IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT–BHISHO.

CASE NO: CA&R 19/2011

HEARD: 16 SEPTEMBER 2011

DELIVERED: 29 SEPTEMBER 2011

In the matter of:

MXOLISI SOBEKWA **APPELLANT**

v

STATE **RESPONDENT**

JUDGMENT

MAGEZA AJ:

[1] Appellant herein, a 64 year old pensioner, was charged before the Magistrate – Regional Court, Mdantsanewiththe Rape of 15 year old female, a neighbour andgrade 9 Stirling High School learner. He pleaded not guilty and was, pursuant to his trial, duly convicted. He was sentenced to a 10 (ten) year term of imprisonment, 4 (four) years of

which were suspended on certain conditions. He appeals against both the conviction and sentence.

[2] The central issue in the appeal is whether on all the evidence availed the Court by the prosecution and taking into account the appellant's defence disclosing an alibi, the State could in all the circumstances be said to have proved its case beyond a reasonable doubt thus rendering the conviction of the appellant secure and in accordance with justice.

[3] The complainant's testimony was that she lived at the time of the incident with her grandmother and two aunts. On the Saturday in question, she had had plans to attend a braai (barbecue) at a friend's home in Cambridge.Prior to doing so she was required to clean her yard and for these purposes, she went to borrow a rake from the appellant neighbour who lived on his own. This she said was after eight in the morning. She knocked on the front door of the house and on being invited inside and entering, she says she was told by the appellant that the rake was behind her in the kitchen and when she turned around the appellant grabbed her and pinned her down on a sofa. According to her, the appellant removed her track-suit trousers and proceeded to rape her. He inserted his private parts into her's once but that he did not ejaculate. She said they then heard the sound of footsteps on gravel (crushed stone) and the appellant thought it was his wife and released her and she

ran away.

[4] When she arrived at home she said she was not stable and was shouting at other family members. She washed and saw blood on her panties. She did not tell anyone about the incident. Asked by the prosecutor why she did not do so she said the accused had threatened her that if she told anyone he "will do something painful" to her. From her evidence, nothing suggests whether or not any of her aunts had noticed anything untoward in her appearance or questioned her about being unusually flustered or dishevelled.

[5] Later on that same day, shereceived a telephone call from one VuyaniBonyoti, an erstwhile taxi driver well known to her as someone whom she regarded as a father figure. She said she "did not interact with him in a good manner" over the phone and did not tell him what had happened. She only toldhim about the incident some 4 days later and was consequently taken by Bonyoti to Cecilia Makiwane Hospital where she was examined in the presence of her mother. It does not appear anywhere in the record as to how and when her mother came to know of her ordeal and who in particular told her about the incident that had befallen her daughter as well as how she ended up joining them at Cecilia Makiwane hospital. As regards the first opportunity to communicate with Bonyoti on the day of the incident, it only emerged in cross-examination

that she had not spoken to him over the phone as initially alluded to but had in fact met him at Highway taxi rank whilst on her way to the braai at Cambridge.

[6] Although she was examined at the hospital and a J88 report was completed by the examining doctor, the prosecutor elected not to tender the detail of its contents into evidence and informed the Court that she would not be handing in the report on account ofit having beenmade four days after the incident and that the doctor could make no discernible material finding. She went on to inform the Court that:

> "Nothing indicate whether the hymen was actually punctured but perhaps the blood just indicates slightly that there may have been an injury but not necessary that the hymen was broken."

Having accepted that the report was of no value to the State's case, it is unclear whether the prosecutor's reference to "blood" related to any such noted on the J88 or presumably what the complainant had said she saw when she went home to wash. Be that as it may, it is common cause that the Court did not have the benefit of such potentially corroborating medical analysis and report. Furthermore the State did not call any of the aunts, mother or friends whom the complainant had visited for the braai in Cambridge, nor did it seek to introduce into evidence the complainant's statement made to the police when reporting the matter.

[7] Under cross examination, complainant said she had struggled and tried to free herself from being pinned down and that appellant, who was wearing a pair of jeans, had taken out his penis. She said she was crying but her voice "could not go out" and she could not make any sound. He was pinning her down, closing her mouth and taking his penis out and inserting it. She was a virgin at the time and this was a first time sexual encounter.She explained that after this incident and later that day, she went to visit a friend in Cambridge and according to her she came back later on that same day but she also never told this friend about the incident.

[8] When complainant was cross examined, she could not say whether the appellant had in fact heard the sounds of the footsteps on gravel that she had heard. Complainant admitted that appellant was hard of hearing. It is evident from the record that both the prosecutor and the Court had on a number of occasions urged complainant to speak up as the appellant was partly deaf. It was suggested in cross-examination that he locked his gate to avoid anyone entering in light of his inability to hear. It was put to complainant that appellant had left that morning to visit his wife who lived in another house in Mdantsane and had only returned later that afternoon to watch a televised soccer match.

[9] The defence then produced a statement made by the complainant to the police following the incident. According to this statement, it was put to complainant that she had said the appellant had warned her not tell his wife but did not allude to the threat of harm. She replied that he had not elaborated on what he would do. Furthermore, the defence pointed out that according to the said statement, she had told the police that appellant had ejaculated into her. She deniedthat she had said this to the police. It was also pointed out to her that according to her statement, she had told the police that she had reported the alleged rape to her friend Asisipho whom she had visited in Cambridge, something which she also denied. She said that all she had told Asisipho was that she was not feeling well. Pressed on why, according to this statement, she had said on her arrival in Cambridge, she reported the matter to her friend as well as to VuyaniBonyoti who was in Durban at the time, she replied that she did not tell them at the same time. Asked as to why she had said in her evidence-in-chief that when she reported this to Bonyoti he was in East London she replied that he was on his way to work.

[10]VuyaniBonyoti testified that the complainant regarded him as a father figure. He said he met her that afternoon on the day of the incident at Highway taxi rank when she was on her way to Asisipho in Cambridge and complainant was somewhat diffident. He again called her some days later and she still did not want to talk or open up to him. He persisted in asking

her until finally "she said she was raped by uncle."

[11] Testifying in his defence, appellant maintained that he had gone to his wife who lives at NU8 in Mdantsane that morning and only came back later that day to watch a soccer match. He only married his wife when she already owned this other house and that was why he was in the habit of visiting her. He denied raping the complainant.

[12] Called by the defence as a witness, AsisiphoDantjie said on the day in question she had a braai at her home and the complainant had joined her and other friends for the festivities. Complainant slept over that night and left the following day. She was certain of this as complainant had slept together with her. This was on the 8th November 2008. Cross-examined by the State, she said she was no longer certain if complainant had slept over at her home that night. She remembered being told by the complainant of being raped but when and how she was informed was never fully canvassed in cross examination and the issue was left unclarified.

[13] In the course of argument by the State, the presiding Magistrate raised a number of concerns and the following appears from the record at page 52 para 25:

> "And if he (she) failed to report this because he (she) was afraid of the accused why did she eventually report it to his – to her friend? And on the other hand the accused stuck to his version that she (he) was not there – he was not there that he had visited his wife. And has not been shown to be lying.And taking into account that he just has to give a story that is reasonably possibly true. I was not there, I was away, I visit my wife and these are the negatives in the State's case."

[14] It is clear from the aforegoing that the Magistrate, once all the evidence and cross-examination of both the State and defence had run its course, was of the view that the alibi defence had not been shown to be false. Even more detrimental to the State's case was the expressed impressionthat the State's case had material weaknesses, referred to by him as 'negatives in the State's case'.Many of these shortcomings must have been evident even to the prosecutor and it is apparent from the record that a number of deficiencies, inconsistencies, failures to adduce corroborating medical and other witness accounts cumulatively impacted negatively on its case.

[15] In so far as concerns the rape charge the complainant was a single witness. An accused can be convicted of an offence on the basis of the

evidence of a competent single witness."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, he is satisfied that the truth has been told… It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense". **See - S v Sauls and Others 1981 (3) SA 172 (A).**

[16] The onus remains on the State throughout to prove beyond a reasonable doubt that the accused committed the offences as charged, There is no onus on the accused to convince the Court of the truth of any explanation which he gives. Even if the explanation is improbable, the Court is not entitled to convict him unless it is satisfied, not only that the explanation is improbable but that beyond doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal. **See R v Difford 1937 AD 370 at 373.**

[17] Where the defence is premised on an alibi, even if the State's case stood on its own, as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demonstrably false or so inherently improbable as to be rejected as false. – **S v Munyai 1986 (4) SA 712 (V)**.If there is any reasonable

possibility of his explanation being true, then he is entitled to his acquittal.

[18] In**S v Liebenberg 2005(2) SACR 318 (SCA)**, the Court per Jafta JA (as he then was) held that:

"The approach adopted by the trial Court to the alibi evidence was completely wrong. Once the trial court accepted that the alibi defence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution has placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false." at **358-I**

[19] The complainant's evidence concerning what disturbed the appellant leads to an uncertain impression. In her evidence-in-chief, she testified that the appellant had in fact heard footsteps on the gravel outside and had thought that it was his wife arriving, this despite the collectively accepted fact of his to a significant degree, being hard of hearing. Laterand in cross-examination, she conceded that this is an assumption she made without being led thereto by the appellant's own

communication and/or disposition in her arriving at this conclusion.

[20] When she arrived back at home, save forher demeanour towards her aunts, nothing is said about whether or not the aunts noticed anything untoward with her appearance. One can only imagine that an attack of this nature must lead not only to an immediate lack of composure and breakdown arising from trauma in particularly as young a person as complainant (a virgin with no previous sexual experience) but would betray external signs of fluster, disjointed attention and degree of hysteria evident to those close to her. Very little of this crucialevidence from any of the aunts, if any,was introduced by the State.

[21] Complainant does not offer any explanation as regards why she spurned so many opportunities to report an incident of this nature in spite of the many opportunities available her. She has said the appellant had warned her against telling his wife and had threatened her with doing something painful were she to do so. This does not explain why she could not then inform others far removed from the appellant. She could have done so to Bonyoti earlier without him having to prise the report out of her. After all she regarded him as a father figure. She could have informed her mother who lived elsewhere in Mdantsane and not with hermuch earlier. In many of these type of casesinvolving students, there are teachers to whom they are at times able to confide. This alone

however is not a basis to impugn her allegation of rape.

[22] In sexual cases, one of the most crucial sources of corroboration is an independently collatedreport by an appropriate medical expert pursuant to a physical examination colloquially termed - the J88. This is more so where the complainant is a single witness in respect of the rape itself. The report may or may not in some instances be decisive but is of vast value for a number of reasons. For instance, in the case of someone with no previous sexual experience (virgin) it could, even if compiled from an examination some four days later, indicate whether or notthere existed signs of a modicum or degree of penetration. There are also other observations that may be of assistance to the Court in its duty to assess the facts for the purposes of arriving at an informed determination. Taken collectively, these observations where reliable, can be collectively taken into account by a Court to eliminate uncertainties that may be operative in the mind of the presiding judicial officer. Where the report is admittedly available and the State informs the Court that it does not wish to tender it into evidence, uncertainties will needless to say, abound in the mind of the Court.Now the possible adverse consequence of the State’s failure to produce the report must have been clearly within its contemplation and foreseen by the State and that such failure would be a decision it took at the risk of material prejudice to its own case. Not only did the State waive its prospect of producing possible weighty corroborating expert evidence,

it plainly informed the Court that there existed little value in submitting it into evidence. What constitutes little value to the State might in many instances be the kind of great value to the defence which a Court as independent arbiter cannot overlook.

[23] I have already pointed out that there was a litany of many other material and competent witnesses the State had access to but which it elected not to call. In so far as concerns the defence witness Asisipho, what is not in dispute is that complainant attended the braai and there were other friends. According to her version, the complainant would have most likely have ended up sleeping in Cambridge because of the scarcity of transport were she to leave later than around 7 in the evening. Assuming that Asisipho lived with her parent or parents and she had been told by the complainant on the evening of the braai by complainant that she had been raped, such would most likely have caused utmost consternation among her friends and would have likely led to this reaching one or other of Asisipho's parent or parents. These were after all 15 and 16 year olds and it is difficult to imagine how they would collectively have covered up such an awful and unlawful invasion of complainant's person. Indeed it was never the State's case that complainant had told the friends at the braai and the State accepted that the first time a report was made by complainant was 4 days later and even then, after some painstaking prompting by the witness

VuyaniBonyoti.

[24] The Magistrate furthermore accepted that the alibi defence tendered by the appellant was never shown to be palpably false or untrue. In fact he accepted it andin his words, ‘he was not shown to be lying’ and in that event then there the matter ought to have rested.

[25]In light of all the aforegoing cumulative factors, I have grave misgivings regarding the State having adduced enough reliable and cogent evidence to make out a case against appellant beyond a reasonable doubt. The Magistrate clearly did seriously entertain these doubts and very little explains why he proceeded to find otherwise. Certainly this was a misdirection calling for this Court’s intervention.

[26] In the result the following order is made:

a) The appeal is upheld

b) The appellant’s conviction and sentence are set aside

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MAGEZA AJ:

ACTING JUDGE OF THE HIGH COURT

I AGREE

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A.E.B. DHLODHLO

JUDGE OF THE HIGH COURT

ACTING DEPUTY JUDGE PRESIDENT.

FOR APPELLANT: **MR N. SANDI**

INSTRUCTED BY: **MESSRS MASETI INC.**

FOR RESPONDENT: **MR A. ERASMUS**

INSTRUCTED BY: **DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS – BHISHO**