

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A280/2010

In the appeal between:

JACOB MLENDILE

Appellant

and

THE STATE

Respondent

CORAM:

MOCUMIE, J et KUBUSHI, AJ

HEARD ON:

14 FEBRUARY 2011

DELIVERED ON:

10 MARCH 2011

KUBUSHI, AJ

[1] This is an appeal from the Regional Magistrate Court, Welkom. The appellant was convicted on a charge of rape and sentenced to ten years imprisonment. The appellant has now approached this Court, with leave of the Court *a quo*, appealing against his conviction and sentence.

[2] The facts of the case are shortly as follows. The complainant testified that the appellant had sex with her without her consent. She testified that on 23 December 2007, on a

Sunday, whilst walking in the street in Hertzogville the appellant then unknown to her approached her. He pulled and dragged her to a certain shack where they found another man, also unknown to her, who assisted in pushing her into the shack. Inside the shack the appellant assaulted and raped her. After the rape, the appellant offered her money which she refused to accept. She then went directly to the police station and reported the rape.

- [3] On the other hand, appellant's case is that he had sex with the complainant with her consent. He testified that on the 22 December 2007, on a Saturday, he was at a tavern in Hertzogville where he met the complainant. He proposed love to the complainant who accepted same. They later went together to his friend's shack where they had consensual sex. After the sex complainant requested him to give her R50-00. Appellant did not have the R50-00 requested by the complainant and instead offered her R20-00 which she refused to accept and threatened to lay rape charges against him.

- [4] According to the appellant they were seen by the owner of

the shack who even witnessed them having sex. Appellant called two witnesses, one to corroborate his story that the complainant was at the tavern on that day and one to corroborate his story with regards to the events at the shack. Both defence witnesses corroborated him in all material respects and were not discredited at all.

- [5] Appellant's counsel argued, as regards conviction, that the complainant's evidence as a single witness did not comply with the requirements as set out in section 208 of the Criminal Procedure Act 51 of 1977 ("the CPA") with reference to a single witness in that:

- 5.1 she contradicted herself as to the date of the incident;
- 5.2 she did not give a good impression as a witness;
- 5.3 Her evidence was not supported by that of Constable Litabe;
- 5.4 her injuries were not supported by medical evidence.

- [6] In relation to the sentence, counsel for appellant argued that in the event the conviction is not upheld, the personal circumstances of the appellant; the fact that complainant did not suffer any physical and genital injuries and that the

appellant had spent three months in custody awaiting trial were all compelling and substantial circumstances which justified the court to have deviated from the minimum prescribed sentence. Alternatively, he submitted, the sentence of ten years was shocking and unjust.

[7] In the Heads of Argument and during the appeal hearing, counsel for the respondent conceded that appellant's evidence did not comply with the cautionary rule and conceded further that the conviction and sentence ought to be set aside.

[8] The question to be answered by this Court is whether the trial court erred in accepting as truthful the evidence of the complainant (a single witness) and rejecting the appellant's version which was corroborated by two witnesses as being false beyond a reasonable doubt.

[9] In terms of section 208 of the CPA an accused may be convicted on the evidence of a single competent witness. In **S v Sauls & Others** 1981 (3) SA 172 (A) 180H it was noted

that the absence of the word “credible” (in section 208) is of no significance; the single witness must still be credible. There is no rule of thumb test or formula to apply when it comes to the consideration of the credibility of a single witness. The question is what weight, if any, must be given to the evidence of a single witness.

- [10] The correct approach in determining the guilt of an accused is as pointed out in **S v Chabalala** 2003(1) SACR 134 (SCA) 139i-j to 140a , to weigh up all the elements which points towards the guilt of the accused against all that 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 about the accused’s guilt. See also **S v Francis** 1991 (1) SACR 198 (A).

- [11] In arriving at its decision the trial court relied on the evidence of a single witness, namely, the complainant and found her to be an honest witness. This Court accepts that the trial court was better placed to make such a finding on credibility.

It is however, trite that a trial court should not readily rely on the evidence of a single witness. In such cases the court has to apply the cautionary rule. See DT Zeffert in **The South African Law of Evidence** 2nd ed at p961.

[12] Although the trial court in its judgment appeared to have applied the cautionary rule, in my view, it did not apply it properly for the following reasons. The complainant was inconsistent and gave conflicting evidence in so far as the day on which the alleged rape took place. When she started to testify she alleged that it was on Saturday and later on it became Sunday. She alleged that she sustained visible injuries on her face during the rape which she alleged the police saw yet these were not proved by medical evidence or any other way. Furthermore the medical officer that examined her on the morning after the alleged rape did not see and note such alleged injuries on her face, the so called "blue eye". The medical officer also did not find any fresh injuries to her genitals which are consistent with the allegations that the appellant had been rough, and had un-lubricated and painful intercourse with her.

[13] I find it very strange that both the police officer who took her

statement immediately after the incidence and the medical officer who examined her did not corroborate her on these two critical aspects. I am persuaded to agree with counsel here, that this is evidence that was vital to prove that the sexual encounter was marred by violence which would fly in the face of consensual sexual intercourse pleaded by the appellant.

[14] The trial court's reliance on two decided cases, **R v Abdoorham** 1954 (3) SA 163 and **S v Sauls**, *supra*, did not help in this set of facts at all. As in the case of **S v Gentle** 2005 (1) SACR 420 (SCA) where the court required corroboration, this is a typical case where evidence of, for instance, the complainant's sister would have assisted to corroborate the complainant's evidence on her whereabouts on Saturday and or Sunday.

[15] The appellant's version was corroborated by the two defence witnesses in all material respects. In my view taking into consideration all the probabilities and improbabilities on both sides when the two are weighed against each other I find the appellant's version to be more probable. I also find that the

trial court misdirected itself materially by finding that the State has proved its case beyond reasonable doubt. Accordingly the conviction and sentence fall to be set aside.

[16] In the circumstances I make the following order:

- a. The appeal is upheld.**
- b. The conviction and sentence are set aside.**
- c. The Registrar of the High Court Free State, Bloemfontein is ordered to bring this order to the attention of the Commissioner of Correctional Services where the appellant is currently resident for the appellant's immediate release.**

E.M. KUBUSHI, AJ

I concur.

B. C. MOCUMIE, J

On behalf of the appellant:

Mr. S. Kruger
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv. S. Chalale
Instructed by:
Director of Public Prosecutions

BLOEMFONTEIN