**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NUMBER: A502/2012

DATE: 8 NOVEMBER 2013

In the matter between:

**D M** Appellant

and

**THE STATE** Respondent

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**J U D G M E N T**

**BOQWANA, AJ**:

The appellant was charged with rape in contravention of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He appeared before the Wynberg Regional Court and pleaded not guilty to the charge. On 6 December 2010 he was convicted of rape and sentenced to 10 years direct imprisonment. On 25 May 2011 the magistrate granted him leave to appeal against his conviction only.

The events giving rise to the conviction occurred on the night of 24 November 2008. The appellant visited the complainant

at her place in Gugulethu. The house where she lived belonged to the appellant. It is common cause that the two had once had a relationship and lived together. They were however living separately during November 2008. According to the complainant she had terminated the relationship whilst the appellant maintained that she was still his girlfriend. The complainant testified that she had a boyfriend by the name of Disco. She testified further that on the evening of 24 November 2008 she went to fetch her 13 year old daughter from her neighbour's house. On her return she found the appellant in her house. The appellant requested accommodation from her until 18 December 2008. She prepared her daughter and took her to her neighbour's house to sleep over there again as she was expecting her boyfriend to visit her that night.

It is common cause that Disco knocked on the complainant's window and the appellant went to check who it was. Upon his return, the appellant confronted the complainant about the man that was knocking on the window. He climbed on top of her while she was sitting on her bed and choked her resulting in her losing consciousness for a few minutes. The complainant testified that when she woke up from her unconscious state she asked for water. The appellant refused to give her water but instead urinated on her. The appellant then undressed her

and proceeded to rape her telling her that he 'wanted to rape her before he killed her'. She cried but could not scream as the appellant kept her mouth closed with his hand. The appellant then stopped and fell asleep next to her.

The appellant testified on the other hand that he choked the complainant because she grabbed his penis which was injured as a result of an infection. He testified that he did not have sex with the complainant because he could not get an erection due to a medical condition that he had. According to him it was impossible for him to have raped the complainant. The complainant however testified that she saw that the appellant had an erection and that he penetrated her. There were no other witnesses who saw what happened. The complainant's brother was in another room but too drunk to notice or hear what was happening. The complainant reported the incident to her daughter and brother the following morning. The daughter confirmed what was reported to her and testified further that when she arrived her mother was crying and had swollen eyes. She also stated further that she saw the appellant on top of her mother when she arrived from the neighbour's house in the morning. This part of her testimony differed from her mother's, who testified that the appellant was not there when the child and her brother arrived.

The complainant was examined by Dr Chunga who found swelling around the right eye, bruising on the left upper neck and abrasion on the lower lip. He found no injuries on the genitalia but testified that that was not unusual in rape cases. He also noticed a yellow discharge on the vagina from which certain organisms were found.

The appellant called Dr Johnson who had treated him at Pollsmoor to testify on his behalf regarding sexually transmitted infections ("STI"), he had suffered from and in particular about his alleged erectile dysfunction. Dr Johnson testified that the appellant suffered from HIV and confirmed that she had treated the appellant for gonorrhoea and other STIs but testified that the appellant never reported erectile dysfunctions to her. She testified that STIs do not cause erectile dysfunction.

In a nutshell, the magistrate found that the totality of evidence pointed to the appellant's guilt. He was satisfied with the complainant's testimony and was impressed with her as a witness. He acknowledged that there were discrepancies between the complainant's evidence and the first report and was aware of the dangers of accepting the child's evidence and acted with caution when dealing with her evidence. He however found that the child confirmed the report about what

happened the previous night. The magistrate also found that there were no inherent improbabilities in the complainant's version. He rejected the appellant's version as not being reasonably possibly true having analysed its strengths and weaknesses.

The grounds of appeal set out on behalf of the appellant are the following: there are inconsistencies between the first report and complainant's evidence; the complainant's evidence as a single witness should have been evaluated with more caution before it could be accepted as being reliable and trustworthy; and the finding on credibility was not supported by evidence; and the magistrate misdirected himself by failing to critically evaluate the complainant's evidence.

The state's case was largely based on the evidence of a single witness, the complainant. Section 208 of the Criminal Procedure Act 51 of 1977 provides that "an accused may be convicted of any offence on the single evidence of any competent witness". A court is therefore entitled to convict on the evidence of a single witness if it is satisfied, beyond reasonable doubt, that such evidence is true notwithstanding that the witness is in some respects an unsatisfactory witness. See **R v Abdurham 1954 (3) SA 163 (NPD) at 165E.** In other words, the evidence of a single witness has to be satisfactory

but not necessarily perfect.

The evidence of a single witness is subject to the cautionary rule. This means that the trial court must warn itself against the dangers inherent in convicting on the uncorroborated evidence of a single witness. (**R v Mokoena 1932 OPD 79.**) The utmost care which a judicial officer should adopt was stated in **S v Sauls and Another 1981 (3) SA 172 (A) at 180E** as follows:

> "*There is no rule of thumb test or formula to apply when it comes to a consideration of credibility of a single witness. The trial judge will weigh his evidence, will consider its merits and demerits and having done so will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told*".

The court held further that in evaluating evidence of a single witness the trial court should satisfy itself that the truth had been told and *the exercise of caution must not be allowed to displace the exercise of common sense*. **(at 180 F-G)**

The complainant's evidence must be tested against that background. The complainant in this case was found to be a satisfactory witness in all material respects. Her account of the events of the evening of 24 November 2008 was clear and made more sense than that of the appellant. Her version was in material respects supported by all the witnesses who testified including the appellant's witness. The appellant's version on the other hand was found to be unreasonable and improbable.

In my view, the magistrate was correct in his assessment of the evidence. The totality of the evidence clearly pointed to the occurrence of the rape. In the first instance, most of the facts are common cause. It is common cause that the parties slept on the same bed that night and the appellant sat on top of the complainant strangling her. The complainant's version, that they were no longer in a relationship is the most probable version in that it is supported by a number of factors, which are that the parties were not living together for months, the appellant was chased away from their "common property" by the community members due to his abusive behaviour towards the complainant, and the complainant had sent her daughter to the neighbours to sleep over because she had a boyfriend. The appellant's version that the complainant was his girlfriend was highly improbable. It follows from the evidence at hand

that the appellant had no permission to sleep on the complainant's bed that night let alone having sex with her.

His actions of choking and raping the complainant were clearly motivated by jealousy. He assaulted the complainant because he was unhappy with Disco's visit. He choked her so he could subdue and rape her. The loss of consciousness, visible bruises on the eye and the injury on the complainant's neck indicated the amount of force that was used against her. The amount of force used is not consistent with his version that he acted in self defence.

In any case, his version of self defence consists of material discrepancies. The version put to the complainant by his legal representative during cross-examination of the complainant was that she touched his private parts when he did not want to be touched that evening as he was not well, giving an impression that she touched him because she wanted his "attention". In his testimony however he stated that the complainant grabbed his penis because she was angry at him pulling the blanket.

His version that he could not get an erection was also discredited by both the complainant and the appellant's own witness, Dr Johnson. The complainant testified that she saw

the appellant's erect penis and he penetrated her vagina. Dr Johnson testified that she treated the appellant for gonorrhoea and STI. The ailments the appellant was treated for and the existence of HIV did not result in erectile dysfunction. According to Dr Johnson erectile dysfunction itself differed in severity and a person with that condition could still maintain an erection. If one looks at the events of that night and Dr Johnson's opinion, it was highly probable that the appellant had an erection that night.

Turning to the discrepancies between the first report and the complainant's evidence. If one has regard to the reasoning of the magistrate, it becomes clear that he was aware of the dangers of accepting evidence of a child. The child's testimony that she saw the appellant on top of her mother when she arrived in the morning was clearly inconsistent with the complainant's evidence and this could be due to the beguiling nature of a child to convince herself of the truth. This discrepancy was however not material as it did not go to the heart of the case. The child however confirmed the report given by her mother about what had occurred the previous night. Even if the child's evidence were to be disregarded, I am persuaded that the complainant's evidence as a single witness, coupled with the facts that are common cause and Dr Johnson and Chunga's evidence were cumulatively compelling

in sustaining a conviction of rape.

As regards lack of injuries to the complainant's genitals, the legal position is now trite that the absence of injuries on the genitalia of the complainant does not exclude the possibility of rape. That fact was confirmed by Dr Chunga, who examined the complainant.

The possible motive suggested by the appellant that the complainant laid charges against him because she wanted to keep his house does not hold as the complainant's evidence showed that she was not interested in keeping the house for herself.

In light of the above, I am satisfied with the findings of the magistrate. There was no misdirection on his part. He weighed the merits and the demerits of both cases of the appellant and the state, and analysed the strengths and the weaknesses of both versions. Taking a holistic view of the evidence on record, he was, in my view, fully justified in finding the appellant guilty of rape. The appeal against the conviction is accordingly without merit and stands to be dismissed.

In conclusion, I must remark about the gruesome attack that

the appellant directed at the complainant. The actions of the appellant towards the complainant were appalling, demeaning and disgraceful. The appellant did not only rape the complainant, but he choked and assaulted her to the point of losing consciousness. He treated her in the most inhumane manner by urinating on her. Had she not turned her face away, he would have urinated in her mouth. Dr Chunga found that the complainant had a yellowish discharge in her vagina. This could have possibly been transmitted by the appellant to her as he had also complained of a yellow discharge to Dr Johnson. Furthermore the appellant could have infected the complainant with HIV. In these circumstances, the magistrate was correct in finding the appellant guilty of rape and I find no grounds to disturb his findings.

In the result, I propose the following order:

**THE APPEAL AGAINST CONVICTION IS DISMISSED AND THE CONVICTION AND SENTENCE IMPOSED BY THE MAGISTRATE IS CONFIRMED.**

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**BOQWANA, AJ**

I agree, and it is so ordered.

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**TRAVERSO, DJP**