IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISIION, GRAHAMSTOWN

C.A. & R.: 199/2014

Date Heard: 25 February 2015

Date Delivered: 18 March 2015

In the matter between:

BONGANI SALI Appellant

and

THE STATE Respondent

JUDGMENT

EKSTEEN J:

[1] The appellant was convicted in the Regional Court of the Eastern Cape of rape and was sentenced to undergo 10 years imprisonment. An application for leave to appeal against his conviction and sentence was refused by the presiding magistrate but subsequently granted on petition to the Judge President of this Court.

[2] It is alleged that the appellant raped the complainant, to whom I shall refer as BM, on 11 February 2007 at New Brighton in Port Elizabeth.

[3] BM was 17 years of age and a scholar in grade 11 at the time. She lived in Uitenhage with her mother. Early in 2007, on a Sunday, she accompanied her mother to New Brighton in order to visit her grandmother as they were accustomed

to do on a weekend. During the afternoon she had wandered off with some friends into the township of New Brighton. At some stage during the afternoon her mother became impatient at her persistent absence and proceeded back to Uitenhage, leaving BM in New Brighton. Upon her return to the home of her grandmother late on the Sunday afternoon BM was advised that her mother had left and returned to Uitenhage. BM had no money to pay for bus fare back to Uitenhage and attempted to borrow money from her grandmother, however, alas, her grandmother advised that she had no money.

[4] BM wandered off to the nearest bus stop in the hope of finding transport back to Uitenhage. There she met her aunt M[…] L[…], to whom she referred as "Aunt T[…]" (herein referred to as "L[…]"). She attempted to borrow money from L[...], however, L[…] too advised that she had no money in her possession and was unable to assist. The appellant, who was known to L[...] was also present at the bus stop and L[…] accordingly suggested that BM approach the appellant. She introduced the appellant to BM and they attempted to borrow money from the appellant. The appellant too had no money in his possession, however, he suggested that they proceed to "A" Street where his mother was resident. The three of them proceeded there and he entered the home alone. After emerging from the home a while later he suggested to BM that the two of them take a taxi to Njoli Square where a connecting taxi could be found as he was going in the same direction as she was. This they duly did. Thus far the facts are common cause.

[5] There is a dispute on the evidence as to what transpired thereafter. BM states that at a stop on route the appellant requested the driver to stop and he forced

BM out of the taxi taking her to his home where he raped her. She states that it was a painful experience and that she continued to have pain for approximately a week thereafter in the area of her genitalia and bled for three to four days thereafter. When the appellant had completed the rape, BM says that he threatened to kill her if she told anyone what had occurred.

[6] The appellant, for his part, denies that these events occurred at all. He testifies that the taxi proceeded to Njoli Square where they disembarked and he borrowed money from a friend who lives nearby. He then advanced money to BM for her to obtain further transport to her home.

[7] It is common cause that the complainant arrived home during the course of the evening. She did not tell her mother of the ordeal although she states that she and her mother had a very close relationship. She declares that she declined to tell her mother of the ordeal partly because of the threat which the appellant had made to her and partly because her mother was not in good health and was experiencing financial difficulties. She did not wish to saddle her mother with her concerns and she furthermore feared that her mother would blame her for the events which had occurred. Later that evening L[...] called her and spoke to her telephonically. She did not advise L[...] of the events which had occurred and L[...] states that she did not detect anything abnormal about BM during the conversation. She states that BM was her usual self.

[8] BM states that the following day she had confided in two of her friends at school that she had been raped the previous day and the following Friday she had

returned to New Brighton to visit her grandmother. On this occasion she confided in L[...] that the appellant had raped her.

[9] During her evidence BM testified that she had been a virgin at the time of the alleged rape and had had no sexual encounter prior thereto. She did not have a boyfriend prior to or subsequent to the events and she has had no sexual encounter since the rape. Shortly after the alleged rape, she does not say precisely when, she began to develop infection in her genitalia. She went to the local clinic, in approximately April, and received treatment for the infection. The treatment was initially successful but within a few days the infection returned. Sometime later she again went to the clinic and again obtained treatment with similar results. She returned on a third occasion to the clinic and again obtained treatment and again the result was similar. In these circumstances, at approximately the beginning of November, almost nine months after the alleged rape, she realised that she would require more advanced treatment. She accordingly decided that it was necessary to advise her mother of the rape. She did so and she and her mother then reported the matter to the police and attended upon a gynaecologist for an examination. It is not in dispute that at the time of the examination in November 2007 BM was not a virgin.

[10] The gynaecologist, Dr Mabenge testified that upon examination he found her to have vaginal warts which is a sexually transmitted infection. The vaginal warts were surgically removed and treated and HIV tests were carried out. The HIV tests revealed that BM had been infected with the HIV virus. All these infections BM attributes to the alleged rape.

[11] The medico-legal report prepared by Dr Mabenge records that he examined BM on 6 November 2007 following an alleged sexual assault which occurred during March 2007. During cross-examination he confirmed that BM had advised him that the event occurred during March 2007. Upon questions from the presiding magistrate, however, Dr Mabenge, fairly in my view, conceded that he had no independent recollection of the communication and that he relied on what he had written down on his report. He had completed the report upon BM's discharge from hospital after treatment of the vaginal warts. He nevertheless believes that his notes correctly reflect what BM had told him.

[12] Dr Mabenge was asked by the presiding magistrate during his evidence whether it was possible to contract HIV other than through sexual intercourse. Whilst cautioning that he was not a virologist he did confirm that the HIV virus could be transferred by other means and volunteered that a blood transfusion was one method which came to mind. Upon further questioning he acknowledges that the mixing of bodily fluids in another manner could result in the transmission of the virus. He postulated, by way of example, that if one had an open cut and were thereafter to handle urine or faeces infected with the virus transmission could occur.

[13] V[…] B[…] was a close friend of BM at school. She testifies that on 12 February 2007 BM had advised her that she had been raped the previous day. Her evidence of the report accords with the evidence of BM in this regard. B[…] testifies further that BM had advised her that she could not report the matter as the appellant had threatened to kill her if she did.

[14] L[...] also testified confirming the general version of BM in respect of the events which occurred in New Brighton on the day of the alleged rape and that on the following Friday BM had advised her that she had been raped. She too confirms that BM had advised her that the appellant had threatened to kill her if she reported the matter.

[15] During cross-examination of B[...] it was suggested to her that the appellant was not HIV positive. In these circumstances after the close of the State's case and upon application by the prosecutor the magistrate made an order in terms of the provisions of section 32 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 (Act No. 32 of 2007) that the appellant undergo an HIV test. This was duly done and the result of the testing revealed that the appellant is indeed HIV negative.

[16] As recorded earlier the appellant denied that the alleged event occurred at all. He suggested that BM, knowing that she had contracted HIV was seeking a scapegoat to blame in order not to reveal her own promiscuous lifestyle. The appellant, I pause to record, was, *ex facie* the record, an argumentative and evasive witness. The magistrate correctly rejected his evidence. It is nevertheless incumbent upon the State to prove the guilt of the appellant beyond reasonable doubt. That requires evidence, in this case, not only of the sexual intercourse which is alleged, but also of the absence of consent

[17] It is apparent from the judgment of the magistrate that she accepted the evidence of BM, B[...] and L[...] in respect of the time and content of the reports

made to B[...] and L[...] to the effect that the appellant had raped BM. She considered that these reports served to establish that BM had been consistent in her version relating to the alleged rape. In respect of the infections she held:

> "It is not a given that to contract HIV and Aids or infections of vulva warts one has to be leading an irresponsible life and have multiple lovers. Nor is it a given that HIV can only be contracted during sexual intercourse (only)."

[18] In argument before us Mr **Mtini**, on behalf of the appellant, argued that the magistrate had erred in concluding on the evidence that the State had succeeded in proving its case beyond a reasonable doubt.

[19] It is trite that the onus of proof in a criminal case, which rests upon the State, can only be discharged by producing evidence which establishes the guilt of the accused beyond reasonable doubt. In ***S v Van der Meyden*** 1999 (1) SACR 447 (WLD) at 447f-i Nugent J pointed out that the corollary hereof is that the accused is entitled to be acquitted if it is reasonably possible that he might be innocent. The learned Judge noted that these were not two separate and independent tests but the expression of the same tests when viewed from opposite perspectives. He emphasised that irrespective of the form in which the test is expressed it must be satisfied upon a consideration of all the evidence. Accordingly a court will not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt nor will it look at the exculpatory evidence in isolation in order to determine whether it might be reasonably possibly be true. The decision of the court must account for all the evidence: some might be found to be false; some of it might be found to be unreliable; and some of it might be found to

be only possibly false or unreliable; but none of it may simply be ignored. (See also ***S v Crossberg*** 2008 (2) SACR 317 (SCA); and ***S v Monyane and Others*** 2008 (1) SACR 543 (SCA).)

[20] Inferences may be drawn and probabilities may be considered during the course of the evaluation of evidence. Inference and probabilities, however, must be distinguished from conjecture or speculation. (See for example ***S v Mtsweni*** 1985 (1) SA 590 (A) 593D; and ***S v Mokgiba*** 1999 (1) SACR 534 (O) at 548.)

[21] The evidence of BM, as set out earlier herein, is categoric that she was a virgin at the time of her ordeal and she has not had any sexual encounter either before or after the alleged rape. Both B[...] and L[...] support her to the extent that they both state that they are so close to BM that BM would certainly have told them if she did have a boyfriend at any time.

[22] It is the essence of BM's evidence that she was infected with the sexually transmitted virus during the rape which manifested shortly thereafter and escalated gradually until November 2007 when she discovered that she had also been infected with the HIV virus.

[23] It is not in dispute that the appellant is not HIV positive. The magistrate was dismissive of this reality stating merely that the virus can be contracted in other ways than through sexual intercourse. The only evidence in this regard is that of Dr Mabenge which is set out earlier herein. There is no suggestion on the evidence that BM had undergone a significant blood transfusion, or any blood transfusion at

all, either prior to or subsequent to the alleged event, nor that she was ever exposed to circumstances in which her body fluids may have been exposed to those of others. The suggestion that BM may have been infected with the HIV virus through a blood transfusion is pure speculation and there is no basis for such a finding in the evidence.

[24] The probabilities too must be considered in the light of the proved facts. The evidence, which the magistrate appears to have accepted, is that BM was a church going woman with good moral values who did not frequent clubs and bars. She was a scholar who was not exposed to any abnormal risk of contact with bodily fluids of others. On the evidence placed before the magistrate in respect of BM's lifestyle the probability of her having contracted the HIV virus through the mingling of bodily fluids other than by sexual intercourse is, to my mind, extremely remote.

[25] A far more plausible conclusion is therefore, on the overwhelming probability, that BM contracted the HIV virus through sexual intercourse with a person who is HIV positive, which the appellant is not. This, as the magistrate correctly pointed out, is not necessarily indicative of a promiscuous lifestyle and accords more readily with the evidence to which I have referred above. It raises a serious question relating to BM's credibility. If she did have sexual relations with another man or other men then the inescapable inference is that her evidence has been tailored to protect the identity of such person or persons.

[26] This brings me to the reports made to B[...] and L[...]. B[...] was adamant that the report was made to her on 12 February 2007. No charge was however laid at

the time and there is no suggestion that B[...] had deposed to any statement or recorded any note in respect of this communication at the time. The charge was only laid some nine months later and it is at this stage that the report became relevant. On the evidence it is probable that B[...] was not required to recall the date of the report made to her before November 2007. In these circumstances I do not think that her evidence in respect of the date is necessarily reliable.

[27] Dr Mabenge testified, as recorded earlier, that BM approached him for an examination alleging a history of a sexual assault during March 2007. The evidence of L[...] is less categoric in respect of the precise date of the report to her but she does testify that the report was made to her one week after BM and the appellant departed together in the taxi.

[28] BM, as recorded earlier, did not state during her evidence precisely when the infection manifested itself but testified that she approached a clinic in approximately April. No evidence was obtained from the clinic in respect of the date of the first treatment administered to BM nor is there evidence of how advanced her disease was at the time. In the circumstances, although the magistrate accepted the evidence of B[...] and L[...] in respect of the reports made and the time of the reports, there must necessarily be some uncertainty as to precisely when these reports were made. The evidence of Dr Mabenge in respect of BM's assertion that the events occurred during March 2007 does not appear to have been considered by the magistrate in the evaluation of the evidence. In the circumstances, whilst I agree that the magistrate correctly held that the reports were clearly made long before November 2007, when the HIV virus was identified, the evidence permits, to my

mind, at least as a reasonable possibility, of a finding that the reports may have been made to B[...] and L[...] later than February 2007.

[29] The magistrate correctly held that reports made to B[...] and L[...] served to show that BM had been consistent in her contention that she had been raped. Such reports do not, however, provide corroboration for her evidence that she was in fact raped. The common law rule against self-corroboration was considered in ***S v Gentle*** 2005 (1) SACR 420 (SCA) where Cloete JA said:

> "[B]y corroboration was meant *other* evidence which supported the evidence of the complainant, and which rendered the evidence of the accused less probable, *on the issues in dispute*."

[30] Repetition of a story cannot therefore constitute corroboration. See for example ***R v Rose*** 1937 AD 467 at 473; ***S v Scott-Crossley*** 2008 (1) SACR 223 (SCA) at para [17]; ***S v Hammond*** 2004 (2) SACR 303 (SCA) at para [12]-[16]; and ***S v M*** 2006 (1) SACR 67 (SCA) at para [5].

[31] Whether or not BM was in fact raped by the appellant is a matter which must be determined upon the evidence of BM. She did not undergo a medical examination immediately after the alleged incident and accordingly there is no medical evidence corroborating her version of the events which allegedly occurred. She is a single witness on the material question which falls for determination in this matter. Mr **Mtini**, on behalf of the appellant, relies on the often cited passage in ***R v Mokoena*** 1932 OPD 79 at 80 where De Villiers JP stated:

> "The uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by sec. 284 of Act 31 of 1917, but in my opinion that section should only be relied on where the evidence of single witness is clear and satisfactory in every material respect."

(Section 284 of Act 31 of 1917 is in all material respects replicated by section 208 of the CPA.)

[32] In ***S v Webber*** 1971 (3) SA 754 (A) it was pointed out that there is no magic formula which determines when a conviction would be justified upon the evidence of a single witness. What is required is that the evidence of the single witness should be approached with caution and that the merits of the witness ought to be weighed against factors which militate against his or her credibility. The approach set out in ***R v Mokoena*** *supra* remains valid, subject however, to the qualification in ***S v Webber*** *supra* (see *Zeffert and Paises: The South African Law of Evidence* (2nd ed) p. 963).

[33] Whilst the magistrate recognised that BM was a single witness in respect of the alleged rape, it does not appear from her judgment that she consciously reminded herself of the caution which she was required to exercise in the evaluation of her evidence. BM clearly impressed the magistrate as a witness. Her reports to B[...] and L[...] provide evidence of the fact that substantially prior to November 2007 BM alleged that the appellant had raped her. This weighed heavily with the magistrate and it is a factor to be considered in favour of BM's accusations.

[34] On the other hand, however, I have alluded earlier to the overwhelming probability that BM was infected with the HIV virus through sexual intercourse with an individual carrying the virus. This probability is wholly destructive of BM's account

of the manner in which she came to be infected. In these circumstances it cannot be said that the evidence of BM was satisfactory in every material respect. This feature enjoyed no more than two sentences in the evaluation of the evidence by the magistrate. I consider that the magistrate erred in failing to weigh the effect of the appellant's HIV status on the reliability of BM's version, particularly where BM was a single witness on this crucial aspect of the enquiry.

[35] The magistrate did not, in evaluating the evidence, consider the account of Dr Mabenge that BM had reported a sexual assault during March 2007. Nor did she consider the absence of any evidence from the clinic relating to BM's infection or the possible time of the onset thereof. On a consideration of these features I consider that the evidence permits, at least as a reasonable possibility, of a finding that the reports to L[...] and B[...] may have been made at a later stage than the magistrate accepted and that the infection of the complainant may have manifested at an earlier stage than April 2007.

[36] In these circumstances, for the reasons set out earlier herein, I consider, that the evidence permits of a very real possibility that BM may have tailored her evidence to protect a different sexual partner and that she may therefore have made the reports to B[...] and L[...] in order to identify a scapegoat to blame for the infection which may already have manifested. In the result I think that the appellant is entitled to the benefit of the doubt which arises herefrom and that it is therefore reasonably possible that the appellant might be innocent. (Compare ***S v Van der Meyden*** *supra*.) Put differently, I do not think that the evidence, properly considered, proved the guilt of the appellant beyond reasonable doubt.

[37] In the result the appeal succeeds and the conviction and sentence are set aside.

J W EKSTEEN

JUDGE OF THE HIGH COURT

GOOSEN J:

I agree.

G GOOSEN

JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Mr O Mtini instructed by Justice Centre, Grahamstown

For Respondent: Adv D Els instructed by the National Director of Public Prosecutions, Grahamstown