REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE

CASE NO: A873/2016
17/4/2018

In the matter between:

T K Appellant

and

THE STATE Respondent

JUDGMENT

TEFFO, J: (Msimang AJ concurring)

[1] The appellant was convicted in the Regional Court, Nigel on one count of rape in contravention of section 3 of the Sexual Offences and Related Matters Act, 32 of 2007. He was sentenced to 16 years imprisonment. He appeals against his conviction and sentence with leave having been granted on petition.

THE APPEAL AGAINST CONVICTION

[2] The appellant challenges his conviction on the basis that the trial court

erred in concluding that the State proved its case against him beyond a reasonable doubt and by accepting the evidence of the complainant who was a single witness to the rape without applying the cautionary rules applicable to it and thereby rejecting his version.

THE APPEAL AGAINST SENTENCE

[3] It was submitted on behalf of the appellant that the sentence of 16 years imprisonment is shockingly inappropriate.

[4] The State disagreed with the submissions on both conviction and sentence. It was argued on behalf of the State that the appellant was correctly convicted and that the sentence imposed is justified.

THE EVIDENCE

[5] The State called two witnesses namely Ms K N M *("the complainant")* and her aunt, Ms S Re ("*Ms R")* in support of its case while the appellant testified in his defence without calling witnesses. The complainant testified as follows: She and the appellant reside in the same street. They knew each other from long. At the time of the incident, she was in a lesbian relationship for two months. On 15 February 2015 she was from her girlfriend at night when she met the appellant in the company of his friend. He asked her where she was going. She told him that she was on her way home. They decided to walk together up to a point where the appellant's friend left them. They continued walking and at approximately 22h00 the appellant asked her to accompany him to his friend's place in order to check on him. They went to the place where they met with his friend who was with a lady friend and consumed alcohol. They left the place around 01h00.

[6] As they were walking, her sister phoned her and asked her where she was. At that time they were already in their street and she told her where she was. Her sister told her that there were some boys in the street, she should not immediately come home. She should wait for them to leave the street. When the appellant heard that, he invited her to his homestead. They proceeded to the appellant's homestead. She and the appellant entered his room. The room was outside in the yard and there was also the main house where the appellant's

family resided. They sat down. At some stage the appellant put on his slippers, grabbed a blanket and fell asleep while she sat on the couch. Her sister phoned her again and asked her where she was. She told her she was on her way. When she was about to open the door in order to leave, the appellant grabbed her and told her that she was not going anywhere. He told her that he was having some feelings for her. She turned down his proposal. He told her that he was not afraid of the police and that he was going to rape her.

[7] She cried but despite all this, he pushed her to the bed and undressed her. She tried to fight him. At that time the appellant grabbed both her hands. When she tried to stand up, the appellant stood up first, went behind the door and grabbed a knife. He threatened to kill her. He undressed himself and went to fetch a condom which was on the table. He put it on and inserted his penis into her vagina until he ejaculated. After he had ejaculated, he took his penis out and inserted it again into her vagina. When he penetrated her for the second time, he did not put on a condom. She waited for him to fall asleep. Immediately she noticed that he was fast asleep, she stood up grabbed her clothes and left. She went to her aunt's house. She knocked and her aunt opened the door for her. She asked her what happened and she told her everything. Her aunt went to the appellant’s homestead and returned to her house with him. She subsequently phoned the police. The police arrived and she was taken to the hospital. Her aunt's house is about four houses away from the appellant's homestead. When she arrived at her aunt's place, she was not dressed.

[8] Under cross-examination she testified that she left her home at approximately 17h30 on the day of the incident. She was tipsy when she and the appellant left his friends' place who they visited on their way home from the tavern. She did not tell her sister and mother where she was going when she left home and they both did not know that she drank alcohol at the time. She could not recall the times when her sister phoned her while she was on her way home. She did not consume any alcohol prior to drinking with the appellant and his friends. She did not tell her sister in whose company she was when she called her but she told her where she was. She denied the appellant's version that after they had met at David's Tavern, he invited her to go with him to a stokvel and she

agreed.

[9] She denied that where they met the appellant's friends, they consumed 9 to 10 beers. She admitted that she went to the appellant’s homestead freely and voluntarily and reiterated that it was for her own safety as well after her sister had phoned her and alerted her of the boys who were in the street next to her homestead. She further denied that upon their arrival at the appellant's homestead, the appellant left her in his outside room and went to get food for the two of them in the main house. She denied that they ate the food together and that subsequent thereto, they started kissing each other, they undressed themselves voluntarily and had sexual intercourse with her consent. She also denied that she asked the appellant if he had condoms prior to having sexual intercourse with him. She was adamant that she tried to stop the appellant from having sexual intercourse with her but he threatened to kill her. According to her evidence, the table where the condom was, which the appellant used during the sexual intercourse, was very close to the bed. He did not have to get off the bed to get it. She closed her thighs but the appellant forcefully opened them. When she was told that the appellant would not rape her because he had known her for a long time, she testified that she had a good relationship with him. She trusted him and she never thought he would do such a thing but he did it. She denied that she laid a charge of rape against the appellant because she was afraid of getting into trouble with her mother and sister. She also denied that she switched her phone off after her sister phoned her for the second time. She testified that it was the appellant who switched her phone off.

[10] Ms R’s evidence was as follows: The complainant was her sister's daughter. On 15 February 2015 she was at her house sleeping together with her boyfriend when she heard a knock at the door. The person who was knocking, was also crying. She went to open the door. After she opened it, the complainant jumped into the house. She was carrying her clothes with both hands to her chest. She immediately closed the door and locked it. She asked her what happened. The complainant started crying. She waited for her to calm down. She told her that the appellant raped her. She sent her boyfriend to go and call the complainant’s mother and she phoned the police. The complainant’s mother

came to her house and they both went to the appellant's room. They found him sleeping. She woke him up and asked him why he raped the complainant. He apologised. They took him to her house. The police arrived. She, the complainant and her mother left her house with the police and proceeded to the police station. The complainant was later taken to the hospital. She corroborated the complainant's evidence that when she arrived at her house she was not dressed but was holding her clothes to her body.

[11] Under cross-examination she testified that the appellant was her neighbour's child and that she had known him for a long time. She did not know how the appellant and the complainant knew each other and for how long have they been knowing each other.

[12] The J88 medical report was admitted into the evidence by agreement.

[13] The appellant, Mr T [redacted] also testified. His evidence was briefly as follows: He had been knowing the complainant for about 8 to 9 years. The complainant was his neighbour and he had been proposing love to her. He wanted them to have a love relationship. He corroborated the complainant's evidence that he met her at David's Tavern while she was on her way home. He asked her to wait for him. On their way, they decided to go to one of his friends where they consumed alcohol. At some stage they ran out of drinks. He wanted to go to a stokvel but the complainant refused and said she wanted to go and sleep. As a result they did not go to the stokvel. They went home and slept. They consumed about 10 to 11 beers. He denied the complainant's evidence that he, the complainant, his friend and his friend's girlfriend shared 6 beers. He corroborated the complainant's version that at some stage her sister phoned her while they had already reached his place asking where she was.

[14] He further testified that after the complainant spoke to her sister over the phone, she switched her phone off. He denied that the complainant's sister phoned her while they were still on their way. He testified that she phoned while they were already at his place. They proceeded straight to his parental home to the room he occupied outside. His siblings were in the main house. She and the complainant entered the room and locked. The room was 7 metres from the main house. They sat in the room. The complainant was busy chatting on WhatsApp.

He told her that he was hungry and immediately went to the main house to fetch the food. They shared the meal and subsequent thereto, he left the complainant on the couch. He went to bed. The complainant joined him. They kissed and developed feelings for each other. The complainant asked him if he had condoms. He said he had them and she asked him to bring one. He admitted that they had sexual intercourse and that he penetrated her twice.

[15] He was adamant that the complainant undressed herself and that he had sexual intercourse with her with her consent. He denied threatening her with a knife. He corroborated the complainant's evidence that the condom was on a table in his room and that he used it during the sexual intercourse but denied that he did not have to get off the bed to reach it. He denied that when he penetrated her for the second time, he did not put on a condom. He testified that after having had sexual intercourse with the complainant, they fell asleep. He woke her up at 05h00. They both got dressed and he offered to accompany her home but the complainant refused and said she did not want people to see them. He denied that the complainant left his homestead not dressed. He testified that after they both got dressed, he took her out up to the gate. He asked her what she was going to say when she arrives at home. She told him not to worry as she would come up with a plan. When he turned at the gate, she told him she was going to her aunt's place. He denied apologising for raping her.

[16] Under cross-examination he testified that he had been proposing love to the complainant for about four months. The complainant had been refusing her love proposal because he had a girlfriend in the area. He was aware of her sexual orientation. He testified that on the night of the incident, he only reminded her that he loved her. He further testified that when they went to his homestead, he and the complainant had already agreed that they were going to spend the night together at his home. The agreement was reached before they went to the tavern and she went to the tavern with him. He testified that he was standing with his friend at David's Tavern when the complainant came to him and told him that she was going home. He asked her to wait for him. He further testified that the incident happened on Valentine's Day. He testified that he asked the complainant why she was going to bed early and she told him that she did not have any plans for the night. He denied the complainant's evidence and testified that he went to

the stokvel with her where they found his friend, Vusi. They also went to another place where they found his other friends. He conceded that the complainant's sister called her twice on her cellphone. In her first call to her, she asked her where she was. The complainant told her that she was on her way. Ten minutes later, she phoned her again and told her to be careful as there were some boys in the street. She then told her not to worry as she was coming. At some stage he testified that before they reach his homestead, they go past the complainant's home first. He denied raping the complainant. The appellant closed his case without calling further witnesses. This therefore concludes the summary of the evidence that was led in the Regional Court.

[17] Section 208 of Act 51 of 1977 *("the Criminal Procedure* Act") provides that an accused person may be convicted of any offence on the single evidence of any competent witness. It is however, a well-established judicial principle that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (S *v Stevens* 2005 (1) All SA (1) (SCA)).

[18] The correct approach to the application of the so-called *"cautionary rule"* was set out by Diemont JA in *S v Sauls and Another* 1981 (3) SA 172 (A) at 180E-G where he stated the following:

> *"There is no rule of thumb test or formula to apply when it comes to* a *consideration of the 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 the testimony, he is satisfied that the truth had been told. The cautionary rule referred to by De Villiers JP in R v Mokoena 1932 OPD 79 at 80, may be* a *guide to the right decision but it does not mean that 'the appeal must succeed if any criticisms, however slender, of the witnesses' evidence were well founded* ... ' *It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."*

[19] The appellant admitted that he had sexual intercourse with the

complainant on the night of the incident at his parental home in the outside room and that he penetrated her twice. The only issue in dispute is whether the sexual intercourse took place with or without the consent of the complainant.

[20] The appellant raised the following issues in the appeal: That the learned magistrate did not apply the cautionary rules applicable where a single witness testifies in relation to an alleged sexual offence. The trial court was critical of the appellant's evidence, attached disproportionate weight to it while no or insufficient attention was given to issues which were not satisfactory in the complainant's evidence. The trial court based its credibility finding of the rape on Ms R's evidence. It also found proof of the absence of consent in her evidence, in particular, the trial court found that the complainant's sexual orientation would exclude sexual intercourse with the appellant.

[21] The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness's evidence is presumed to be correct. In order to· succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony (see *S v Francis* 1991 (1) SACR 198 (A) at 198j-199a).

[22] In evaluating the evidence in matters of this nature the court has to take all the factors into account. The facts in this matter are by and large common cause. The complainant met the appellant at David's Tavern on her way home. She agreed to walk with him and along the way they decided to deviate. They ended up at the appellant's friend where they consumed alcohol.

[23] The court has to evaluate the conduct of the complainant based on the standard set by herself in her testimony. She testified that she was in grade 12 at the time. On the day in question she went to see her girlfriend. She was supposed to be at home by 20:00. She did not consume alcohol and that if her mother and her sister knew that she was consuming alcohol, they were going to

be angry and disappointed.

[24] The court must, against this background, evaluate the conduct of the complainant holistically. She met the appellant at David's tavern at approximately 22:00, which was two hours late as she was supposed to be home at 20:00. She agreed to join the appellant and to deviate from her way home to a place where they consumed alcohol. They left the place at 01:00, which was past midnight and five hours after her curfew time. She testified that at that time, she was tipsy and the appellant was drunk.

[25] She further testified that the appellant's home and hers were on the same street and were seven houses apart. She and the appellant were in the same street when she received the first call from her sister. She told her sister that she was in the same street as her aunt's house but did not disclose with whom. She agreed to go to the appellant's house. She testified that the appellant went to bed and she sat on the couch. She also did not disclose to her sister that she was with the appellant at his house when she called her for the second time. She never testified in her evidence in chief that after her sister's second call, her cell phone was switched off. She did not state in her evidence what was happening after the first sexual penetration and before the second sexual penetration, whether she and the appellant fell asleep or not and, what prevented her from leaving the appellant's room at the time. This is a person who was busy chatting on her cell phone at the appellant's house. She did not explain in her evidence what prevented her to send a message to her sister or anyone else that there was something wrong immediately she realised what the appellant's intentions were. The only difference in her version and that of the appellant was that the appellant testified that she joined him in bed and she testified that he coerced her into bed and raped her.

[26] The court has to take all these factors and put them into perspective to enable it to decide on the issues before it. The complainant set a standard of behaviour for herself but her conduct fell short of it. She clearly went on a drinking spree knowing fully well that both her mother and sister would not approve of her conduct. She was not at home after midnight and she surely had to account to her mother for her whereabouts, particularly the fact that she was

drunk or tipsy according to her own version.

[27] She agreed to go to the appellant's house when her home was about seven houses away and her aunt's home was about four houses from the appellant’s home. Her evidence of how she left the appellant’s room after the sexual intercourse, is very strange. It is further very strange that she was able to walk in the street not dressed as she had alleged, where she was able to pass about four houses and also knock at her aunt's house in the condition she was. The evidence that her cell phone was switched off after the second call from her sister, is crucial. This evidence would have confirmed that she was kept at the appellant's homestead against her will if the phone was switched off by the appellant. If she had switched it off on her own, it would have meant that she did not want to be disturbed when she was with the appellant. I find it strange that this evidence only came out during cross- examination. Her reply when it was put to her that the appellant will testify that she switched her cell phone off after her sister's call was that it was the appellant who switched it off. She did not explain in her evidence why her cell phone was switched off. It is against this background that the court has to consider whether her own conduct met the standard which she set for herself.

[28] I am of the view that the conduct of the appellant was strange and left a lot to be desired. She fell short of her own standard. She had to justify why she was not home prior to 20:00 and why she was drunk. In my view this conduct is not consistent with the conduct of a person who had sexual intercourse with the appellant without her consent.

[29] The Learned Magistrate, in my view, placed too much reliance on the evidence of the complainant without interrogating her conduct referred to above. Had he interrogated the above issues, he would have arrived at a different conclusion. He further placed too much emphasis on the fact that the complainant alleged that she was a lesbian. He concluded that the complainant could not have consented to the sexual intercourse against her sexual orientation.

[30] It was conceded at the hearing of the appeal that according to the J88 medical report, the last date of the complainant's sexual intercourse with consent

was in November 2013. She testified that she was previously in a heterosexual relationship. There was no evidence before court when her heterosexual relationship ended and when her lesbian orientation started.

[31] She testified that her lesbian relationship was two months old at the time and that prior to that she had other relationships with some girlfriends. The duration of her lesbian orientation was not clear. The Learned Magistrate erred, in my view, in concluding that the appellant was not in the same sexual orientation as the complainant and that the complainant could not have consented to the sexual intercourse. The fact that the complainant was a lesbian and that she was in a lesbian relationship at the time of the incident was, in my view, irrelevant taking into account the evidence in this matter.

[32] Although I agree that there were contradictions in the appellant's evidence, his evidence that he had sexual intercourse with the complainant with her consent could have been reasonably possibly true taking into account the totality of the evidence and the above concerns raised in the complainant's evidence.

[33] It is trite that there is no obligation upon an accused person, where the State bears the *onus* to convince the court. If his version is reasonably possibly true, he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him, is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true (see *S v V* 2000 (1) SACR 453 (SCA) par 3 of the judgment).

[34] In my view the complainant's evidence regarding the rape was not satisfactory in all material respects. The trial court misdirected itself in failing to treat the complainant's evidence with caution and thereby being too critical of the appellant's evidence. It therefore erred in concluding that the State proved its case against the appellant beyond a reasonable doubt. I am persuaded that there is a reason for this Court to interfere as the conviction of the appellant cannot

stand. It falls to be set aside.

[35] It is therefore unnecessary to deal with the issue of sentence.

[36] In the result I make the following order:

36.1 The appeal against the conviction of the appellant is upheld.

36.2 The conviction of the appellant is set aside and replaced with the following:

" The accused is found not guilty and discharged."

M J TEFFO
JUDGE THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree:

H M MSIMANG
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the appellant	F van As
Instructed by	Pretoria
For the respondent	A J Fourie
Instructed by	The Director of Public Prosecutions
Date of hearing	6 March 2018
Date of judgment	17 April 2018