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REPORTABLE:	YES/NO
CIRCULATE TO JUDGES	YES/NO
CIRCULATE TO MAGISTRATES	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA (NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case no: CA&R 46/2019

HEARD ON: 09-09-2019

DELIVERED: 08-11-2019

In the matter between:

Pako Kgosiengo

Appellant

And

The State

Respondent

CORAM: WILLIAMS ADJP et Vuma AJ

J U D G M E N T

Williams ADJP

1. The appellant was convicted of sexual assault (a contravention of sec 5 of Act 32 of 2007) in the Regional Court, Galeshewe

and was sentenced to 4 years imprisonment, wholly suspended for a period of 5 years on certain conditions.

He now appeals against the conviction.

2. The grounds of appeal are simply that the court *a quo* erred in accepting the evidence of the complainant who was a single witness and not finding the version of the appellant to be reasonably possibly true.
3. The common cause facts are briefly as follows:
 - 3.1 The complainant and the appellant were both students at the Sol Plaatje University and knew each other.
 - 3.2 On that particular night the students were congregating in groups in the quadrangle on campus awaiting the results of the Student Representative Council election which took place during the course of the day. The atmosphere was festive with music and alcoholic beverages being consumed.
 - 3.3 At one stage the appellant, who lived off-campus, asked the complainant whether he could leave his speaker in her room at a residence on campus. She agreed and gave him her room keys. While in the complainants room he decided to charge his cell phone there as well.
 - 3.4 Later that same night he asked for her key again to retrieve his cell phone. The appellant returned the key to the complainant on both occasions.
 - 3.5 After the election results were announced, the complainant who was feeling a bit tipsy by then, left the group for her room with the appellant following her.
 - 3.6 The appellant got delayed along the way but eventually entered the room of the complainant which was unlocked and lied down next to her on her bed.
 - 3.7 At one stage the complainant left the room and returned after some time. She asked him to leave her room.
 - 3.8 Soon after the appellant got out of bed a friend of the complainant knocked on her door. When the complainant opened the door, she ran out of the room crying.

4. The complainant testified that the appellant had offered to walk her half way to her residence after she had decided to call it a night. Although she declined the offer, the appellant nonetheless followed her. Halfway to the residence, he was approached by a fellow student and while he remained to chat, she proceeded to her room. She left the door unlocked since she expected her sister to collect her key, which was with the complainant, later on. The complainant stated that she did not expect the appellant to follow her into her room since she had been under the impression that he had been banned from the residence at some prior stage.
5. The complainant testified that she fell asleep while still fully clothed and woke up when she felt someone putting his arms across her waist. When she turned around she saw that it was the appellant who was lying next to her in bed. Upon enquiring what he was doing in her room, the appellant told the complainant that he just wanted to cuddle. She refused but felt that the appellant had an erection. When she looked down she saw his clothes on the floor and realised that he was naked.
6. She stated further that the appellant started dry humping her – which she describes as having sex with ones clothes on, although in this instance she was the one fully clothed.
7. The appellant refused to stop when she asked him to whereafter she then, while still lying next to the appellant used her laptop to contact her boyfriend, one M[...] on Facebook. She texted her boyfriend that someone was in her room and that he did not want to leave. She also asked her boyfriend to contact her sister or one of her friends about her situation. M[...] told her to scream but the appellant said she should not scream.
8. After a while she left the room to go to the bathroom which was situated down the passage. According to the complainant she sat there for about twenty minutes before she returned to her room. She had hoped that the appellant would have left by then.

9. When she asked him to leave he got out of bed but did not start getting dressed. There was a knock on the door and the appellant moved towards the door. When the complainant started moving towards the door the appellant told her not to open and went to stand behind the door.
10. The person at the door was her friend N[...] who had been alerted to the situation by the complainant's boyfriend M[...]. In any event the complainant rushed past the appellant and unlocked the door, which she testified must have been locked by the appellant. She opened the door and ran past her friend to the toilet. When she ventured to her bedroom later on the appellant had left.
11. Ms F[...] M[...] (N[...]) testified that she had knocked on the complainant's door for a while without any response. She was about to leave when M[...] urged her to try again since the complainant had told him that there was someone in the room who did not want to leave. When she knocked again the complainant opened the door and ran past her crying. The appellant was standing at the bed dressed in boxer shorts and a t-shirt and was busy putting on his pants.
12. Mr M[...] M[...] testified that he received a text message from the complainant on the night in question telling him that she was drunk and that a guy had followed her to her room and refused to leave. She asked him to get hold of her friend N[...]. While he was trying to get hold of the friend's number the complainant told him that the guy was getting undressed and was touching her. He then told her to scream. The complainant then told him that the guy said that he will beat her if she screams. He eventually got hold of N[...] and told her to check on the complainant. While waiting for a return call from Nonthlantla the complainant texted him again to say that the guy was forcing her onto the bed.
13. The appellant's version is that he was approached by the complainant, while they were waiting for the SRC election results, to sit with her group of friends since he had music. When the battery of his speaker went flat it was the complainant

- who suggested that he take her key and leave the speaker in her room for safekeeping. By the time the election results were announced it was already late and since his residence was about 4 kilometres away he asked the complainant if he could sleep over at her place. She agreed but added that he would have to wake up very early to go to his own place. When they got to her residence, she signed the security register and proceeded to her room, whereafter he signed the register and followed her.
14. When he got to the complainant's room, he knocked and entered. He saw the complainant lying in bed busy on her laptop. He took off his shoes and lied on his stomach on the bed where he fell asleep. The appellant testified that he woke up when the complainant got out of bed and left the room. He then waited for her for a long time to return so that he could go home. He stated that he did not want to leave before she got back.
 15. When the complainant eventually returned to her room she closed the door and asked him to leave. He had no problem with that, since it was his intention to go. As he was about to leave – he only had to put on his shoes – there was a knock on the door. The complainant surprised him by telling him to keep quiet. The knocking continued and the person was calling her name before eventually the complainant opened the door and ran out of the room and Nonthlantla entered.
 16. The appellant testified that he was standing at the desk next to the bed at the time. He denies that he was pulling up his pants as testified to by N[....]. In fact at that stage he had already put on his shoes and was fully dressed. He denies having threatened or sexually assaulted the complainant.
 17. S208 of the Criminal Procedure Act 51 of 1977 permits a conviction on the single evidence of any competent witness. Such evidence should however be substantially satisfactory in every material respect or there should be corroboration.
 18. *In casu* the trial court was aware of and acknowledged the dangers inherent in accepting the evidence of a single witness

without exercising the necessary caution. It appears from a reading of the judgment however that the trial court justified the inconsistencies and improbabilities in the version of the complainant by ascribing it to:

- (i) The fact that this was not the normal sexual assault situation;
- (ii) The fact that the appellant was a friend and fellow student of the complainant; and
- (iii) That one should therefore not impute stereotypical responses to the complainant.

19. In following through on this line of reasoning, the trial court accepted as reasonable the complainant's explanation for going to the bathroom instead of alerting the campus/residence security to the presence of an unwelcome naked man in her room – i.e. that she had given the appellant the benefit of the doubt that he would leave her room as she had requested of him.
20. Whilst the fact that they knew each other may explain why the complainant elected to give the appellant an opportunity to leave of his own accord, it does not explain why, when she returned to her room and discovered that he had not left, the complainant nonetheless entered the room and in fact closed the door behind her. This must be so since the door was closed when N[...] arrived shortly after the complainant had returned to her room and found the door closed.
21. Mr Steynberg for the appellant highlighted during argument many more inconsistencies and improbabilities in the state case. Amongst these are:
 - 21.1 The fact that the complainant would not want the appellant to accompany her to her residence when it was common cause that his speaker was still in her room;
 - 21.2 The fact that the complainant could have thought that the appellant had been banned from the residence (and therefore would not be able to gain entry) when he had

been to her room on two prior occasions during the course of that night without any problem;

- 21.3 The fact that the complainant had left her door open whilst being aware that the appellant was following her;
 - 21.4 The fact that the complainant was able to have sent multiple text messages via Facebook while, on her version, being sexually assaulted by the appellant;
 - 21.5 The inconsistencies between the complainant's evidence as to what she had texted M[....] and M[....]'s testimony in this regard; and
 - 21.6 The inconsistency between the complainant's evidence as to the appellant's position in her room and his state of undress when N[....] entered the room and that of N[....].
22. Despite the discrepancies, the trial court found that the complainant had maintained her version throughout, was honest, credible and satisfactory and that there was no reason not to believe the complainant. Corroboration for the complainant's distress was found in the evidence of N[....] and M[....]. The trial court found further that *"the state witnesses corroborated each other on material aspects of the evidence. The corroboration for the complainant by the witnesses is on material aspects of this case, thereby completing the puzzle."* In addition the trial court held that the evidence of the appellant corroborated the version of the complainant to a large extent.
23. I have already pointed out the contradictions and improbabilities in the evidence of the complainant. Her evidence on its own could therefore not have been found to be substantially satisfactory or reliable. Corroboration for her evidence thus becomes important before a conviction can follow.
- The corroboration which the trial court alluded to is rather vague and presents with at least two problems. Firstly, the fact of the complainant's distress when she opened the door for N[....] and thereafter has not been placed in dispute. The evidence of N[....] and M[....], who arrived on the scene later, can therefore not be considered as corroboration of her distress. In *S vs*

Gentle 2005(1) SACR 420 (SCA) at paragraph 18 thereof Cloete JA said the following:

“It must be emphasized immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, on the issues in dispute (cf R v W 1949 (3) SA 772 (A) at 778-9). If the evidence of the complainant differs in significant detail from the evidence of 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 the evidence of other State witnesses on issues not in dispute does not provide corroboration.”

24. Secondly, in as far as it was found that the state witnesses corroborated each other on material aspects, the trial court failed to elucidate these material aspects and in addition failed to have regard to the glaring inconsistencies in the different versions.
25. It is of no avail in these circumstances so seek corroboration for the complainant’s version in the evidence of the appellant. The trial court found the appellant’s version to be improbable, but such evidence cannot be rejected merely because it is improbable but only if it can be said to be so improbable that it cannot be reasonably possibly true. In *S v Schackell* 2001(2) SACR 185 (SCA) at paragraph 30 thereof Brand AJA, as he then was, held that:

“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 on the acceptance of that version. Of course it is permissible to test the accused’s version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be

rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.”

26. In any event, the appellant’s version in the circumstances of the events of that evening and specifically the fact that the witnesses, with the possible exception of M[....], had all partaken in alcoholic beverages cannot in my view be rejected as not being reasonably possibly true.
27. Mr Mxabo who appeared for the state in my view correctly conceded that in all the circumstances of this matter, the state had failed to prove the offence beyond a reasonable doubt and that the appeal should succeed.

In the premises, the following order is made:

- a) **The appeal succeeds.**
- b) **The conviction and sentence are set aside.**

CC WILLIAMS
JUDGE

I concur

L VUMA
ACTING JUDGE

For Appellant: Mr H Steynberg
Legal Aid South Africa

For Respondent: Adv NA Mxabo
Office of the DPP