**IN THE HIGH COURT OF SOUTH AFRICA**

**NORTH WEST PROVINCIAL DIVISION, MAHIKENG**

**CASE NO: CA 42/2013**

**In the matter between:**

**GIFT BLOS** **APPELLANT**

**AND**

**THE STATE** **RESPONDENT**

**CRIMINAL APPEAL**

**GUTTA J ; DJAJE AJ**

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**JUDGMENT**

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**DJAJE AJ**

[1] This is an appeal against the conviction of the Appellant on a charge of rape read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997. The Appellant was arraigned at the Regional Court, Taung and after conviction he was sentenced to ten (10) years imprisonment. He now appeals against the conviction with the leave of this court.

[2] In the court a quo the Appellant was not legally represented as he chose to conduct his own defence. His rights were fully explained throughout the trial.

[3] The facts of this case can be summarised as follows. It is alleged that the Appellant on 22 January 2011 unlawfully and intentionally had sexual intercourse with the complainant, S[…] M[…]. The complainant testified that on the day of the incident she was in the company of her two friends, B[…] and Bo[…] taking them halfway. On the way she met the Appellant who asked her

to accompany him and she refused. The Appellant then ‘turned’ her and took her towards his parental home threatening to assault her if she does not accompany him. When they reached the Appellant’s home his mother was present and they sat outside under the tree. Later, the Appellant ordered her to

get inside his bedroom in the house and she complied. He then requested to have sexual intercourse with her and she refused. The Appellant undressed her and had sexual intercourse with her without her consent three times throughout the night. In the morning he took her half way. When he turned back she went to the police station to report that the Appellant had sexual intercourse with her without her consent.

[4] Both Bo[…] and B[…] confirmed that they were with the complainant on the day of the incident and she explained to them that the Appellant had proposed that they should have a love relationship and she was not interested. She further told them that the Appellant even promised to assault her. When they saw the Appellant approaching they made a gesture to the complainant to run away. The Appellant did not take kindly to that gesture and he insulted them. At a later stage they met the Appellant walking with the complainant.

[5] Constable Mguye testified that she was on duty at the police station and the complainant reported to her that she was raped by the Appellant. The complainant was crying and her clothes were soiled. The doctor who completed

the medical examination form, J88 could not be traced and therefore did not testify.

[6] The Appellant disputed that he raped the complainant. He explained that they were in love and that the sexual intercourse was consensual. He said the complainant only laid charges as she was afraid of her uncle for not sleeping at home.

[7] It has not been disputed that the complainant and the Appellant were together on 22 January 2011 and that they had sexual intercourse. The only dispute was whether the complainant consented to the sexual intercourse or not.

[8] The attack on the conviction by the Appellant is that the court erred in accepting that the state had succeeded in proving its case beyond reasonable doubt and overlooking the improbabilities and contradictions in the state case. Further that the court ***a quo*** dealt with the evidence on a piece meal basis when

convicting the Appellant. The Respondent supports the conviction and submitted that the court ***a quo*** dealt with the evidence in totality.

[9] In the case of **S v Trainor 2003 (1) SA 35 (SCA) par [9]** the following was stated in relation to the evaluation of evidence:

> "A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety.
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> **See also S v Van der Mayden 1999 (1) SACR 450 (WLD) @ 450b**

[10] The following was stated in the case of **S v Chabalala 2003 (1) SACR 134 (SCA)** by **Heher AJA** at 40a–b that:

"The correct approach is to weigh up all the elements which points 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 to 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 that can only be on 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 in evidence.

[11] In the matter of **Shackell v S [2001] 4 All SA 279 (SCA) Brand AJA** stated as follows at **288e-f** that:

"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."

[12] The contradictions and improbabilities referred to by the Appellant need to be scrutinised carefully to determine whether there was any misdirection by the court ***a quo*** in convicting the Appellant.

[13] The complainant testified that the Appellant forced her to go with him to his parental home. On their way to the Appellant's home they met with many people. Further a police van passed them. They further went to a tavern and the Appellant left her at the gate with his friends who are staying in the same section as the complainant. At that time the Appellant was inside the tavern buying drinks and cigarette. When they arrived at the Appellant's home his mother was present and they sat outside under the tree. She also stated that when she enquired from the appellant what he was going to do with her, the Appellant indicated that he was going to have sexual intercourse with her. Despite this knowledge she did not use the opportunity to alert all those people and tell them about her predicament. She only testified that the Appellant threatened to do something to her if she does not accompany him. There is no evidence of any weapon or specific threat made to her by the Appellant.

[14] According to the Constable the complainant's clothes were soiled when she arrived at the police station and the complaiant reported that the Appellant was dragging her on the ground. There is nowhere in the complainant's testimony where mention is made of her being dragged on the ground. On the

contrary she testified that she was raped inside the bedroom, on a bed and she had been sitting outside with the Appellant prior to proceeding to the bedroom.

[15] During cross-examination by the Appellant the complainant conceded that in the morning she was asking herself what she was going to say to her elders when she gets home. This concession was confirmation of the appellant's version that the complainant told him she was afraid of her uncle and he was going to hit her. This can be the reason why the complainant first went to the police station and not straight home to report to her uncle.

[16] According to the complainant the Appellant had proposed love to her and she had no interest. Bo[…] testified that she used to go to the Appellant's gate with the complainant and the Appellant would be there. She said the complainant was not being honest with them when she said she was not in love with the Appellant. B[…] also testified that the complainant asked them to take the route that passes at the Appellant's place. The complainant further conceded during cross-examination that she saw her photograph in the Appellant's bedroom although the Appellant got it from her friend D[…]. All the aforestated evidence is in direct contrast with the complainant's version that

she was afraid of the Appellant and points to the Appellant's version being reasonably possibly true.

[17] The doctor who examined the complainant noted in the medical (J88) that there were tears and bruising on the genitalia of the complainant and concluded that there was sexual assault. In attacking this evidence Counsel for the Appellant relied on the case of **S v MM 2012(2) SACR 18 (SCA) at par 24** where the following was stated:

> "It is most unsatisfactory to have to reach a conclusion on the basis of uncertainty concerning the meaning of the medical report……Certainly, whenever the implications of the doctor's observation are unclear, the doctor should be called to explain those observations and to guide the court in the correct inference to be drawn from them."

In this matter the doctor was not called to testify and his findings remain unexplained. It is therefore difficult for this court to draw any inference from the doctor's report and the importance thereof.

[18] A conspectus of all the evidence is required to establish whether the state has succeeded to prove its case beyond reasonable doubt. Taking into

consideration the general conduct of the complainant on the day of the alleged incident, it is doubtful whether she was indeed raped as she alleged. The benefit of the doubt should be given to the Appellant and the conviction should therefore be set aside.

**ORDER**

[19] Consequently, the following order is made:

1. The appeal against the conviction is upheld

2. The conviction and sentence is set aside.

**DJAJE AJ**

**ACTING JUDGE OF THE NORTH WEST HIGH COURT**

I agree

**GUTTA J**

**JUDGE OF THE NORTH WEST HIGH COURT**

**APPERANCES**

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| DATE OF THE HEARING | : 14 NOVEMBER 2014 |
| DATE OF JUDGMENT | : 20 NOVEMBER 2014 |

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| COUNSEL FOR THE APPLICANT | : ADV GONGXHEKA |
| COUNSEL FOR THE RESPONDENT | : ADV NEKHAVHAMBE |
| ATTORNEYS FOR THE APPLICANT | : LASA |
| ATTORNEYS FOR THE RESPONDENT | : DPP |