

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No. : A173/07

In the appeal between:-

SAMUEL MONYANE

Appellant

versus

THE STATE

Respondent

CORAM:

RAMPAL, J *et* MOLEMELA, AJ

JUDGMENT:

MOLEMELA, AJ

DELIVERED ON:

20 SEPTEMBER 2007

[1] The appellant was convicted on the 30th November 2006 on one count of rape in the regional court sitting in Bloemfontein. He was subsequently sentenced to imprisonment for 7 (seven) years. It is against that conviction and sentence that this appeal was lodged and argued.

[2] According to the complainant, in the early hours of New

Year's day, she was alone at her parental home. She felt unsafe and decided to go and look for her cousin at a tavern situated about three houses from her home. As she was under the age of 18 years, she could not be allowed into the tavern. She gave the security guard posted at the tavern a description of how her cousin was dressed and requested him to call her. While she was waiting outside the tavern, the appellant approached her. He greeted her and then told her that she was the kind of person he was looking for. She told him to leave her alone. He then held her hands and started pulling her. She screamed and tried to wriggle free from his grip, but the appellant drew a knife and threatened to stab her. He then started pulling her towards a passage in the street. While they were walking through the passage, he slapped her in the face, while still holding the knife in his other hand. He then continued pulling her until they reached his place of residence. Upon arrival there, he unlocked the door of the house and the two of them entered. He then closed the door. He attempted to undress her but she resisted by holding onto a chair. He took out the knife from underneath

his trousers belt and scratched her finger with it. He undressed her and then undressed himself. He then threw her onto the bed. She bit him on his right hand. He then raped her four times. After the fourth act of rape, the appellant fell asleep. She could not leave then, as she did not know where he had kept the key. At 06h00, realizing that he was fast asleep, she put on her clothes. She found only one of her shoes. She looked for her other shoe, but to no avail. She found the key underneath the sofa and then left the house quietly and ran home. She found her cousin at her home and asked her where her mother was. Her cousin informed her that her mother had not yet returned from the traditional ceremony. She then informed her cousin that she was raped. After she had informed her cousin about the rape, her mother arrived and she informed her about the incident.

- [3] The appellant's version is that the complainant was her girlfriend with effect from the 16th December 2005. On the

31st December 2005 he met the complainant by chance at a tavern. The complainant was uneasy about her brother's presence there and suggested that they go to another tavern. He told her that there was no one at his home and suggested that they should go there. She agreed and they both proceeded to his home. Upon arrival at his home he left the complainant in his room and fetched some food from the main house and shared same with the complainant. They then had sex. At some point he went back to the tavern to buy some cigarettes, leaving the complainant in his room. He later went back to his home and knocked at the door. The complainant opened the door for him. They had sex and then slept. In the morning the complainant woke him up and told him that she was going home. They parted amicably and arranged to see each other in the afternoon on the same day. He was later arrested and informed that the complainant had laid a charge of rape against him.

- [4] It is clear that the versions of the appellant and the complainant are diametrically opposed to each other, the

only undisputed fact being that there was sexual intercourse that took place between the appellant and the complainant at the appellant's place of residence. The main issue is whether that sexual intercourse was consensual.

- [5] In **S v CHABALALA** 2003 (1) SACR 134 (SCA) at 139 par 15 Heher AJA described the correct approach for evaluating evidence as follows:

“The correct approach is to weigh up all the elements which point 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 about the accused's guilt.”

- [6] In this matter, the State relied mainly on the evidence of the complainant and she is thus a single witness insofar as the act of rape is concerned. With the exception of medical evidence, corroboration from other witnesses is only as far as the circumstances surrounding the rape are concerned. In **R v MOKOENA** 1932 OPD 79 it was laid down that a

conviction can be made on the evidence of a single witness where the evidence of that single witness is clear and satisfactory in every material respect. In **S v SAULS AND OTHERS** 1981 (3) SA 172 (A) it was stated that “an accused may be convicted of any offence on the single evidence of any competent witness”.

- [7] With the approach laid out in S v Chabalala (*supra*) in mind, I must now determine whether the complainant's evidence was clear and satisfactory in every material respect, bearing in mind that her evidence must not be considered in isolation but against the totality of evidence. In a nutshell, the complaint's version is that the appellant accosted her during the small hours of a quiet morning, pulled her all the way to his place of residence even though she was screaming and resisting and thereafter raped her four times, during which process she asked him who he was and he told her his correct name. It is somewhat odd that a would-be rapist does not take advantage of the darkness and quietness of the street by raping his unknown victim in some dark spot right

there, and instead chooses to risk identification by dragging her screaming and resisting for about a kilometer all the way to his own home, then displays aggression towards her by scratching her with a knife just before raping her and then discloses his real name during the process. The narration of the complainant's version was also not satisfactory in that it bore the following material contradictions:

[7.1] Under cross-examination, when asked whether there were any people in the street where the appellant first pulled her away from the tavern, given that it was New Year's Eve and people generally milled around, she answered in the affirmative. She later stated that there were no people either outside the tavern or in the street. When her cousin was called as a state witness, she testified that there were people outside the tavern at the time that she was told that the complainant was looking for her.

[7.2] The complainant testified that while the appellant was pulling her towards his home, she was screaming and resisting, yet

when asked why she did not run away while the appellant had both hands on the padlock in order to open it, she stated that she was afraid to run away as she knew that he had a knife with him.

[7.3] She initially testified that the appellant had a knife in his hands when he opened the padlock. When asked how the appellant was then able to open the padlock with one hand, she changed her version to say that he did not have a knife in his hands. She then later changed her version again to say that it was only after they had entered the house that the appellant pulled out a knife from somewhere around his waist.

[7.4] She testified that the appellant raped her four times, getting off her after each act. When confronted about why she did not run away after the first act, she said the appellant took out a knife and scratched her with it. When confronted about why she did not run away after the second act she then testified that the appellant never got off her and laid on top of

her throughout all the rapes.

[7.5] In her evidence-in-chief she testified that after the fourth rape act she found the key to the door under the sofa, unlocked the door and then ran home. Under cross-examination she testified that the door was only on a latch and not locked with a key.

[7.6] In her evidence-in-chief she testified that before the appellant raped her for the first time she resisted and even bit his hand. Under cross-examination, she testified that she bit the appellant's cheek after the first act. When asked whether she bit the appellant on the cheek or on the hand, she said that she could not recall.

[8] While it is indeed so that not every contradiction adversely affects the credibility of a witness, the importance and materiality of the contradictions that accompanied the complainant's version are significant and cannot be ignored.

See **S v MKOHLE** 1990 (1) SACR 95 (A)_98 f – g.

- [9] In my view, the version of the complainant, when considered against that of the appellant and the totality of evidence, is a version that leaves one's mind with serious doubt as to whether the complainant was raped by the appellant. When such serious doubt exists, the State cannot be said to have discharged its onus of proving the appellant's guilt beyond reasonable doubt.
- [10] The other side of the same coin is to consider whether the appellant's version is reasonably possibly true. When one considers the appellant's version in conjunction with the complainant's version, what unavoidably bothers one's mind is: if the parting was as amicable as described by the appellant, why would the complainant choose to hasten home only with one shoe, leaving the other one at the appellant's house? The defence counsel's speculative argument was that the complainant's main focus could have been to hurry homewards in order to arrive there before her mother's return from the traditional ceremony. This

argument is neither without merit nor unfathomable under the circumstances. Of cardinal importance is that the version of an accused person need not be one that “convinces” the court. See **S v V** 2000 (1) SACR 453 (SCA) at 455 A – C and **S v Shackwell** 2001 (2) SACR 185 (SCA) at 194 g-i, where the following was stated: “It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably possibly true in substance the court must decide the matter in acceptance of that version.”

- [11] Applying the approaches mentioned in **S v Chabalala** (*supra*) and **S v Shackwell** (*supra*), I am satisfied that the court *a quo* erred in rejecting the appellant’s evidence as false and in accepting that the State had proven its case beyond reasonable doubt.

[19] I accordingly make the following order:

1. The appeal against conviction and sentence succeeds.
2. Both conviction and sentence are set aside.

M. B. MOLEMELA, AJ

I concur.

M.H. RAMPAL, J

/sp