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IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CA 20/2012

In the matter between:-

JOHNNY DEMUSI

Appellant

and

THE STATE Respondent

CRIMINAL APPEAL

HENDRICKS J; GURA J

DATE OF HEARING	:	19 OCTOBER 2012
DATE OF JUDGMENT	:	01 NOVEMBER 2012
COUNSEL FOR THE APPLICANT	:	ADV SKIBI
COUNSEL FOR THE RESPONDENT	:	ADV NONTENJWA

REASONS FOR JUDGMENT

HENDRICKS J

Introduction:-

[1] The Appellant, an Ethopian National, stood trial in the Regional Court, Mogwase on charges of rape and kidnapping respectively. He was convicted and sentenced to life imprisonment (presumably both counts were taken as one for sentencing purposes although it was not so pronounced by the presiding Regional Magistrate). The Appellant now appeals both the convictions as well as the sentence imposed upon him.

Ad Condonation:-

[2] An application for condonation for the late noting and prosecution of the appeal was made by the Appellant/Applicant. This application was not opposed by the Respondent (The State). After careful consideration of the said application as well as the merits, this Court is of the view that the requisite condonation be granted to the Applicant, in the interest of justice.

Ad Merits:-

[3] The State's version of the events can be summarized as follows:-

The complainant testified that on 18 May 2008 she was from music competitions when she decided to enter the Appellant's place. The reason for her visit was to fetch an atlas from Kagiso who was

attending school with her. Upon her arrival she found that Kagiso was not present and she then asked for water from the Appellant, who ushered her inside the house to fetch water for her. After entering he closed the door, gagged her mouth and thereafter fastened her onto a chair with her hands tied behind her back. She said her mouth was closed with cello-tape. The Appellant did not say anything to her. That evening the Appellant took her from the chair, untied her hands, placed her on the bed with her hands at her back and had sexual intercourse with her while her mouth was still closed with the cello-tape. The Appellant had prepared a bed on the floor and after the sexual intercourse he put her on the floor. She slept there with her hands and mouth tied. The following morning the Appellant took some blankets and a book and left her in the house. He returned at about 12h00 midday. She did not eat and could not go to the toilet. She was wetting herself. She did not eat until at a later stage on the 19th when the Appellant went to buy bread and started feeding her. During the night of the 19th May the Appellant had sexual intercourse with her again. In the morning of the 20th May he took a notebook and some blankets and rode his bicycle into the village. He left her inside the locked house, although her hands were untied at that stage. After the departure of the Appellant, she opened a window. She could see one Dikeledi who was the neighbour. She called and requested her to assist her to get out through the window of the Appellant's house. Dikeledi advised her to take a table, push it to the window, and climb on top of it and thereafter to get out through the window. She complied and managed to escape through the window. She proceeded to Dikeledi who then took her to her sister's place. She stated that she did not consent to the

sexual intercourse. During the period in question, the Appellant said nothing to her and she remained gagged during the two sexual encounters. Her evidence is corroborated by Dikeledi Mafora.

[4] The convictions are attacked on the basis:-

[i] that the court ***a quo*** erred in convicting the Appellant seeing that the State failed to prove the guilt of the Appellant beyond reasonable doubt bearing specifically in mind the numerous and material contradictions and inconsistencies in the State's case;

and

[ii] the incorrect approach, evaluation and adjudication of the ***alibi*** evidence produced by the Appellant which was not disproved by the State and which resulted in the misdirected shifting of the onus by the Regional Magistrate onto the Appellant to prove his ***alibi***.

[5] There are numerous material contradictions in the evidence tendered on behalf of the State. The most important of them all is the fact that the charge sheet states that the Appellant raped the complainant repeatedly but that is not what she reported to Seleke and the doctor who recorded it on the medical form which was handed in as an exhibit. The Regional Magistrate found the Appellant "guilty as charged" but during sentence he corrected what he said in his judgment on the merits. There is also no

evidence to prove whether the injuries on the complainant's private parts were either fresh or not or were consistent with consensual intercourse because the doctor was not called to testify.

[6] As far as the ***alibi*** of the Appellant is concerned, the following is apparent:-

The Appellant states that he left Mabelapodi on his way to Johannesburg on the 18th of May 2008 at about 15h00 and he slept that evening at Tlhabane. He woke up at 04h30 on the 19th of May 2008 and proceeded to Johannesburg. He bordered a taxi. He arrived in Johannesburg at around 08h30. He renewed his permit to stay in South Africa. The said permit bears a stamp of the 19th of May and the document was handed in as Exhibit "B". When he left for Johannesburg, his house keys remained with Kagiso Twala. This has been confirmed by Mr Kagiso Twala. He returned to Mabelapodi on the 20th of May 2008 and he received his keys back. The document, which bears a date stamp of the 19th of May 2008, is an indication that the Appellant was in Johannesburg on the said date. That is in complete contrast to the evidence of the complaint who says that the Appellant was at Mabelapodi.

The evidence of Obakeng Tau places the complainant at the Mabelapodi hostel with her boyfriend Phako, on the weekend of the 16th to the 19th of May 2008. This witness had no reason to shield or to be biased towards the Appellant because he stated he did not even know him. He knew the complainant by sight.

Jacob Matlhaga is a classmate of the complainant. He also places the complainant at the hostel with her boyfriend. He goes further and state that she did not go to school on Monday, the 19th of May. On his return from school he saw her in the company of a certain boy at about 16h00.

[7] In my view the Magistrate erred in rejecting the Appellant's evidence on the bases that the Appellant did not personally go to Johannesburg when his permit was extended. There is no evidence to rebut that the Appellant was not personally in Johannesburg but that somebody else was there to extend the permit on his behalf.

[8] The Appellant's version is corroborated in a number of material respects:-

- The Appellant left his house key to Kagiso Ntwala on Sunday, the 18th of May 2008 at 15h00. He was to be in Johannesburg the following day, the 19th of May. This piece of evidence is confirmed by Kagiso Ntwala, that he was given the house key of the Appellant, and that he is the one who locked the house of the Appellant on Sunday at 18h00 or 19h00 and went home.

- The Appellant says that he was in Johannesburg on Monday the19th of May 2008 and he was renewing or extending his residence permit to stay in South Africa. He handed a document which bears a date stamp of the 19th of May 2008. It is highly improbable that someone could have renewed the

resident permit of the Appellant without him being there.

- The Appellant received his house key on Tuesday, the 20th after he returned from Johannesburg. Although Kagiso Ntwala says that he handed the Appellant's key on Wednesday, this difference is not material. The fact that on the night of the 18th and 19th May Kagiso had the keys and was in control of the house of the Appellant is crucial.

[9] In the case of **S v Malefo** 1998 (1) SACR 127 (W) at 158 (a-e) the court held that:- *"the correct approach in assessing an alibi defence raised by an accused is (a) there is no burden of proof on the accused to prove his alibi; (b) if there is a possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of doubt"*. In the case of **S v Liebenberg** 2005 (2) SACR 355 (SCA) it was held that:- *"the accused is entitled to an acquittal if there is a reasonable possibility that his alibi evidence is true, and such defence cannot be rejected on the bases that there is a strong evidence linking him with the crime"*.

[10] Adv Nontenjwa, on behalf of the Respondent (The State) quite correctly in my view, conceded that in the light of the aforementioned, the convictions cannot be supported and that the Appellant's appeal must succeed. It follows that the sentence imposed should also be set aside. In my view, the Appellant's version that he did not kidnap and rape the complainant, is reasonably possibly true and he should have been given the benefit of the doubt and be acquitted by the court ***a quo***.

Order:-

It is for the aforementioned reasons that the following order was made:-

"[i] Condonation is granted for the late noting and prosecution of the appeal.

[ii] The appeal succeeds.

[iii] The convictions and sentence are set aside."

R D HENDRICKS
JUDGE OF THE HIGH COURT

I agree.

SAMKELO GURA
JUDGE OF THE HIGH COURT