IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: AR686/2016

In the matter between:

HENRY SANDILE NGWAZI Appellant

versus

THE STATE Respondent

APPEAL JUDGMENT

Delivered on: 01 September 2017

ABRAHAM AJ

[1] The appellant was charged with one count of kidnapping and one count of Rape. In respect of the kidnapping charge it was alleged by the state that on or about 19 August 2011 and at or near Umlazi Township in the Regional Division of KwaZulu Natal, the appellant unlawfully and intentionally deprived N N of her liberty by taking her by force to his house and keeping her captive. In respect of the Rape charge which was read with the provisions of section 51(1) and schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended it was alleged that on the same date and at the same place the

appellant unlawfully and intentionally committed an act of sexual penetration with the complainant by inserting his penis into her vagina without her consent and that in doing so he inflicted grievous bodily harm on her.

[2] The state called the evidence of three witnesses; N N who is the complainant ("the complainant"); Mrs Nt N, the mother of the complainant and the first report ("the mother"); and three Dr Sunthrie Sagen Naidoo ("Dr Naidoo"), a full time medical officer and district surgeon in the employ of Department of Health conducted who a medical examination of the complainant on 20 August 2011.

[3] The facts which are common cause or not seriously disputed can be briefly summarised as follows:

- The complainant and the appellant were known to each other.

- There had being an dispute involving three CD's which the complainant had borrowed from the appellant and subsequently lost but this issue had being resolved after the intervention of the complainant's mother who, during July 2011 offered to compensate the appellant for the CD's but the appellant declined to accept payment.

- On 19 August 2011 and at about 7pm the complainant left her home and met the appellant.

- She thereafter accompanied him to his home.

- At the home of the appellant:-

    I. The complainant and the appellant had sexual intercourse on at least one occasion;
    II. The appellant assaulted the complainant inflicting various injuries upon her.

- They spent the night together and the complainant departed on foot early the next morning and returned to her home.

- Upon her arrival at home the complaint made a report to her mother.

- Later that day on 20 August 2011;

    I. A report was made to the South African Police;
    II. At about 11h30 the complainant was medically examined by Dr Naidoo.

[4] The appellant said he and the complainant had being lovers since 2010. He had met her when she was employed has a domestic worker at a neighbouring property.

[5] The complainant had borrowed and lost three of his CD's but this dispute had being resolved prior to the incident.

[6] On 19 August 2011 the appellant telephoned the complainant expressing the wish to meet with her and they agreed to meet that evening.

[7] That the evening the complainant left her home and they met nearby at a river after which they walked to appellant's residence where:-

- They watched television;
- The complainant had something to eat;
- They then retired to the appellant's bedroom;
- They had sexual intercourse;
- The complainant's condition made the appellant suspicious;

- Upon questioning the complainant about his suspicions, the complainant admitted having had sexual intercourse with another man earlier that same day;
- The appellant became incensed and assaulted the complainant, inter alia with a mental aerial inflicting upon her the injuries which Dr Naidoo, upon his examination found on the complainant and recorded on the form J88; and
- The complainant nevertheless spend the night and left early the next morning.

[8] The next time the appellant saw the complainant was when she arrived with the South African Police and the aerial used in the assault confiscated.

[9] The appellant was subsequently;

- Charged with and pleaded guilty to assault with intent to cause grievous bodily harm;
  and;
- For reasons which remain unclear, in addition separately charged with kidnapping and rape.

[10] The appellant denied that;

- He kidnapped the complainant and;
- That he raped her when he had sexual intercourse with her during the evening of 19 August 2011.

[11] The complainant was a single witness.

[12] Her evidence does not read well and is open to criticism in the following respects.

[13] After the appellant slabbed the appellant twice, she accompanied him to his home because she was scared and unsure as to what would happen if she had refused to do so. Under cross examination she contradicted this by saying that she accompanied the appellant to his home because he said he would throw her into the river if she refused to accompany him.

[14] At the home of the appellant the complainant said that while they were in the kitchen the appellant picked up a knife “from somewhere close” and pointed it at her but that the knife was left behind in the kitchen when they entered the bedroom. Under cross examination the complainant said that the knife was lying on a table and when asked what exactly the appellant did the knife; the complainant replied that he held the knife and added the appellant said that “he is going to hurt me”. The knife was however in fact not used to hurt the complainant and was left in the kitchen.

[15] The complainant was also asked to demonstrate how the appellant pointed the knife at her but she declined saying she did not have the knife in Court to do so thereby creating the impression that she was uncooperative or casting doubt upon whether in fact she was threatened with a knife at all.

[16] Following the assault and alleged rape, the appellant went to sleep. When asked why she did not raise the alarm or make good her escape, the complainant said that she told the appellant she wanted to go home but he would not accept that until the next morning. This is contradicted by the complainant herself later on when she went onto say that upon telling the appellant she wanted to go home, the appellant did not say anything and in addition to this the complainant also has an afterthought said that the door was locked. She claimed that she only knew that the appellant had closed the door but was sure whether it was locked or not. She went on to say that she was too scared to check whether the kitchen door was unlocked and that she just lay there without moving. The complainant conceded that whilst the appellant was asleep she could have left or summoned help via her cellular telephone and that the appellant did not in any way hinder her escape.

[17] Following the rape the complainant said that the appellant turned off the light and went to sleep but that she herself was unable to sleep. However later under cross examination she said that she also fell asleep and that they both slept until approximately 6am the next morning and they both slept naked until that morning. At approximately 6am she got up, dressed and the appellant let her out and she walked home. On the way home she telephoned her mother but did not say anything. She cried and then terminated the call. There was no explanation why the complainant did speak to her mother. Upon her arrival at home, the complainant said that she told her mother what had happened.

[18] Her mother contradicted this version in that the mother said she was concerned about the complainant staying away at night and, lacking airtime sent her a series of “call me back” messages but received no response. The mother made no mention of the complainant telephoning her the next morning before returning home. She said that when the complainant arrived home, her cousin opened the house for her and announced that the complainant was crying.

[19] The mother then asked the complainant what had happened and in response to this the complainant tendered an explanation which differed from the complainant’s evidence in that the appellant had called her and asked to meet in which they did whereafter the appellant then said that they should go to his home to discuss “the matter” and they then went. At the appellant’s home they entered and the appellant asked where his “movies” were to which the complainant replied that they were lost. The appellant then assaulted her and thereafter raped her. The mother could not say whether she were raped more than once because she said that she did not ask this of the complainant.

[20] Accordingly the evidence of the mother differed from that of the complainant as to whether the complainant was assaulted and forced to accompany the appellant to his home which undermines the complainant’s claim that she was kidnapped, assaulted by the appellant in order to subdue

her will with the object of raping her as oppose to punishing her for losing the dvd's and that the complainant was raped twice.

[21] The evidence of Dr Naidoo also contradicted the evidence of the complainant's in that he said that the complainant informed him that she had previously being raped by the appellant on 14 August 2011 and she had previously given birth to a child who had died at two months old of age. This contradicted the evidence of the complainant who denied any previous sexual experience with the appellant and said her child was alive and well and approximately four years of age. Under cross examination the complainant said that she was unable to recall telling the doctor that the appellant had previously raped her on 14 August 2011 and that she did recall telling Dr Naidoo that the baby had died. The complainant claimed she was so traumatised that she was unable to recall most of the interview which she had with Dr Naidoo. This contradicts the evidence of Dr Naidoo who concluded that the complainant was calm and composed at the time of his examination of her in that he recorded on the form J88 which he confirmed as correct that at the time of the examination carried out by him on the complainant, she was "fully conscious, cooperative and orientated".

[22] In the result there is no explanation for the contradictions for the evidence of the Dr Naidoo and the complainant. It is unlikely that Dr Naidoo was mistaken because he meticulously recorded the details of his examination on the form J88 and said that he had no communication difficulties and further that a translator was available in the case of such being required. These contradictions are material and impact adversely on the quality of the complainant's evidence.

[23] Of further significance in the evidence of Dr Naidoo was that he did not record any significant injuries during the course of his genital examination which were indicative of forceful penetration or non-consensual intercourse. The injuries which were recorded are all consistent with the assault perpetrated upon the complainant by the appellant and which was common cause.

[24] The improbabilities in the evidence of the complainant are that whilst the denial that she and the appellant had ever being lovers or more than casual acquaintances, the complainant was unable to explain how it came about that the appellant had her telephone number, why she left home unannounced to meet with the appellant in the dark near the bridge of after he phoned her and why it did not occur to her to tell her mother she was going out to meet with the appellant.

[25] According to the complainant the reason for the meeting with the appellant was to discuss the missing CD's but it is improbable that the appellant would have enquired from the complainant on 19 August 2011 about the whereabouts of the CD's when previously on the evidence of both the complainant and her mother the dispute about the lost CD's had being resolved during July 2011. After the complainant's mother offered to pay for the CD's the appellant declined to accept compensation and effectively said that the matter was settled.

[25] The Magistrate delivered a lengthy, ramblingly judgment which fails to acknowledge that the complainant was a single witness, that there were unsatisfactory feathers attaching to her evidence, that a cautionary approach was called for or that the Magistrate sought to apply any caution when it came to the acceptability of the evidence of the complainant. In the judgment the Magistrate acknowledged that the Court was faced with two mutually conflicting and irreconcilable versions and sought to resolve this conflict with resort to the probabilities emerging from the evidence before her.

[26] In terms of section 208 of the Criminal Procedure Act 51 of 1977 a Court is entitled to convict upon the single evidence of any competent witness.

[27] However has was illustrated in the case of *S v Crossley* 2008 (1) SACR 223 (SCA) at page 229 (e), a cautionary rule of practice applies to such a witness. A cautionary rule has its origins in *Rex v Mokoena* 1932 OPD 79 at

80 where De Villiers JP said the following of the corresponding section 284 of Act 31 of 1917:

> 'In my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias averse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation etc.'

[28] In *R V Mokoena* 1956 (3) SA 81 (A) Fagan JA observed at page 86 D-E that:

> 'The learned Judge President was enumerating the factors in which the Court should direct its mind when weighing the cogency of incriminating evidence, and uttering what may well be a useful warning that the right to convict on the evidence of a single credible witness, stated without qualifying words in the section, should not be regarded as putting the evidence of one witness on the same footing in regards to cogency as the evidence of than one.'

[29] In S v Hlapezula 1965 (4) SA 439 (A) Holmes JA explained at page 440 F-H that what evolved was a:-

> 'Cautionary rule of practice requiring: (a) recognition by the trial Court of the foregoing dangers, and (b) the safe guard of some factor reducing the risk of a wrong conviction, such corroboration implicating the accused in the commission of the offence, or the absence of the gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him…satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proved beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard aforementioned.'

[30] Corroboration was described in *S v Gentle* 2005 (1) SACR 420 (SCA) at 430 J - 431 A as follows:

> 'It must be emphasised immediately that by corroboration is meant other evidence which support the evidence of the complainant, and which renders the evidence of the accused less probable, on the issue in dispute.'

[31] Then followed a passage which is particularly apt for consideration for the present matter, namely-

> 'If the evidence of the complainant differs in significant detail from the evidence of the other state witnesses, the Court must critically examine the differences with a view to establishing whether the complainant's evidence is reliable. But the fact that the complainant's evidence accords with other state witnesses on issues that are not in dispute does not provide corroboration. Thus, in the present matter, for example, evidence that the appellant had sexual intercourse with the complainant does not provide corroboration with her version that she was raped, as the fact of sexual intercourse is common cause. What is required is credible evidence which renders the complainant's version more likely that the sexual intercourse took place without her consent, and the appellant's version less likely that it did not.'

[32] Here the Magistrate failed to properly consider or even to recognise the contradictions and improbabilities emerging from the complainant's version, or the contradictions between her evidence and those of the mother and Dr Naidoo. The fact that the complainant was assaulted and party to sexual intercourse are common cause. The question the Magistrate failed to consider was whether the appellant's explanation for the sexual intercourse and then the assault (in that order) could reasonably and possible be true. Underlying that version is whether or not the complainant and the appellant could have been romantically linked prior to 19 August 2011. Here the complainant failed to explain why the appellant had her telephone number, was prepared to go out into the night to meet with him at his telephonic request, left unannounced, made no attempt to get dressed after the alleged rape(s), stayed in bed with the appellant throughout the night, made no attempt to leave whilst the appellant was asleep and why she did not attempt

to seek assistance by using her cell phone if not to make a call then at least to transmit a message saying where she was. These all detract from the credibility of the evidence.

[33] Conversely, the same questions tend to strengthen or support the version of the appellant that he or the complainant were romantically involved, that they met and retired to his homestead for this purpose; that they indulged in consensual sexual intercourse; that a quarrel occurred by a reason of her alleged unfaithfulness which culminated in the admitted assault by the appellant upon the complainant whereafter they apparently made their peace and the appellant apologised and treated her injuries and the complainant stayed the night.

[34] Arguably the complainant could have falsely alleged kidnapping and rape by way of explanation for her absence from home overnight and or because she was upset with the appellant for assaulting her and wanting to exact retribution. In *S v BM* 2014 (2) SACR 23 (SCA) at paragraph 23 the Court held that there is no duty upon an accused person to explain why a state witness would dishonestly and falsely implicate him in a crime.

[35] Credible evidence needs to be determined not only by the quality of the presentation of a witness but more importantly by consideration of the probabilities in the light of the content of such evidence. Inferences can be drawn only once there is a credible body of evidence before the Court.

[36] In the final analysis the approach of the Magistrate called for a balanced consideration to be given to the evidence as a whole as set out in *S v Chabalala* 2003 (1) SACR 134 (SCA) at paragraph 15. In the process the Magistrate omitted relevant considerations and included irrelevant considerations. The Magistrate's reasoning was muddled, unconvincing, at times plain confusing and legally flawed.

[37] Generally the Magistrate's views of the probabilities are open to criticism and dissent.

[38] There are numerous misdirections contained in the Magistrate's judgment but for the present purposes it suffices to merely identify the fact the Magistrate

- failed to give any let alone adequate consideration to the fact that the complainant presented both as a single witness as well as a witness whose evidence displayed material imperfections;
- failed to warn herself of the dangers of reliance of such evidence or sought apply a cautionary approach;
- gave no or at the very least inadequate consideration to any cooperation or indeed any other safeguard to reinforce the evidence of the complainant; and
- in effect failed to adequately consider the evidence of the appellant.

[39] The Magistrate employed a circuitous approach of reasoning in rejecting the appellant's evidence and in this regard the case *S v Abrahams* 1979 (1) SA 203 (A) is instructive.

[40] In the circumstances we are at liberty to interfere. In my view the state's evidence is open to serious doubt and neither count was established with the requisite degree of certainty. The Magistrate ought to have found that the state had failed to discharge the onus and should have acquitted the appellant on both counts.

[41] I would propose:

- The appeal against conviction succeeds.
- The convictions of the appellant on both counts one and two as well as the sentence imposed by the Magistrate are set aside.
- A verdict is entered that;

‘The accused is found not guilty and discharged on both counts one and two’.

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ABRAHAM AJ

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VAN ZÝL J

I agree, and it is so ordered