IN THE NORTH WEST HIGH COURT

MAFIKENG

CA 29/2009

In the matter between:

GABANAKGOSI CHRISTO **APPELLANT**

and

THE STATE **RESPONDENT**

CRIMINAL APPEAL

GURA J, KGOELE J

DATE OF HEARING	**:**	**20 APRIL 2012**
DATE OF JUDGMENT	**:**	**7 JUNE 2012**
FOR THE APPELLANT	**:**	**Advocate B. Segone**
FOR THE RESPONDENT	**:**	**Advocate T.D. Muneri**

JUDGMENT

KGOELE J:

[1] The appellant was convicted of Rape by the Regional Court held at Ganyesa. He was sentenced to ten (10) years imprisonment. Leave to appeal was granted by the court *a quo* against conviction only, hence this appeal.

[2] The issues on appeal were the following:-

- that the court *a quo* misdirected itself by making a finding that the state had proved its case beyond reasonable doubt that the appellant had sexual intercourse with the complainant without her consent;
- that the court *a quo* misdirected itself by rejecting the version of the appellant as not being reasonably possibly true, especially taking into consideration that the complainant and the appellant were found by the complaint's boyfriend having sexual intercourse.

[3] The following is a summary of the evidence of the two witnesses called by the state:-

On the 19th December 2007 complainant was alone at home. Her mother had gone to Rustenburg. Appellant arrived at her home after 6:00 pm. As she regarded him as a brother she welcomed him. They chatted about how quickly she had grown up. He thereafter left. He returned after 8:00 pm the very same night. They both watched television until after 9:30 pm when he said he wanted to leave. Appellant requested complainant to take him out of the door. As they were going out the appellant started accusing the complainant that she is undermining him. They exchanged some words on the issue of being undermined. Appellant then started assaulting complainant with open hands. He pulled her back to the house, in one of the bedrooms he undressed her and had sexual intercourse with her without her consent. At some stage complainant managed to grab the appellant by the hips and pushed him off. Appellant refused to leave and said he was going to have sexual intercourse with her for the second time. When he was trying to do that, the complainant's boyfriend, arrived. He firstly knocked at her mother's room, a bedroom wherein she (complainant) used to sleep, and did not get a response. When he opened the door where the two were, he found appellant not wearing a trouser, complainant crying.

[4] Because complainant and her boyfriend had an appointment for 9:00 pm that night, complainant asked him whether the time he arrived at was 9:00 they had agreed to. Her boyfriend

did not speak to her, he went straight to the appellant, spoke to him and they both went outside. She did not hear what they were talking about as she was less interested in what they were discussing. When the boyfriend came from outside where he left appellant, complainant reported to him that the appellant had sexual intercourse with her. He asked if that was by consent, and she replied by saying, it was not. Her boyfriend suggested that they should proceed to the police station to report, she then said she would only go when her mother arrives on the 22nd. The mother did arrive on the 22nd and it was only then that the matter was reported to the police.

[5] Her boyfriend's testimony corroborates almost everything that the complainant testified about after he arrived. They only contradicted each other as far as the time of arrival is concerned. Complainant said the arrival was around past twelve to one midnight when her boyfriend said he arrived at eleven o'lock in the evening.

[6] The appellant testified and said in fact he and complainant had a love relationship. He confirmed that he visited complainant twice as per agreement. They ultimately had sexual intercourse with each other by consent, and unfortunately, the boyfriend to complainant, Boetie, found them when they were still having sexual intercourse. Although complainant told him that she was awaiting her boyfriend the same night, he told her that he would not be long, he would make it snappy and

leave. He thinks that the complainant has laid a charge of rape against him because her boyfriend found them together having sexual intercourse.

[7] The court *a quo* after assessing the totality of the evidence before it, found that there was no reasonable possibility that the evidence which implicated the appellant might be false and further that the evidence as a whole proved that his version was false beyond a reasonable doubt. It accordingly rejected it.

[8] It is trite law that the court need not believe the evidence of the accused and is bound to acquit him if there exist a reasonable possibility that his evidence may be true **(R v Difford 1937 AD 370 at 373; S v M 1946 AD 1023; S v Kubeka 1982 (1) SA 534 (W); S v Makobe 1991 (2) SACR 456 (W) and S v Mokoena & Others 2006 (1) SACR 29 (W) 49 e-g.**

[9] **In S v Chabalala 2003 (1) SACR 134 (SCA) paragraph 15** the court described the approach to be adopted as follows:-

> "15. The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide

whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear."

[10] Whilst in agreement with the fact that inherent probabilities play a critical role in the inquiry, the following remarks which were made in the case of **Monageng v S February (1) 2009 ALL SA 237 (SCA)** are worthy to be quoted:-

"But whilst it is entirely permissible for a court to test an accused's evidence against the probabilities, it is improper to determine his or her guilt on a balance of probabilities. The standard of proof remains proof beyond reasonable doubt, ie. evidence with such a high degree of probability that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exist no reasonable doubt that an accused has committed the crime charged. An accused's evidence therefore can be rejected on the basis of probabilities only if found to be so improbable that it cannot reasonably possibly be true".

[11] Ms Segone on behalf of the appellant submitted that the court *a quo* misdirected itself by rejecting his version which was probable in the circumstances of the matter. Appellant's

counsel maintains that his version:

- that he had a love relationship with the complainant;
- that he did have sexual intercourse with her with her consent;
  and
- that the reason why the complainant was crying and falsely implicating him is because the complainant's boyfriend caught them;

was reasonably probably true.

[12] Mr Muneri on behalf of the respondent, submitted that looking at the evidence in its totality, the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt. Further that, based on the condition in which the boyfriend testified to have found the complainant, it cannot be concluded that she consented to sexual intercourse and that she is fabricating a case against the appellant.

[13] The fact that appellant and complainant had sexual intercourse and were found by the complainant's boyfriend whilst both of them were naked in the bedroom where the complainant does not usually sleep, is common cause in this matter.

[14] The complainant, whilst she impressed the court *a quo* in the

manner in which she testified, her conduct gathered from the evidence as a whole after the alleged rape is questionable. Firstly, she did not immediately report to her boyfriend that she was raped. Instead, she confronted him about his late coming. Even after confronting him, she waited for her boyfriend to talk to the appellant, take him (the appellant) out of the house and only when confronted by the boyfriend on his return, opened up and said the sexual intercourse was not consensual. Her strange behaviour on this aspect of not reporting immediately is worsened by the fact that, even at the stage when she was confronted, she did not immediately say she was raped, she waited for her boyfriend to further ask whether the sexual intercourse was consensual and only replied with the word **"no"** thereafter.

[15] Secondly, when the boyfriend requested that they should go immediately to report to the police, she refused, and chose to wait for her mother who was going to be available on the 22nd, three days after the alleged rape. This is probably a reason why the medical report was not available in this matter.

[16] Thirdly, what is also strange is the fact that according to her own version, when her boyfriend and the appellant talked to each other in the room and even outside, the complainant became less interested in what they were discussing, this is the reason why she did not hear what they spoke about. One will expect her to be curious of their conversation at that time

so that in the event that her boyfriend confronted the appellant about whether the sexual intercourse was consensual or not, she could have been in a better position to reveal that it was not consensual in front of her boyfriend and more importantly, whilst the appellant was still there.

[17] In as far as the crying is concerned, her boyfriend and the appellant testified that she was crying when the boyfriend arrived, although appellant's version is that complainant started crying when realising that her boyfriend had arrived. Complainant forgot to mention that she was crying. She could only remember about this fact during cross-examination. The question is, if it is indeed true that she had been crying long before her boyfriend arrived, can she just simply forget about this important part of the evidence. Unfortunately, this leaves this court with a doubt as to when did she start crying.

[18] The time factor is also important in this matter. According to the evidence when the incident of the rape started it was about 9h30 pm. The boyfriend arrived at 11h00 pm. According to complainant, when her boyfriend arrived, it is when appellant was trying to have sexual intercourse with her for the second time. Appellant on the other hand alleges that there was a stage when they fell fast asleep. Complainant did not dispute this. If one is to accept the complainant's version, I find it highly unlikely that the intercourse could have lasted for 1 hour 30 minutes. I find it more probable that indeed they slept for

some time after the first sexual encounter. It is further strange why the complainant did not at this time get out of the house and shout for help from neighbours whilst appellant was still asleep, if indeed he was not party to the sexual intercourse.

[19] Unfortunately all of the considerations I made in the paragraphs above were not dealt with by the trial court.

[20] Counsel for the respondent submitted that it is highly improbable that the complainant could engage in sexual intercourse with another man whilst expecting and waiting for her boyfriend. On the same breath, one cannot just overlook the version of the appellant that because it was so late the complainant did not expect her boyfriend to arrive any longer, and that that was the reason why she consented to have sexual intercourse with him.

[21] This court is alive to the fact that there is no onus on the appellant to satisfy the court of the truth of any explanation that he gives. Further to the fact that motive to incriminate the accused is one of the relevant factors for consideration in matters of this nature. If he gives a version that is reasonably possibly true, then he is entitled to his acquittal. When this court considers the totality of the evidence that was before the trial court, the probabilities and improbabilities on both sides, coupled with the considerations made by this court above concerning the conduct of the complainant, I am of the view

that this court cannot safely conclude that the appellant's version is so improbable that it cannot reasonably possibly be true. The state's evidence cannot be said to be of such a high degree of probability that a conclusion can be reached that there exists no reasonable doubt that the appellant has committed no rape.

[22] Consequently the following order is made:-

22.1 The appeal succeeds;

22.2 The conviction and the resultant sentence are set aside.

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A M KGOELE
JUDGE OF THE HIGH COURT

I agree

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SAMKELO GURA
JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE APPELLANT	:	Justice Centre Mafikeng
FOR THE RESPONDENT	:	DPP