IN THE HIGH COURT OF SOUTH AFRICA

(NORTH WEST DIVISION, MAHIKENG)

CASE NO.: CA 32/15

In the matter between:

TSIMAKO PULE MESHAK **APPELLANT**

And

THE STATE **RESPONDENT**

LANDMAN J & GURA J

JUDGMENT

Landman J:

Introduction

[1] Pule Meshak Tsimako, the appellant, was convicted in the Regional Magistrate Court sitting at Mmabatho on a charge of rape and sentenced to life imprisonment. He appeals against his conviction and sentence. The appeal is out

of time. The appellant has applied for condonation for the late noting of the appeal. The respondent does not oppose the application for condonation. The application is granted.

[2] The complainant and her cousin testified on behalf of the state, while the appellant and his friend, testified for the defence.

Outline of the facts

[3] The facts are relatively straightforward. About 19:00 hours on 7 July 2007 the complainant and her cousin set off from their home in Lonely Park for the White House, which is a local tavern. They remained there consuming Redds "ciders" until about 02:00 in the company of the appellant and his friend. The cousin's boyfriend was also at the tavern. He is said to have supplied liquor but, strangely, he did not sit with them nor did he leave with them. The complainant's cousin later said she did not know who was buying them liquor. She, however, noticed the complainant following the appellant to the bar. The complainant and her cousin were given a lift home together with the appellant and his friend. There is some dispute between the complainant and her cousin about what happened when they disembarked. Her cousin maintains that the appellant said to her that he wished to speak to the complainant. But the complainant declined to speak to him. The complainant denies that this happened.

[4] Then, on the complainant's version as well as that of her cousin, the appellant took hold of the complainant and pulled or dragged her to his residence. While this was happening, her cousin woke the complaint's parents and told them what was happening. The parents said to her that they were asleep and declined to open the door.

[5] On arriving at the appellant's residence, the appellant and the complainant entered the room. He closed the door. There was food on the table. He says he offered some food to her but she declined to eat. She says he ate a meal. She says she refused to undress herself. He did so. He had a knife and threatened her and he then raped her twice.

[6] The appellant agrees that they had sexual intercourse twice but denies that he raped her. He said that he asked whether she would have sexual intercourse with him and she agreed. He also denies that he was in possession of a knife.

[7] The next morning the complainant says that the appellant opened the room and offered to take her halfway home. She declined his offer. She went home. She was crying. She knocked on the door of the room that she shared with her cousin. Her cousin opened and she complained to her that she had been raped. She then saw her parents. They suggested that she lay a charge of rape against the appellant which she did.

The judgment

[8] After setting out the evidence, the learned Regional Court Magistrate evaluated the evidence as follows:

(a) The Magistrate noted that the complainant and the accused knew each other by sight.

(b) The complainant and her cousin said that they asked for a lift from a certain person to take them home, while the appellant said that he asked the driver for a lift.

(c) The court found that it was undisputed that the complainant's cousin said she was feeling ill at 02:00 and wanted to go home.

(d) The witnesses consumed liquor. But this was not to be held at against the complainant and her sister.

(e) The appellant said that two girls should go and spend a night at their place, but in the same breath he said that there was only one bed. But he had not been to their bedroom.

(f) The Magistrate remarked that the accused and his friend said that when they left they did not go directly to the complainant's home. They first went to a club called Kings but it was closed and they went to the complainant's home. The appellant did not say they agreed to go to Kings.

(g) The complainant's cousin immediately went to the main house and reported that the appellant was dragging the complainant away. The Magistrate also said that the accused's friend confirmed that the cousin went to the main house and came back but the friend said he did not hear

what she was telling the parents. The Magistrate concluded that the report was made immediately that the appellant forcibly took the complainant away.

(h) The next day, the complainant arrived home and informed her parents what had happened and they told her to report the rape to the police. In the course of his cross-examination, the accused had said that maybe the complainant decided to lay charges because she had arrived at her home in the morning. The Magistrate rejected this and said that the women were not afraid of the parents. The Magistrate also noted that when the complainant arrived at home on the next morning her parents did not see her arriving. So she could not have been afraid of her parents. She could simply have gone into her room and her parents would be none the wiser.

(i) The Magistrate said that the appellant had not said that the complainant accepted his proposal of love when they were at the tavern.

(j) The Magistrate remarked that when the complainant and the appellant were under the blankets kissing each other the appellant concluded that she had agreed to sexual intercourse.

(k) The Magistrate said that this was the complainant's first experience of being raped.

(l) The Magistrate concluded that the appellant did not get consent from the complainant and therefore he was guilty of rape.

The law

[9] The powers of a court of appeal to interfere with the factual findings of a trial court are limited. In the absence of a misdirection on the facts, there is a presumption that the trial court's evaluation of the factual evidence is correct. See **S v Bailey** 2007 (2) SACR 1 (C). This court must be convinced that the trial court was wrong in accepting the evidence of the State witnesses in order to justify interference with the trial court's findings. See **S v Pistorius** 2014 (2) SACR 314 (SCA) para 30.

[10] The proper approach to the evaluation of conflicting evidence is to be found in **S v Singh** 1975 (1) SA 227 (N) at 228, where the Court said:

> '… [I]t would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witness and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established

beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner in the abovementioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.'

Evaluation

[11] It may be properly inferred that the learned Magistrate accepted the credibility of the complainant and her cousin and did not accept the credibility of the appellant. It is not clear whether this also applied to the appellant's friend.

[12] The court accepted that it was not disputed that the complainant's cousin said she was feeling ill at 02:00 and wanted to go home. But the complainant said this would be a lie.

[13] The complainant's cousin says that when she reported to her parents after their arrival from the tavern she stood at the door and she told them what was happening to the complainant. The parents said she should leave them alone as they were sleeping. It is important to bear in mind that the cousin said that the appellant's friend was with her at this stage. He testified that he did not hear her making this report. He spent the night with her. The cousin confirmed this, but said that although the friend said that he would rape her, they did not have sexual intercourse.

[14] Apart from this it seems improbable that on receiving a report that their daughter was being dragged away by a young man that the parents displayed complete indifference.

[15] The appellant's suggestion, that the complainant laid a complaint against him because she had to explain why she came home only the next morning, was merely conjecture. The learned Magistrate rejected this possibility by saying, *inter alia,* that the complainant could simply have gone into her room and her parents would have not known about this. But this overlooks the finding that the cousin had already made a report to her parents around about 02:00. It was, on the acceptance of this fact, necessary for the complaint to have said something to her parents.

[16] The appellant's legal representative suggested that the complainant had remorse after having sexual intercourse with the appellant as he had a child with a relative of hers. This aspect did not receive attention when the judgment was delivered.

[17] Although the learned Magistrate did not believe the appellant and, even though his evidence may not have been without blemish, the learned Magistrate did not ask the critical question, whether his version could have been reasonably possibly true.

[18] The fact that a complaint was made to the parents by the complainant does not mean that the complaint was true. See **S v Hammond** 2004 (2) SACR 303 (SCA) at 307J to 310F and **S v Gentle** supra at 431D–E. In **S v Shackell** 2001 (4) SA 1 (SCA) paragraph 30, Brand AJA said the following:

> `It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, 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.'

[19] The appellant is corroborated by the evidence of his friend in regard to certain aspects. The evidence of the complainant's cousin was not consistent in some respects with her statement to the police. The complainant's evidence concerning when the knife was produced is in conflict with her statement to the police. There are no inherent improbabilities in the evidence of the appellant.

[20] It is reasonably possibly true that the complainant and her cousin left the tavern with the appellant and his friend after being in their company and consuming liquor. And, after arriving at the complainant's home, the appellant's friend and the cousin paired off, as did the appellant and the complainant and that consensual intercourse took place between the complainant and the appellant. This being the case, the conviction cannot stand, and it falls to be set aside.

Order

[21] In the result:

1. The late noting of the appeal is condoned.
2. The appeal is upheld and the conviction and sentence is set aside.

A A Landman
Judge of the High Court

I agree

Samkelo Gura
Judge of the High Court

Appearances

Date of hearing:	18 March 2016
Date of Judgment:	24 March 2016
For the Appellant:	Adv Gonyane instructed by Legal aid South Africa, Mafikeng Justice Centre
For the Respondent:	Adv Nontenjwa instructed by The Director of Public Prosecutions, Mafikeng