IN THE HIGH COURT OF SOUTH AFRICA
BOPHUTHATSWANA PROVINCIAL DIVISION

CA NO.: 113/06

In the matter between:

EZEKIEL MODISE **APPELLANT**

and

THE STATE **RESPONDENT**

CRIMINAL APPEAL

MOGOENG JP & GURA J

DATE OF HEARING	**:**	**28 SEPTEMBER 2007**
DATE OF JUDGMENT	**:**	**09 NOVEMBER 2007**
FOR THE APPELLANT	**:**	**ADV C J ZWIEGELAAR**
FOR THE RESPONDENT	**:**	**ADV DE BEER**

JUDGMENT

GURA J:

Introduction

[1] The appellant was convicted in a Regional Court of attempted rape and sentenced to undergo a term of five years imprisonment. This appeal is directed against the conviction and the resultant sentence. Leave to appeal was granted by the trial court. The factual background follows below.

Factual background

[2] The appellant and the complainant were husband and wife. As at the date of the alleged attempted rape, divorce proceedings were pending. For a period of almost one year prior to the incident, the couple neither shared the same bedroom nor enjoyed conjugal rights together.

[3] According to the complainant, the appellant had not been sleeping at the matrimonial home for a long time. He had moved to his parental home. On the evening of the alleged incident, he came unexpectedly to the matrimonial home and proceeded straight to the matrimonial bedroom.

[4] His wife, the complainant, joined him in bed later. They shared the same blankets on the same bed. She was clad in a pair of panties and a nightdress only.

[5] In the middle of the night, the appellant asked her if they could make love. This request was turned down. He grabbed her and completely undressed her of her panties. He throttled her and pinned her down to the bed. Initially, the complainant was lying on her side, but the appellant then

turned her body in such a way that she eventually lay on her back. He then tried to lie on top of her. They engaged in a tussle with each other. She broke loose and jumped out of the bed. In an attempt to prevent her from fleeing, he grabbed her nightdress which got torn. It is not clear whether it fell down or remained in the appellant's grip. She grabbed a petticoat from a chair, wore it and fled to her neighbours, the Chumes, where she spent the whole night.

[6] The appellant's version is that he had always been staying and sleeping at his matrimonial home. He only went to his parental home for meals. On the night in question, he, as usual, slept in the main bedroom. At the time, the complainant was sleeping in another bedroom.

[7] Around 02h00, she joined him in the bed. She then kicked him and pushed him to the edge of the bed. He asked her why she kicked him whereupon she said that she was going to lay a charge against him. He ignored her and they slept peacefully. According to him, he did not attempt to rape her and the complainant did not go to the neighbour's house that night.

[8] The trial Court approached the evidence of the complainant with caution, especially with regard to what actually happened inside the bedroom. It found that she was an honest witness who did not contradict herself. It also found that the second State witness, Mrs Chume, was an unbiased and reliable witness, who corroborated the evidence of the complainant in material respects. It rejected as baseless, any suggestions by the defence, that there was a conspiracy between the two ladies to incriminate the appellant falsely.

The issues

[9] The issues raised by Mrs Zwiegelaar, on behalf of the appellant are as follows:

9.1 There was a possible perjurious conspiracy between the complainant and Mrs Chume to falsely implicate the appellant. The contradictions in their evidence, is proof of this.

9.2 No reasonable woman would have joined her husband in bed, taking into account the tension which had been existing between them. Her motive for creeping under the appellant's blankets that night, was evil.

9.3 Even if the Court does accept the evidence of the State, no offence of attempted rape has been proved. At best, assault common has been proved.

Evaluation of evidence

[10] The alleged contradictions in the State's case pertain to the injury which the complainant allegedly sustained and the manner in which she was dressed when she arrived at her neighbour's house.

[11] The complainant testified that when she ran out of the house, she fell down whereupon she was scratched by a fence. All that Mrs Chume said about this aspect was that she did not see any injury on her body. In my view, this is not a contradiction, for Mrs Chume may have been more concerned about

the complainant's virtual nakedness as well as the hysterical state in which she was. The complainant's evidence in chief is to the effect that she was clad in her "underwear" when she arrived at Mrs Chume's house. Under cross-examination she stated that she was clad in "one of my clothes" which she grabbed from a chair. In her statement to the police, she stated that she slept "without a panty or a nightdress". Mrs Chume on the other hand, testified that she had an "underwear" on. When she was called upon to be specific, she (Mrs Chume) said that it was a "petticoat". It is common cause that a petticoat is neither a panty nor a nightdress. The phrase "one of my clothes" cannot be construed as excluding a petticoat.

[12] In my view therefore, what may appear to be a contradiction regarding how she was clothed is no contradiction at all. Even if this were to be regarded as a contradiction, it is certainly not a material one. One aspect runs like a golden thread in the evidence of both ladies – the complainant was naked on her upper body. She did not even have a bra on.

[13] Mrs Chume never implicated the appellant directly in any way. She only testified about the arrival of a late night guest who was half clad. The trial Court's view was that if she had an adverse motive against the appellant, she would have done something more to build a case against him, for example, by confirming that the complainant was injured. In any case, there is no doubt that the two ladies are not friends. They are not in the habit of chatting with or visiting each other. Mrs Chume did not even know whether or not the appellant was still staying at his house. After the complainant told her that her husband wanted to rape her, she did not even probe. The trial Court was satisfied, beyond a reasonable doubt, and so am I, that there was no

collusion between the two State witnesses.

[14] The State's version is that the appellant was neither staying nor sleeping at his matrimonial home all along. It was the complainant who was sleeping in the main bedroom. She said that she went to sleep in that bedroom, nowithstanding that the appellant was already there because that was where she slept daily. In my view, if anyone had an evil motive, by sleeping in the main bedroom, it is not the complainant but the appellant. There is no doubt in my mind that the complainant ran to her neighbour's house at midnight and spent the night there. I am satisfied that the two women are indeed credible witnesses and that the appellant's version is not reasonably possibly true. Notwithstanding all of the aforegoing, the question still remains whether or not the state has proved that the appellant is guilty of attempted rape beyond reasonable doubt.

[15] In deciding whether or not there was any attempt to rape the complainant, the following accepted facts must be taken into account:

1The appellant asked the complainant if they could have sexual intercourse, she refused;
2He then undressed her of her panties;
3He throttled her and pinned her on the bed;
4He turned her body, causing her to lie on her back;
5He attempted to lie on top of her; and
6When she jumped out of bed in protest, he grabbed her nightdress which eventually got torn.

[16] In my view, no other reasonable inference may be drawn from these facts, except

> that the appellant intended and attempted to have sexual intercourse with the complainant, without her consent. A man who only intends to assault a lady under these circumstances would not undress her of her panties and thereafter cause her to lie on her back and then try to lie on top of her. Such is the conduct of a man who is intent on having sexual intercourse with a woman. Accordingly, I am satisfied that the guilt of the appellant was proved beyond a reasonable doubt.

Sentence

[17] The trial Court took the following factors into account for the purpose of sentence:

(i) The seriousness and prevalence of the offence;

(ii) The defencelessness of the victim and the injury on her knee;

(iii) The Supreme Court of Appeal judgment which was handed down during the same week when sentence in this matter was passed. In that case a husband had raped his wife twice, and the sentence of five years imprisonment which had been imposed by the trial court was increased on appeal to ten years imprisonment (that is the case of **S v Mvamvu 2005 (1) SACR** 54 (SCA));

(iv) The appellant's previous conviction of assault where he paid an admission of guilt in the amount of R150.00 in 2002. This, according to the court *aquo,* was proof that the appellant was a violent person,

and that he had not learnt any lesson from his previous conviction; and

(v) The poor health condition of the appellant who was alleged to be suffering from polio.

[18] The imposition of sentence lies entirely within the discretion of the trial Court. A Court of Appeal (such as this Court) should not usurp the function of the trial Court which, as I said above, is endowed with the discretion to impose an appropriate sentence. A Court of Appeal will, however, interfere where there is a material misdirection on the part of the trial Court or where the disparity between the sentence of the trial Court and the sentence which the Court of Appeal would have imposed, had it been the trial Court, is so marked that it can properly be described as shocking, startling or disturbingly inappropriate (**S v Malgas** 2001 (2) SA 1222 (SCA) at 1232A–E).

[19] This is a man whose wife joined him in bed, clad in panties and a nightdress. When life was still normal between them, they would ordinarily have made love. The appellant must, therefore, have been sexually aroused when his wife entered the blankets. The desire to make love to his wife must have overwhelmed him, hence his somewhat violent behaviour. He, however, neither smacked, punched nor kicked her. Minimum force, so to speak, was resorted to in order to subdue the complainant's resistance.

[20] In order to arrive at a decision to impose five years imprisonment, the trial Court was to a large extent influenced by the decision in **S v Mvamvu**, supra. The case of **Mvamvu** is clearly distinguishable from the present case, for the reasons set out below:

i)**Mvamvu** was convicted of two counts of rape;

(ii) When the first incident of rape was committed, he kidnapped the complainant and kept her against her will for several days and he had sexual intercourse with her at least six times;

(iii) When the second incident of rape took place, he went to where the complainant resided, armed with a knife, and forced her out of the house to some bushes where he sexually violated her person, twice; and

(iv) Those sexual acts were accompanied by a disturbing measure of brutality, including hitting her with a stick on her thigh.

Accordingly, apart from **Mvamvu's** case being that of at least eight incidents of rape, and this matter being a singular incident of attempted rape, the appellant in this matter did not beat up the complainant; not even to half the degree to which **Mvamvu** had done to his wife. There are, therefore, more mitigating factors in the present case as opposed to the strong aggravating features in the **Mvamvu** case which was incorrectly relied on by the Court *aquo*. Each case has to be decided primarily on its own facts.

[21] The relationship between the complainant and the appellant seems to have played no role in the exercise of the Magistrate's discretion. This relationship, of husband and wife, should never be overlooked by any judicial officer. See **S v Moipolai** 2005 (1) SACR 580 (BD).

[22] The trial Court seems to have over-emphasised the appellant's previous conviction of assault. Clearly, such a record is not an indication that a person did not learn any lesson. It is true that the complainant was injured, outside the house when she fell, but the appellant himself did not inflict any injury on her directly. He never chased after her. No real harm or injuries resulted from the throttling. It is not in the interest of justice to send the appellant to prison. This case is not comparable to a case where a lady comes across a stranger on the street who suddenly attempts to rape her. An effective term of imprisonment is, therefore, inappropriate in this case.

Conclusion

[23] In the result, the following order is made:

1. The appeal against the conviction is dismissed.
2. The appeal against the sentence is upheld and the sentence is set aside and substituted with the following:

> "Five (5) years imprisonment wholly suspended for three years on condition that the accused is not convicted of rape, attempted rape or indecent assault committed during the period of suspension".

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SAMKELO GURA
JUDGE OF THE HIGH COURT

I concur

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M T R MOGOENG
JUDGE PRESIDENT

APPEARANCES

For the Appellant	:	Kgomo Mokgetle & Tlou Attorneys KMT Building No. 56 Shippaard Street MAFIKENG 2745
For the Respondent	:	Department of Public Prosecution - Mr R.R. Makhaga Old Standard Bank Building Cnr. Robinson & Main Street MAFIKENG 2745