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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Appeal No.: A235/2017

In the appeal between:-

JOHN SELLO MALEBO

Appellant

and

THE STATE

Respondent

CORAM:

MATHEBULA, J *et* MOLITSOANE, AJ

JUDGMENT BY:

MOLITSOANE, AJ

HEARD ON:

20 NOVEMBER 2017

DELIVERED ON:

11 JANUARY 2018

[1] This is an appeal against conviction on a charge of rape and the sentence of 10 years' imprisonment imposed by the regional court sitting in Bloemfontein. The appeal is with leave of this court after the appellant successfully petitioned the Judge President.

[2] The facts of this case were briefly as follows: The complainant and her friend one WM had attended a funeral. After the funeral they and other friends of theirs went to a tavern to drink liquor. Complainant testified that when they left the tavern with WM she was drunk. WM also confirmed that she and the complainant were intoxicated. They boarded a taxi driven by the appellant, with WM sitting in front and her at the back. Upon boarding the taxi she fell asleep. When she woke up she noticed that her skirt was lifted, her pantyhose and underwear were lowered and she was wet in her private parts. She testified that she did not give consent to the appellant to have sexual intercourse with her.

[3] On the other hand the appellant acknowledged that he had had sexual intercourse with the complainant but same was with consent. It has to be borne in mind that the complainant did not actually see the act of sexual intercourse between herself and the appellant. The case for the state rests on the assertion that the complainant was so intoxicated that she could not have given a valid consent.

[4] Originally the appellant attacked the state case, inter alia, on the basis that the evidence did not prove that complainant was penetrated either vaginally or anally. This assertion was abandoned, correctly so because the appellant had admitted the act of sexual intercourse and such admission was made in terms of s220 of the CRIMINAL PROCEDURE ACT 51 OF 1977(the Act).

[5] The grounds on which the appellant bases his appeal against his conviction are that the trial court erred :

1. "By not applying the cautionary rule on the uncorroborated evidence of the complainant;
2. By not considering the contradictions in the evidence of the complainant vice versa (vis-a vis?) her affidavit to the police;
3. By not taking into account that there were no injuries on the genitalia organs of the complainant;

4. By rejecting the appellant's version as not being reasonably possibly true."

[6] It is my considered view the following issues call for determination:

1. Whether the complainant was intoxicated to such an extent that she was not in a position to have consented to sexual intercourse;
2. Whether the version of the accused is reasonably possibly true.

[7] Both the complainant and Winnie testified that the complainant was heavily intoxicated. According to their testimony she fell asleep immediately she got in the taxi. She did not even pay the fare for the trip. There is a dispute whether such a fare was paid or not paid as according to Winnie she had known appellant for some time and she had used his taxi in the past but she had never paid any fare. According to the complainant they had consumed two bottles of whiskey. There are various degrees of drunkenness. The court in *S v Chretien 1981(1) SA 1097 at 1104* said: **"Ek haal hier aan wat algemeen bekend is en wat soos volg deur Regter WESSELS in *R v Bouke 1916 TPD 303 te 305* beskryf is:**

" It is a well-known fact that there are various degrees of drunkenness. A man may drink a small amount of liquor, the effect of which upon him and make him act differently to the way in which he would act if he were absolutely sober, but, at the same time, drinking under such circumstances, would not be in any way sufficient to prevent his controlling himself, or have any influence upon his intentions. If he drinks more than this, his faculties become more and more dulled and obscured, and a stage is subsequently reached at which he cannot be said to have any intention at all."

[8] The evidence of the complainant must therefore be evaluated against this background. The complainant was without doubt intoxicated. It must be borne in mind that the complainant never saw or felt the act of sexual intercourse. In her testimony she said she never had any discussions with the appellant save to ask the

appellant who he was. But during cross examination when confronted with her statement she testified that she asked the appellant if the latter had ejaculated into her. It is difficult to understand this assertion in view of the fact that according to the complainant when she woke up because of the cold, her skirt was lifted, her pantyhose and underwear were down and she was wet in her private parts and at no stage in examination in chief did she say that she also asked the appellant *if* he ejaculated *into* her. While with the appellant she never spoke about sexual intercourse whether with or without consent. The only talk of rape only arose when she made a report to WM. It is clear that when she made such a report to Winnie it was an inference she drew. It is clear that if complainant says in her statement that she asked the appellant if he ejaculated into her, she was being untruthful and her version in testimony contradicts materially her previous statement she made before the police.

[9] The critical question is whether the complainant was so drunk that she was not in a position to give consent. Perusal of the record indicates that the appellant and the complainant did not know each other. In her testimony the complainant indicates that even months later she passed the appellant without recognising him .An inference can thus be drawn that the appellant did not even know where the complainant resided. The fact that she did not recognise him does not corroborate the assertion that she was so heavily intoxicated that she could not recognise him. They simply did not know each other.

[10] There is no evidence on record that even Winnie gave the appellant the address of the complainant. According to Winnie she testified that she thought that complainant and the appellant knew each other. The question that arises is if the appellant did not know where the complainant stayed how he was going to deliver her to her home. The logical explanation is that the complainant was to give the directions to her home. In this regard it cannot be said that she was so drunk or that she passed off to such an extent that she could not have communicated with the appellant. I am unable to find that the complainant was so intoxicated as not to be in a position to give consent.

[11] In view of the admission by the state witnesses that they were drunk and the

fact that complainant was a single witness, this case, therefore called for a cautionary approach. Section 208 of the Criminal Procedure Act provides that an accused may be convicted on the evidence of a single competent witness. (See **R v Mokwena** 1956(3) SA 81 at 85. Such evidence must be clear and satisfactory in all material respect. Not only must such evidence be credible but it must also be reliable. The court in **S v Sauls and others** 1981(3) SA 172 at 180 E-G said the following:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness...The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether there are shortcomings or defects or contradictions in his testimony,[if] he is satisfied that the truth has been told. The cautionary rule referred to by DeVilliers JP in 1931(in Av Mokoena) ,may be a guide to a right decision but it does not mean ' that the appeal must succeed if any criticism, however slender, of the witnesses' evidence where well founded...." It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense"

[12] From the beginning the appellant admitted that he had had sexual intercourse with the complainant. He insists that it was with the consent of the complainant and according to him the complainant was not heavily intoxicated. On the available evidence it appears that but for the admission by the appellant that he had sexual intercourse with the complainant there is no evidence of penetration. On her own evidence complainant did not observe the act of sexual intercourse.

[13] The appellant was convicted on the strength of his admission and consequently his version. The portion of the evidence to the effect that the appellant admitted sexual intercourse was accepted by the court but the court rejected how the sexual intercourse took place. One has to ask oneself, why the court accepted a part of the admission by the appellant of sexual intercourse but reject other parts of the evidence, *to wit*, that the intercourse was consensual in the absence of any corroborating evidence to the contrary. The court also found that the sexual

intercourse took place "in the veld amongst the trees." Where this finding comes from is not borne by the evidence. On page 78 of the record the following appears:

"PROSECUTOR: Before we proceed, I think it would be necessary at this stage to ask you this, the place where this car was then parked, was it still within the residential area or was it an open space outside the residential area?..../ said Your Worship, I do not remember seeing anything else, I iust(saw?) trees and it was dark(my emphasis)"

[14] The trial court rejected the version of the appellant as being not reasonably possibly true. In evaluating evidence the court in **S v Chabalala 2003(1) SACR 134 (SCA)** at 140 a-b said the following: **"The correct approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides, and having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt to the accused's guilt."**

[15] It is clear that the complainant did not know where she was. This does not mean that they were in the veld. They could have been anywhere where there were trees including the appellant's house. The conduct of the appellant after the alleged rape does not rhyme with the conduct of a person who has just raped someone. The appellant after the sexual intercourse took the complainant to the house of a friend of the complainant. He stood outside conversing with the husband of the friend. The critical question to be answered is whether the version of the appellant is reasonably possibly true. I cannot find that the version of the appellant is inherently improbable.

[16] Admittedly there were contradictions in the evidence of the appellant but such contradictions were not as material as to vitiate his version as being reasonably possibly true.

[17] It is my considered view that the version of the appellant is reasonably possibly true and trial court erred in rejecting same.

ORDER.

I accordingly propose the following order:

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

PE MOLITSOANE AJ

I concur.

MA MATHEBULA

On behalf of appellant: Adv.G.J.M Write

Instructed by:

Peyper Buitendag Inc

BLOEMFONTEIN

On behalf of respondent: Adv Sekwena

Instructed by:

Director: Public Prosecutions

BLOEMFONTEIN