant’s version.

[20] As already indicated in the quoted passages this assessment proceeded on the premise that no acceptable explanation could be found for an allegedly false accusation being made against the appellant.

[21] An accused person bears no onus to provide some reason why the allegation made against them is false. Our courts have warned about this on several occasions noting that it is not an acceptable practice to confront an accused person with the need to explain why a complainant should not be believed. In this instance the magistrate herself embarked upon an extensive questioning of the appellant in order to test the appellant’s version and, pertinently, to examine the improbability of that version. This questioning by the magistrate not only belies a serious misdirection in relation to the proper approach to assessment of the evidence, it constitutes an irregularity in the conduct of the trial.

[22] The responses elicited from the appellant, in particular his inability to explain why the complainant would cry rape following a night of consensual sex, formed the substantive basis upon which the magistrate rejected his version as improbable.

[23] By focussing upon these shortcomings in the appellant's version the magistrate ignored the deficiencies in the complainant's testimony and in the case presented by the state. The consequence was that the magistrate failed to approach the evidence of the complainant with due caution, notwithstanding the assertion that this was being done.

[24] In the circumstances the conviction of the appellant is tainted. In rejecting the appellant's version as improbable no consideration was taken of the fact that the appellant's mother was present in the house; the fact that the appellant had left the complainant alone after the sexual intercourse when he went to smoke outside; the fact that the complainant had fetched water with which to wash (a version later altered by the complainant) and that the appellant had "released" the complainant without demure the next morning. All of these facts are relevant to the exercise of evaluating probabilities. When taken into account they suggest that the appellant's version may possibly be true rather than the opposite.

[25] The evidence of an accused person need not be accepted in order to raise reasonable doubt. Nor is it necessary that an accused person should be believed. Provided the exculpatory version given by an accused person is reasonably possibly true, reasonable doubt arises. In such circumstances the state fails to discharge the onus which rests upon it. That is the case in this instance. In my view, when the totality of the evidence is considered it does not establish beyond a reasonable doubt that the appellant is guilty of the offences for which he was charged. In the circumstances, he ought to have been acquitted.

[26] In the result I make the following order:

1. The appeal is upheld.
2. The order issued by the trial court is set aside and replaced with the following:

"The accused is acquitted and discharged on Counts 1 and 2."

G.G. GOOSEN

JUDGE OF THE HIGH COURT

Pakati J,

I agree.

B. PAKATI

JUDGE OF THE HIGH COURT

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