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FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No. : A206/2018

In the matter between:-

THEMBA GEORGE MOKHOTHU

Appellant

and

THE STATE

Respondent

CORAM: MATHEBULA, J *et* MOLITSOANE, J

HEARD: 25 MARCH 2019

JUDGMENT BY: MOLITSOANE, J

DELIVERED: 6 JUNE 2019,

Deleted:

- [1] The Appellant was convicted in the Regional Court: Bloemfontein on a charge of rape read with the provisions of s51 (1) of the Criminal Law Amendment Act 105 of 1997. He was sentenced to life imprisonment. He has an automatic right of appeal and this appeal is against both conviction and sentence.
- [2] The facts of this case are briefly as follows: The complainant was at a tavern known as the Jazz Bar. Her boyfriend worked at that tavern. She arrived at the said tavern around 19h00 to 20h00 when she started to drink. She drank until the early hours of the morning. Just after 5h00 the following morning she went to the toilets at the taxi rank. Before she could arrive at the toilets she was accosted by three men. They dragged her to the male toilets where they took turns to rape her. Each of the assailants raped her once. She recognised the appellant as one of her assailants. She knew him as the family of the son in law of her friend M. After they had raped her they walked away. She dressed up and immediately went to the nearby police station known as Thabure and laid charges. She related her story to Warrant Officer Moroeng who took down her statement.
- [3] She was taken to National Hospital where she was examined by Dr Krige who also completed the medico legal report which was formally admitted into evidence. About two weeks later she was again at the Jazz Bar. She saw the appellant and immediately went to summon the police. She again met W/O Moroeng and the latter and another policeman accompanied her to the tavern where she pointed the appellant in the company of five other male persons. The appellant was then arrested.

[4] The following are the grounds of appeal in a nutshell on the conviction:

1. The court *a quo* erred in finding that the state proved its case against the appellant beyond a reasonable doubt;
2. The court *a quo* erred in accepting the evidence of a single witness and failed to approach such evidence with the necessary caution;
3. The court *a quo* erred did not attach any weight to the evidence of the DNA results;
4. The court *a quo* erred in finding that the appellant was positively identified by the complainant.

[5] The evidence of the state is based on the evidence of a single witness. A conviction may follow on the evidence of a single and competent witness which is both credible and reliable. It is settled that the evidence of a single witness must be approached with caution. In *S v Stevens*¹ the court said:

“It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility.”

[6] It is the version of the complainant that she went to the tavern at about 19h00 and continued to drink until the early hours of the morning. She admits that she was drunk. It is her evidence that when the appellant and the two other male persons approached her at the taxi rank she could not remember how lightening was on the scene. She further testified that she could not recognise the

¹ 2005(1) All SA 1 (SCA) at par [15]

appellant immediately when the three male persons approached her before being dragged to the male toilets.. She only recognised the appellant after the first assailant had already raped her and when she was about to dress and the appellant slapped her. It is unfortunate that although the appellant denied being on the scene of this rape, the question of visibility inside the male toilets which ultimately would have laid to rest the issue of identification, was not explored. It is not enough for the court to accept the *ipse dixit* of the complainant that she saw the appellant at the scene. Her evidence as to the identity of the appellant should have been approached with the necessary caution. Much more than her *ipse dixit* is required in order to satisfy the court that the identification was both credible and reliable. In *S v Mthetwa*² the court said the following:

“Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation: the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused’s face, voice, build, gait and dress; the result of identification parades, if any, and of course, the evidence by or on behalf of the accused.”

- [7] The complainant was a single witness as to the events of the day and the identification of the appellant. It is her version that she could not remember how visibility was where she was accosted by the three male persons. It is her case that she could not remember how the appellant was dressed.

² 1972(3) SA 766(AD) 768a-c

- [8] Of further importance it is the version of the complainant that she came to know the appellant through her friend M. According to the complainant the appellant was the brother in law of M. It is the case for the state that at the time of this incident, *to wit*, 10 June 2006 the complainant was already a friend of M and as such he knew the appellant. M, however, testified that she came to know the complainant from 2013, some six years after this incident. It is clear from the testimony of M, contrary to the assertion of the complainant, that the complainant could not have known at the time of the incident that the appellant was the brother in law of M let alone his names.
- [9] It is the evidence of Warrant Officer Moroeng that when the complainant laid the charges she indicated that she did not know her attacker and she further said that *'she will be able to him out*. We now know that it is the evidence of the complainant that she knew the appellant as the brother in law of M at the time of this incident. This begs the question why she said to W/O Moroeng that she was raped by an unknown attacker but she could point out that person.
- [10] Warrant Officer Moroeng also testified that the complainant told him that she was raped by one person. It is indeed so that during an examination by the doctor she said that she was raped by three persons of which one was known to her. This, however, does not detract from the fact that at her earliest opportunity she said that she was raped by one unknown attacker who she could point out.

The trial court correctly referred to the decision of *S v Kruger*³ in which the court said the following about the rationale of the so called evidence of the 'first report':

"That fact that the complainant informed the sister of what had happened immediately after the incident is not only admissible under s 58 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 but shows consistency of the part with regard to the complainant, a factor that serves to rebut any suspicion that she may have fabricated in her allegations."

[11] It is clear that the complainant was inconsistent in her narration of the events to W/O Moroeng. The complainant further in her testimony testified that when she took the police to the tavern two weeks later she pointed the appellant amongst five other people. Days later it apparently dawned to her that at the time when she pointed the appellant to the police, the third person who allegedly raped her was sitting with the appellant. Not only did she not inform the police about this other person at the time of the arrest of the appellant but she also failed to inform the police at any stage thereafter. She could not give a reason for such failure. It is inconceivable how a person would fail to also point another person who raped her at the earliest opportunity.

[12] The overall testimony of the complainant was inconsistent and unreliable. It is my considered view that the trial court erred in finding that the evidence of the complainant was credible and reliable. I accordingly find that the state failed to prove its case beyond a reasonable doubt. The conviction in this regard cannot stand. In view of my finding aforesaid the sentence also falls. I make the following order:

³ 2014(1) SACR 647 (SCA) at page 650 par[9]

ORDER

1. The appeal against the conviction and sentence is upheld.
2. The conviction and the sentence are hereby set aside.

P.E. MOLITSOANE, J

I agree.

M.A. MATHEBULA

On behalf of the Appellant: Mr ML Tshabalala
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the Respondent: Adv. R Hoffman
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN