



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
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**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Saakno / Case number:	CA&R42 / 2013
Datum aangehoor / Date heard:	22 / 02 / 2016
Datum gelewer / Date delivered:	26 / 02 / 2016

In the appeal of:

CURTIS LOUW

Appellant

and

THE STATE

Respondent

Coram: Olivier, J *et* Erasmus, AJ

JUDGMENT ON APPEAL

ERASMUS, AJ

[1] On 9 February 2012 the appellant was convicted on a charge of contravention of section 3 of Act 32 of 2007 (rape) in the Regional Court held at Prieska. He was sentenced to 15 years imprisonment. The appeal is against his conviction and sentence.

- [2] The State's case was based on the evidence of the complainant, her father and the medical doctor who had examined the complainant the following day.
- [3] The complainant was a single witness in respect of the facts in issue, namely whether the appellant had in fact had sexual intercourse with her without her consent.
- [4] As she was a single witness, it was required of the Court *a quo* to treat her evidence with caution. Proper application of the cautionary rule requires that a Court should consciously remind itself to be careful in considering evidence which practice has taught should be viewed with suspicion. Secondly, a Court should seek some or other safeguard reducing the risk of a wrong finding based on the suspect evidence.
- [5] Although a Court can convict on the evidence of a single witness, it is subject thereto that the evidence is substantially satisfactory in every material respect and/or that there is sufficient corroboration.
- [6] It is trite that a Court of Appeal will not lightly interfere with the factual findings of the trial Court and that it will only interfere if it is convinced that the findings were

wrong.¹ Differently put, it is presumed that a trial Court's findings of fact are correct. If there is no misdirection, the Court of Appeal will interfere only if it is convinced that such evaluation is wrong.²

[7] Mr. van Tonder, on behalf of the appellant, submitted that the complainant was not a satisfactory witness. He pointed out that she had contradicted the police statement in several respects and referred us to the numerous contradictions in this regard. I refer to a few of these contradictions.

7.1 The complainant testified that she drank with Mannetjie Re and his friends. She became drunk and left them. On her way home she met the appellant and his friends. They approached from the front and she met with them in the vicinity of the heaps. She accompanied them to an old church. In her statement to the police she stated that it was Mannetjie Re and his friends who had left and that she had stayed behind, as she was drunk. The appellant and his friends then showed up while she was still at the river. She did not know where they had come from.

¹ *R v Dhlumayo and Another* 1948(2) SA 677 (A) op 705 -706

² *S v Mlumbi en 'n Ander* 1991 (1) SACR 235 (A); *S v Hadebe and Others* 1998 (1) SACR 422 (SCA); *S v Kekana* 2013 (1) SACR 101 (SCA)

7.2 She testified that the appellant cut her bra in two with a knife, while she stated to the police that her bra was torn.

7.3 She testified that the appellant threw her with a stone and hit her on the thigh. She did not mention this in her statement to the police.

[8] When the complainant was confronted with the contents of her statement, she conceded that she could only remember parts of what had happened on that particular day. On her own version she was drunk on the day in question and had had trouble with her memory after receiving a blow to the head.

[9] The complainant also contradicted herself. She testified that the appellant and two of his friends dragged or pulled her down, but she later testified that it was only the appellant and one of his friends who had done so.

[10] Although it is common cause that the complainant was struck on the head with a stone which was thrown by the appellant, her father testified that she had shown him the injury to her head and reported to him that it had been caused by a knife.

[11] Adv. Kgatwe, on behalf of the respondent, rightly conceded that the complainant's evidence was not satisfactory in every material respect.

[12] Given the fact that the complainant's evidence was not substantially satisfactory in every material respect it could not be accepted as there was no corroboration for her version. What is required in respect of corroboration is set out in **S v SCOTT-CROSSLEY**, 2008 (1) SACR 223 (SCA) at 230 a to b:

"What constitutes corroboration was set out in State v Gentle:

It must be emphasized immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, on the issues in dispute."

[13] The Court *a quo*, in her evaluation of the evidence, referred to numerous instances of corroboration.

13.1 The learned magistrate found that the doctor had found semen in the vagina of the complainant. The evidence of the doctor was that he found something which he thought might be semen and took a sample of it for DNA analysis. No evidence in respect of the DNA analysis was presented by the State.

13.2 The doctor found no signs of penetration or attempted penetration. He stated though that he could not exclude it. The learned magistrate found: *'To a large material degree rape is committed ad exhibit A. Yes, the doctor did not rule it out as a possibility.'*

13.3 The learned magistrate found that the complainant's testimony that she was dragged down and that she lay on top of stones, was corroborated by the doctor's observation that her top was dirty. The doctor who had examined the complainant the following day referred to the condition of her top as *"dirty and blood stained"*. The complainant's evidence in this regard was that the top which she had worn during the rape was placed in a plastic bag with other items and was later handed to the investigating officer. It thus appears that the top referred to by the doctor was not the one she had been wearing during the alleged rape.

[14] The Court *a quo* did not demonstrate by her treatment of the evidence that she heeded the cautionary rule. The facts of this case demanded that the evidence of the complainant be properly evaluated. Although I am

mindful of the advantage which the trial Court had in observing the witnesses, the reasons for accepting the evidence of the complainant in this matter are unsatisfactory. I am therefore at large to disregard the findings of the court.

- [15] The evidence produced on behalf of the State should also be evaluated in conjunction with the appellant's version. It is trite that there is no *onus* on an accused to convince the Court that his version is true. When considering the evidence of the appellant, it is not a prerequisite for an acquittal that I should believe the innocent account given by him; it is sufficient that it might be substantially true. An accused is not required to prove his innocence. In **R v DIFFORD**³ it was said:

'... It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if the explanation is improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.'

- [16] The appellant testified in his own defence and called three witnesses. He clearly did not contradict himself on any material aspect. Mr. van Tonder, quite rightly, pointed out that there were no inherent improbabilities in

³ 1937 AD 370 at 272; See also *S v V* 2000 (1) SACR 453 (SCA); *S v Pistorius* 2014 (2) SACR 314 SCA at 319 (h) to (i)

the appellant's version. His witnesses corroborated him in all material respects. Neither the appellant nor his witnesses were broken down during cross-examination. It cannot be said that the accused's version in this instance is not reasonably possibly true.

[17] If this is the position then he was entitled to an acquittal. The conviction thus stands to be set aside. This being so, I do not deem it necessary to deal with the sentence imposed.

[18] The appeal succeeds and the following order is made:

- 1. THE CONVICTION AND SENTENCE ARE SET ASIDE.**
- 2. THE REGISTRAR IS DIRECTED TO INFORM THE RELEVANT PRISON AUTHORITIES OF THE OUTCOME OF THIS APPEAL WITHOUT ANY FURTHER DELAY.**

SL ERASMUS

ACTING JUDGE

I agree.

CJ OLIVIER
JUDGE

<u>On behalf of the Appellant:</u>	Adv van Tonder (oio Legal Aid SA)
<u>On behalf of the Respondent:</u>	Adv. K. Kgatwe (oio The NDPP)