

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE HIGH COURT, KIMBERLEY

CASE NO: CA&R 42/2011

HEARD: 22/08/2011

DELIVERED: 2/09/2011

In the matter between:

ABIE OLIFANT

APPELLANT

and

THE STATE

RESPONDENT

CORAM: LACOCK, AJP et HUGHES-MADONDO, AJ

JUDGEMENT

HUGHES-MADONDO, AJ

1] The appellant, Abie Olifant, was charged with assault with intent to do grievous bodily harm, kidnapping, three (3) counts of rape and indecent assault. On 15 April 2011 he was convicted,

in the Regional court of Kimberley, and was subsequently sentenced on 7 May 2011 to life imprisonment. Leave to appeal was granted by the court below against conviction.

2] On 28 January 2011 the complainant, Charmaine Mdingwane met the appellant at Chivo's Tavern in Galeshewe, Kimberley. Since as far back as 1996, the appellant was known to her as "Man". The appellant entertained her with liquor and food. After Chivo's tavern they moved on to Parks tavern.

3] The appellant confirms that he was with the complainant at these various taverns. The complainant's evidence is that, as they left Parks tavern the appellant requested her to obtain a cigarette and a match from a certain house. On her return she was grabbed from behind. She could not see who it was but later realised it had been the appellant.

4] The appellant throttled her with one hand, a struggle ensued and he proceeded to use both his hands. During the struggle the complainant ran away. As she was running, he tripped her and she fell on her face. He pounced on her, pulled her up by her hair and eventually led her to a nearby stadium. The appellant denied that he tripped the complainant and said that she fell whilst they were walking.

- 5] The complainant's evidence is that the appellant raped her on the steps of the stadium. The appellant on the other hand states that an arrangement had been reached between them to have sexual intercourse at complainant's home. However he was taken by surprise, when, on their way to her home, the complainant, having just urinated in the street, suggested they have sex there and then.
- 6] The complainant said that she requested the appellant to use a condom as she was aware that he was ill with "the sickness". She explained that he took out a condom and threw it at her. He raped her three times and whilst doing so he throttled her and threatened her. At one stage he instructed her to put his penis between her hands and stroke it, which she did.
- [7] The appellant denied that he had had sex with the complainant more than once. He did however confirm that he had three condoms on his person and used one with the complainant. He said that he personally put the condom on. After the sexual assault at the stadium the complainant suggested they proceed to her house to have sex there instead.
- [8] They proceeded in the direction of her house which was part of a compound. On their arrival the complainant did not go to her

home but proceeded to her neighbour, Nehang Mothibi. Whilst the appellant waited outside she told her neighbour that she was raped by "Man". The appellant, whilst still outside, heard the accusations levelled against him and denied that he had had sexual intercourse with the complainant.

9] The neighbour, Nehang, confirmed that the complainant looked emotional and terrified when she arrived at her home on the day in question.

10] The appellant was told to leave which he did, however he return later seeking the complainant. This was confirmed by both the complainant and Nehang.

[11] The issue is whether the events that transpired took place with the complainant's consent.

[12] A court of Appeal is very reluctant to upset the findings of the trial court, as the trial judge has the advantage of seeing and hearing the witnesses and observing their personalities and demeanour. The trial court is in the best position to even draw inferences than the appeal court. The trial judge has an

advantage to determine what is probable and what is improbable having observed the witnesses in the course of the trial. See **R v DHLUMAYO AND ANOTHER 1948 (2) SA 677 (A) at 705.**

13]Ironically in this case the appellant's version corroborates the complainant's version as regards material aspects. To illustrate but a few: the appellant confirms having enjoyed himself at the various taverns with the complainant; he admits that the complainant sustained injuries in his presence; he admits having had sexual intercourse with the complainant; he confirms that he used a condom that was in his possession; that he was in possession of three condoms and lastly he does not deny that they were to proceed to the complainant's house after having had intercourse with the complainant and he does not deny the encounter with the neighbour.

[14] On examination of the evidence in its totality I find that the evidence of the appellant which corroborates that of the complainant is further corroborated by the neighbour's testimony as well.

15]The complainant was a single witness and as such the court is always mindful of the cases dealing with a single witness. To this end I refer to the dictum which is found in **R V MOKONYA 1932 OPD 79 at 80** where the court held; "*the uncorroborated evidence of a single, competent and credible witness is no doubt declared to be sufficient for a conviction ..., but in my opinion ...should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect.*"

16]The evidence of the appellant as to how sexual intercourse between him and the complainant took place is highly improbable. He expects this court to believe that the complainant wanted sex there and then in the street having just finished urinating. This does not have a ring of truth to it at all.

17]There is also the uncontested evidence of the complainant that she was not HIV positive prior to the rape. After the incident she was tested and the results were negative. However, it's been confirmed having had a second test that her status is now positive.

18]It was never disputed that the appellant was HIV positive.

This further corroborates the complainant's version of the events that at some stage the appellant did not use a condom. On his version he used a condom, in fact he even put it on. Therefore in light of this evidence only one conclusion can be drawn and that is, that the appellant had sexual intercourse with the complainant more than once, as stated by the complainant.

19]This court accepts the evidence of the complainant as what indeed transpired on the day in question and being the truth. The appellant's evidence is therefore rejected as being improbable and false.

20]Turning to deal with the three counts of rape, I refer to the case of **S v BLAAUW 1999(2) SACR 295**, from the head note "*Mere and repeated acts of penetration cannot without more be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraws his penis, positions the victim's body differently and then again penetrates her, will not have committed rape twice. Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (i.e. the intervals between them) and*

*place, the less likely a court will be to find that a series of separate rapes has occurred. **But where the accused has ejaculated and withdrawn his penis from the victim, and he again penetrates her thereafter, it should be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place***".

21]In this matter the evidence is that after each sexual act the appellant took a break, at one stage he even sat next to her and drank cape velvet. The urge arose again and he raped the complainant yet again. The last time he asked the complainant to put his penis between her hands and once he had an erection he raped her again. The complainant's evidence is that he said he intended to have sex with her until he ejaculated.

22]In light of the above I am confident that the appellant committed three separate acts of rape entwined with an act of indecent assault. He also took the complainant by force to the stadium, tripped her so that she fell and injured herself and he throttled her whilst he was raping her.

23]The court below was correct in convicting the appellant of

the charges preferred against him.

In the result the appeal against conviction is dismissed.

In the circumstances the following order is made:

1. The appeal against conviction is dismissed.

W HUGHES-MADONDO
ACTING JUDGE

NORTHERN CAPE HIGH COURT, KIMBERLEY

(i) costs of such proceedings

(ii)

I concur

H J LACOCK
ACTING JUDGE-PRESIDENT
NORTHERN CAPE HIGH COURT, KIMBERLEY

<u>On behalf of the Appellant:</u>	Adv P J Cloete (Legal Aid Board)
<u>On behalf of the Respondent:</u>	Adv N B Mabilietse (DPP)