IN THE HIGH COURT OF SOUTH AFRICA
(NORTH WEST HIGH COURT, MAFIKENG)

CASE NO: CA186/04

In the matter between:

NEO NGESI **APPELLANT**

and

THE STATE **RESPONDENT**

FULL BENCH APPEAL

MOGOENG JP; LANDMAN J & KGOELE AJ

JUDGMENT

KGOELE AJ:

A INTRODUCTION

[1] The Appellant was convicted by the Regional Court sitting in Tlhabane on a charge of Rape. The matter was thereafter referred to the High Court of this Division for sentence in terms of Section 52 of the Criminal Law Amendment Act, 105 of 1997.

[2] The matter came before the honourable Justice Gura on the **22nd July 2004**. His Lordship Gura J confirmed the conviction of the Regional Court Magistrate and sentenced the Appellant to Eighteen (18) years imprisonment.

[3] The Appellant applied to the honourable Gura J for leave to appeal against both the conviction and sentence imposed. Leave to appeal to this Court was only granted in respect of the conviction only.

B BACKGROUND

[4] The complainant was 15 years old when the incident occurred. She testified that on the 7th day of September 2002 she went to the show grounds together with her friends. As it was late in the evening, they hired a taxi to take them there. Around midnight they went to a tavern called Chris's Tavern. At the Tavern the driver of the taxi informed them that he was going to fill petrol.

It became late and the taxi driver had not come back. Whilst standing at the gate panicking, the Appellant and his friends arrived and offered to take them home.

[5] Instead of taking them home, the Appellant and his friends drove the car to a house in Rustenburg "Noord". The Appellant had a gun in his possession. The complainant and her friend, Fila, were ordered by the Appellant and one of his friends to go into the garage of that house. The other people who were in the car went to the main house.

[6] In the garage the Appellant pointed the gun at the complainant and raped her. She and her friend managed to run away during the early hours of the morning. Arriving at home she could not explain anything to her mother, but just cried. Her mother took her to the doctor who examined her after laying a charge at the police station. She made the first report to the doctor as to what happened to her.

[7] Fila, the complainant's friend testified that she was at the same time raped by the Appellant's friend inside the garage where the complainant was allegedly raped. She conceded that she could not see what was happening to the complainant but only heard her screams when she pleaded with the Appellant to leave her.

[8] Dr Maria Mogolelo Sefanyetso who examined the complainant also testified. She testified that on the 8th day of September 2002 she examined the complainant. According to her examination, certain tears were observed by her on the posterior fourchette and on the hymen. This caused her to conclude that signs of assaultative penetration were present.

[9] Appellant testified and admitted having had sexual intercourse with the complainant but with her consent. In effect, the Appellant's evidence suggests that the complainant is the one who initiated the sexual intercourse.

C EVALUATION OF EVIDENCE

[10] It is not in dispute that sexual intercourse between the Appellant and the complainant took place. The only issue that the court a quo had to deal with was whether the sexual intercourse took place with or without consent.

[11] The State essentially relies on the evidence of three witnesses. After evaluating all the evidence in this matter, the trial Court made a finding that, although it is apparent that there were contradictions in the evidence of the State's witnesses, those contradictions were not so material as to weaken the case for the State. In addition, the trial court found some corroboratory

evidence in what the complainant's friend heard and came to a conclusion that no consensual intercourse took place.

[12] The trial court rejected the Appellant's version as highly improbable for the following reasons:

(a) Most aspects of the evidence especially the one relating to the complainant's initiation of the sexual intercourse were not canvassed before and even during her cross-examination for her to answer; and

(b) Further that there are several facts that the state-witness had mentioned that were never disputed by the Appellant, amongst others: the possession of a fire-arm by the appellant; the fact that complainant and her friend actually ran away in the morning.

[13] The trial court consequently, convicted the Appellant as charged.

D SUBMISSIONS

[14] The Appellant's ground of Appeal is to the effect that the honourable Gura J erred in confirming the conviction by the Regional Court Magistrate. **Ms Duvehage,** on behalf of the Appellant, relied on quite a number of submissions to support

the Appellant's ground of appeal. For the sake of completeness of this judgement I will quote them verbatim from the Appellant's heads of arguments. They are:

1. The learned Regional Court Magistrate erred in finding that the evidence of Dr Sefanyetso was to the effect that no tears would have shown in the posterior fourchette in an instance when the intercourse was consensual when in fact the Doctor conceded that even with consensual intercourse tears of this nature could be possible.

2. The learned Regional Court Magistrate erred in finding that the presence of clefts of the hymen referred to resent trauma in the same sense as fresh tears on the posterior fourchette can indicate that. In respect of this Dr. Sefanyetso defined a cleft as meaning an old healed tear, which could point to previous sexual intercourse.

3. The learned Regional Magistrate erred in finding that the evidence of Dr. Sefanyetso ever concluded that the complainant was a virgin. The only reference to that would be the complainant's own reference to no previous sexual or consensual partners, but physically it is not necessarily what was found by Dr. Sefanyetso in that the doctor had at least found evidence of previous interference with the hymen with specific reference to clefts being healed tears.

4. The Regional Court Magistrate erred in finding that there was no substantial contradictions between the evidence of the complainant and Fila Mogopa in respect of a number of issues:

4.1 Whether the complainant was dragged into the house or not;

4.2 Whether the complainant undressed herself after being threatened by the Appellant or whether he undressed her.

4.3 Whether the firearm was produced in the garage for the first time or whether the firearm was exchange in the vehicle on the way to the house;

4.4 Whether the Appellant and his friend remained inside the garage throughout the entire period or whether that Applicant left the garage for a period of in excess of 20 minutes;

4.5 Whether it was lit inside the garage or whether it was dark inside the garage;

4.6 Whether the complainant was raped twice or whether she was raped continuously during the whole night.

5. The learned Magistrate erred in finding corroboration in the evidence of Fila Mogopa when her own evidence there was such serious inherent contradictions, more specifically:

5.1 If this firearm was never produced anytime prior to being inside the garage, how could she see in darkness that the firearm was produced;

5.2 How could she see whether it was the complainant who undressed herself or whether she was undressed by the Appellant

5.3 How could she see that the complainant was raped by the Appellant.

6. The failure of the State to call the mother to at least present evidence as to the state of mind of the complainant when she arrived home provided serious lack of corroboration and is a vital flaw in the State case.

7. The improbabilities in the evidence of the State case, more particular through the complainant and Fila Mogopa were not considered properly by the learned Magistrate, more over;

    7.1 The absolute improbability that the show at Rusternburg would be visited at midnight;
    7.2 That the driver of a taxi with a full load of passengers would have to ask his passengers to disembark, promise to come back and then never return;
    7.3 That the complainant would notice in the car on the way to the Appellant's home the firearm and the not object in any way to go into the garage;
    7.4 That on the evidence of the complainant of being dragged into the garage that the friends, Thandi and Lorraine would not make alarm on their behalf;
    7.5 That the friends would voluntarily remain at the Appellant's house the next morning without any problems.

8. The learned Regional Court Magistrate's erred in concluding that several material aspects was not directly denied and put to the witnesses and that as a result thereof it could be accepted as common cause proven facts, as this issue was clearly indirectly disputed.

8.1 Specifically regarding the firearm improbabilities and contradictions regarding the firearm was pointed out by the defence and then immediately thereafter put to the witnesses that the Applicant would admit that sexual intercourse took place but that it was absolutely consensual. Clearly in that lies the dispute of the firearm.

9. Lastly that the Magistrate erred in her reasoning that common cause facts being the facts not disputed directly were in conflict with the Applicant's version causing his version not to be reasonable possibly true and therefore rejecting his evidence.

[15] On the other hand, **Mr Mokone**, on behalf of the Respondent, submitted that the Court a quo was correct in confirming the conviction of the Appellant by the Regional Court Magistrate. In support of the conviction by the trial court **Mr Mokone** maintained that despite the contradictions mentioned above, the complainant and her friend Fila corroborated each other on material aspects concerning the main issue in this matter, which is whether there was consent or not.

[16] The first three submissions made on behalf of the Appellant can be disposed of summarily. It is quite apparent from the record of proceedings that the trial court did not base its credibility finding that non-consensual intercourse took place solely on the report or the conclusion made by the doctor who examined the complainant.

[17] The fourth and the fifth submissions form the **crux** of the Appellant's ground of appeal. Indeed, there are contradictions between the evidence of the complainant and her friend in respect of a number of issues as enumerated by the Appellant's counsel. The contradictions are many and because of the finding that I make later in paragraphs 19 and 20 of this judgement, I am of the view that they are not worth mentioning. Usually a court is faced with conflicting evidence in nearly every case. To arrive at the correct factual finding, the court must decide what evidence to accept and what to reject. The proper way to decide between the two opposing versions is by reference to the probabilities, demeanour and credibility. Corroboration also, is regarded as an aid or factor in the process of evaluating evidence.

[18] In the case of **S v Gentle 2005 (1) SACR 420 (SCA) at 430 j to 431 c,** the following was stated:

> "*It must be emphasised 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 (R v W 1949 (3) SA 772 (A) at A 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. Thus, in the present matter, for example, evidence that the appellant had sexual intercourse with the complainant does not provide corroboration of 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."

[19] I find the above quoted remarks equally applicable in the present matter. As already pointed above, the legal issue which the trial court had to decide in the present matter was whether there was consent or not. Although there are contradictions between the evidence of the complainant and her friend, a critical examination of the evidence as a whole reveals that those contradictions do not at all relate to the issue in dispute, as the fact of sexual intercourse is common cause.

[20] Instead, and as correctly held by the trial court, there is evidence as to what the complainant's friend heard from the screams of the complainant. This is regarded as corroboratory evidence supporting the version of the complainant on the issue which is in dispute. The complainant's friend testified that although it was dark inside the garage, she could hear complainant saying to the Appellant **"please leave me"; "I do not want to have sex with you"; "you are hurting me".**
She further told the trial court that the complainant was crying at that time. This part of the evidence was not challenged at all, and thus remains uncontested. All of this is credible evidence which renders the complainant's version more likely that the sexual intercourse took place without her consent. It further renders the complainant's evidence reliable.

[21] I am thus satisfied that the trial court correctly regarded what the complainant's friend heard, as corroboratory evidence that supports the evidence of the complainant on the issue in dispute.

[22] In as far as the Appellant's sixth submission is concerned, I cannot agree with the submissions made by his counsel that the failure of the State to call the mother to at least present evidence as to the state of mind of the complainant when she

arrived at home provided a serious lack of corroboration and is a vital flaw in the state case. According to the evidence, the first report about the rape was made to the doctor who examined the complainant and not the mother. The doctor testified. The need for the mother to testify therefore fell away.

[23] The seventh, eighth and the ninth submissions of the Appellant mainly deal with the failure by the trial court to properly consider the probabilities and improbabilities in the evidence in this matter. The Appeal court has always recognized that the trial court enjoys a particular advantage when the demeanour of a witness or witnesses is of importance. In the case of **R v Dhlumayo 1948 (2) SA 677 (A) 705 par 6** it was further recognized that even when inferences from proven facts are in issue, the trial court can be in a more favourable position than the court of appeal because it is better able to judge what is probable or improbable in the light of its observations of persons who have appeared before it.

[24] However, it stands to reason that the appeal court will not always defer to the lower court's finding, for this would mean that the right of appeal against such findings would be illusory **(Protea Assistance Co Ltd v Casey 1970 (2) SA 643 (A) 648 D-E; SANTAM Bpk v Biddulph 2004 (5) SA 586 (SCA) par.5).**

This court is only entitled to reverse the findings of the trial court if it is satisfied on adequate grounds that they are wrong.

[25] Fortunately, it appears from the judgement of the trial court that it explained fully the basis of its findings on facts and why it regarded the evidence of the Appellant as highly improbable. Despite a detailed study of the submissions made by the Appellant's counsel in this regard, I found nothing in the record of proceedings that supports the Appellant's submissions that the factual findings made by the trial court are wrong. I therefore remain unpersuaded to conclude that the trial court failed to properly consider the probabilities and improbabilities in this matter.

[26] I fully agree with the trial court that for the reasons given by it, the probabilities point to the fact that complainant did not consent to the sexual intercourse nor initiate it. Further support for this finding is to be found in the corroboration the trial court found from the evidence of the complainant's friend as to the issue in dispute.

E CONCLUSION

[28] Under the circumstances I come to the conclusion that there was no error on the part of the His Lordship Gura J in confirming

the conviction of the trial court (Regional Court Magistrate). I am satisfied that the trial court correctly concluded that the guilt of the Appellant was proven beyond reasonable doubt.

F **ORDER**

[29] The appeal is dismissed.

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A. M KGOELE
ACTING JUDGE OF THE HIGH COURT

I agree

_____
M.T.R MOGOENG
JUDGE PRESIDENT OF THE HIGH COURT

I agree

_____
A.A LANDMAN

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	: 28 NOVEMBER 2008
DATE OF JUDGEMENT	: 19 MARCH 2009
COUNSEL FOR APPLICANT	: ADV DUVENHAGE
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