REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO. A191/2010

DATE: 15/11/2010

In the matter between:

MKIZE: BONGANI **1st Appellant**

and

THE STATE **Respondent**

JUDGMENT

MOTLOUNG A J

[1] This is an appeal against both conviction and sentence.

[2] The appellant was charged and kidnapping and multiple counts of rape in the Boksburg regional court.

[3] The appellant was legally represented and the magistrate convicted and sentenced him as follows:

1. On the kidnapping charge, to 5 years imprisonment.

2. On the two counts of rape, to 15 years imprisonment.

3. He was automatically declared unfit to possess a firearm.

[4] This means that the appellant was sentenced to an effective 20 years imprisonment.

[5] The appellant was granted leave to appeal against both convictions and sentences after petitioning the judge president. It is on this basis that the matter came before us.

[6] The facts briefly are follows: The complainant testified that she had a love relationship with the appellant which had been in existence for approximately two months as at the date of the circumstances giving rise to this case. On the date in issue, being Saturday the 22nd November 2008 and at approximately 16h00, she went to OK stores at a shopping centre called Goldspot in Vosloorus in order to buy groceries and then meet the appellant thereafter, as previously arranged between the two of them. She wanted to inform the appellant that they must stop their love affair because she was married and she did not want to cheat on her husband anymore. She never had any problems in the relationship with the appellant before then, The appellant came driving in his motor vehicle, she got in the front passenger side next to the appellant and they drove off. It was while they were busy driving that she told the appellant that she wanted them to stop the affair as she was no longer interested in continuing therewith.

[7] The appellant said they must go and discuss the matter at the Basotho hostel there in Vosloorus. They went into a room in the hostel, where they found a certain man. They sat there for a while and the said man left the room and went away. The appellant locked the door and after a long time of sitting there, the appellant told her that it was becoming late and, therefore, she was not going back home that night.

[8] The appellant then gave her a cellphone and instructed her to phone her husband and inform him that she no longer wanted him as she found a new boyfriend. She was busy crying the whole time, and the appellant told her that it was not going to help as nobody was going to come to her rescue there at the hostel. He further warned her that if she continued crying, he would stab her with a knife and throw her underneath the bed.

[9] She phoned her husband and spoke to him to give him the message. Her husband asked what was happening or what was wrong and she replied that the appellant has locked her in a room at the hostel and refused to let her leave and return home. Her husband could no longer wanted her to speak to her husband. The appellant then phoned her husband, swearing at him and using vulgar language, telling him that he was no longer going to get her back.

[10] Thereafter, they slept there at the hostel – he raped her without using a condom. He forced her to have sexual intercourse with him by pushing her onto the bed and instructing her to remove her clothes. Thereafter, he slapped her and instructed her to remove her panties too. She complied with all his instructions as she was scared because she thought that he was going to kill her. The appellant also removed all his clothes and had sex with her the first time. Thereafter, he got off her, had a rest whilst not fast asleep but merely lying on the bed. They were busy arguing at that stage as she was busy

telling him that she wanted to go home and asking him to let her go, whilst he kept on refusing to let her go. He later had sexual intercourse with her again. When he had sex with her the second time, it was also after midnight.

[11] The appellant kept her in the said room for the whole day of Sunday without having sex with her. She could not sleep the whole time whilst the appellant was asleep. Whilst he slept, she was just sitting there next to him as he had earlier threatened to kill her if she made noise and told her that nobody was going to help her, and she only managed to sleep during the day, around midday. The room she was in had a window that was closed with a cloth.

[12] They slept until approximately 15h00 when the owner of the room came back. When the owner knocked on the door, the appellant stood up to unlock and open the door for him. The owner was having bread and a packet of chips with him. The appellant told him to go and buy food and he obliged, came back with the food and placed it inside the room and went away again. Thereafter, the appellant locked the door, sat down, and again warned her that she must not think of escaping from him, because if she did, he would go to her place and kill her husband. This was her reason for not moving or running away, as she was scared that he could carry out his threat. All along they were naked, even at the time that the owner of the room returned. This went on until late that night when the appellant took the food and told her they must eat, but she refused and he ate alone. After eating, he raped her again, whereafter he slept as he was tired. She was also tired and also fell asleep. They slept until the next morning, the morning of Monday, when he woke up and raped her again.

[13] Thereafter, he picked up the phone and handed it to her and instructed her to phone her husband and tell him to leave the house key behind so that she could go and fetch her clothes. She did so, and her husband said she that

if they had a problem between them, she must come back alone so that they could resolve it.

[14] The appellant then changed his mind and told her that she was no longer going home, because of the fact that she had already phoned her husband, and it was possible that her husband had called other people, and the said people would be waiting for him there at her husband's place. He then suggest that they must go to a certain witchdoctor, as he wanted to see what was happening. They went to a certain house in Vosloorus where they met the sangoma who gave them medicine and told them to go and use it. This was around midday on that Sunday. She was afraid to raise alarm because she was afraid as he had earlier on said if she dared run away or raise alarm, he was going to kill her husband too. Both of them used the medicine but it did nothing. The appellant decided that they must go to Soweto. They went to Soweto and while seated there, she informed the owner of the house that she was seeking assistance from her, and the said owner said there was nothing she could do as she was afraid of the appellant.

[15] They stayed there in Soweto and they did not have a place to sleep, and the appellant decided that they should leave the house in issue and go to Diepkloof hostel, which is still in Soweto. Upon their arrival there, the appellant spoke to the owner of the room. The owner said they could come in, and thereafter pointed them a room they could use to sleep. They both got in bed and slept, but the appellant did nothing to her that night. He woke her up around 04h00 and told her that he was taking her home, then. This was on a Tuesday the 25th November 2008.

[16] They got dressed and got into the appellant's vehicle and drove back to Vosloorus. When they got into Vosloorus, and when she was about to get off so that she could go home, the appellant changed his mind and told her that she must not get off because she was going to let him have a problem by laying a charge against him with the police, who will arrest him. He said it is

better to kill her and drove towards Kliprivier, and she asked him where were they driving to, and he said he was going to kill her.

[17] It was whilst driving towards Kliprivier that she saw a marked police vehicle coming towards their direction. She thought to herself that they might held her and immediately opened the door of the moving vehicle and got out. She fell out as the police were going past them. The police saw this and made a u-turn and gave chase to the appellant until they caught up with him and came back with him together with his vehicle to where she was. On e of the police officers was driving the appellant's vehicle. The police phoned an ambulance.

[18] Whilst waiting for the ambulance, she told the police that the appellant kidnapped her and locked her in a hostel for three days, and also raped her. At that stage, the appellant was inside the police vehicle. She sustained open wounds to both knees, lower arm and the face as a result of falling out of the moving vehicle.

[19] After the ambulance arrived, the police took her first to Kliprivier police station to lay a charge before proceeding to hospital. She made a written statement to a lady police officer after which she was taken to hospital where she was admitted from that Tuesday till Thursday when discharged. She was healed when she testified in court.

[20] When asked if she loved the appellant during their affair, she stated that she indeed loved him, but not to say more than her husband, it was only that they were attracted to each other. The appellant was not supposed to do what he did to her, because she disclosed that she was married the first time he proposed love to her.

[21] Under cross-examination:

1. When it was put to her that the appellant will deny that she demanded at any stage to go home, she replied that “I told him to release me, I will go home and I will talk for myself on my arrival at home”.

2. She admitted that she went to Goldspot to meet the appellant as the appellant phoned him to arrange the meeting.

3. She met the appellant after buying the groceries.

4. She said she wanted to tell the appellant that they needed to stop the affair as her husband was now suspicious that she was cheating on him. That was the reason she wanted to stop the affair.

5. She was not familiar with the place of the sangoma, but if accompanied by the police, she could point the place out, and the sangoma can confirm that the appellant was there.

6. On the Monday night, when they slept, they were naked as they had taken their clothes off, but the appellant did not have sex with her that night.

7. When it was put to her that the appellant would say that she is the one who woke him up in the morning of Tuesday, saying that she must go home because her husband left her children at the social worker, she replied that it was a police officer who phoned her immediately they arrived in Soweto to threaten that her husband had given her children away to the social worker, and the appellant was then prepared to release her to go back home. She admitted that her husband phoned through a policeman threatening that her children were with the social worker.

[22] Captain Motshoane testified that she was at the Kliprivier police station when she was approached by the driver of the Nedcare ambulance, Ms Chanel Geldenhuys, who informed her that she had a rape victim outside in the ambulance. She then asked the complainant to explain "what actually happened with her and this gentleman, the suspect." She told her that she wanted to stop the affair and the appellant told her to get into his vehicle so that he could take her to the taxi rank because she wanted to go home. He drove to the hostel where he kept her and raped her. He stopped raping her on Monday morning. He kept her in captivity continuously without ever allowing her out, until Monday. On Tuesday morning he took a cloth and a knife and told her he was going to kill her on that day. They got into his vehicle and as they drove came across the police vehicle, and that was when she decided to throw herself out. She did not tell her where they were going to.

[23] Constable Mokoena testified that after they saw the complainant fall out of the moving vehicle, they tried to stop the vehicle but the driver drove away and they chased him until he came to a stop sign and alighted, and ran away. They stopped their vehicle and he chased the appellant and caught up with him, and took him to where the fallen complainant was. The complainant told him that he kidnapped her, kept her for several days and raped her

[24] The next witness for the respondent was the complainant's husband, Tsotetsi, who testified that the complainant phoned him from her phone at approximately 21h30 on Saturday. He saw from the numbers appearing on his phone that it was her phone. He answered the call by asking who was the person phoning, but got no reply. 'That person did not tell me what or who he was. No he did not answer at all". When asked if the person was male or female, he said it was a male. When asked by the magistrate how could he figure this out, he said it was because the person phoned again for the second time. After a few

minutes of the said person phoning him for the second time, he got a call from his wife who was busy crying then. He asked her where she was and she said at Goldspot shopping centre. It was at that stage that the person grabbed the phone from her and told him in Zulu that he was not going to be with his wife that night as she was his for the night. He asked the person for his name, and he said Bongani from Kwazulu Natal.

[25] The next day, Sunday, he got a call from his wife but every time he tried to phone his wife it was Bongani who answered the phone. When asked by the magistrate whether his wife phoned him, he said it was him who phoned the wife. He then handed the phone to his wife who said they were at the Vosloorus hostel, whereafter he took the phone from her and swore at him, using vulgar words. The next morning, being Sunday at around 10h30, he got another call from his wife's phone, and the appellant asked him as to what were they going to do now "with this wife of yours". He answered that "there is nothing that I could do because you have already taken her.

[26] He went to the police on Monday morning to open a case of kidnapping (to a leading question). He went back again to lay a charge of a missing person, but the police said he could not do so as he was able to communicate each and every time with her. He the asked constable Selema to pretend to be a social worker "as [he] wanted to know their whereabouts", and his wife answered the call and said they were at a Soweto hostel whose name she did not know. Then on Tuesday at 06h45 he got another call from his wife when he was on his way to work, and she said they are at Kliprivier, and Bongani had been arrested. When his wife phoned, at all times, she was crying and angry. The appellant always used his wife's phone, and never his.

[27] The last witness for the respondent was the medical doctor Dr Mashele who testified that his clinical findings regarding a gynaecological examination were that as the complainant had two children, he could not find anything amiss, because everything was intact, there were no bruises, no tears, no lacerations, nothing, and he could not find anything like that.

[28] The appellant testified in his own defence, and his testimony was briefly that he had consensual sexual intercourse with her on two occasions only, and she went around voluntarily with him to the places they went to. He also left her on the morning of Sunday to go to work as a taxi driver and came back in the night and found her there. She got angry with him at some stage, accusing him of making a fool of her by going away with another woman in Soweto and talking to another one over the phone. On the night of Monday, as she was angry and no longer talking to him, he slept with his clothes on. On Tuesday morning he went back to Vosloorus with the complainant, and stopped under a tre and asked her if she was alighting or not, or accompanying him to a trip to Kliprivier to collect some people, and she did not respond, and he drove away towards Kliprivier until they met the police vehicle when she threw herself out without saying a word. He did not know why she did that. He could not stop immediately as he was driving fast, and the police arrested him whilst inside his vehicle, intending to make a u-turn, and accused him of kidnapping and raping her. He testified under cross-examination that many times, whenever he met with the complainant, they had sex, and he thought that she laid a false charge as she was afraid of her husband, and he never had any weapon with him.

[29] He disputed the complainant's version in many material respects, ranging from whether she cried or not, whether the door was locked or not, whether she cooked or ate, whether he gave her the phone to call

her husband, whether he knew that she was still married or not, whether he instructed her to tell him to leave the house keys or not, whether or not they were given medication by the sangoma, whether he threatened to kill her or not. I do not deem it necessary to deal with his testimony in detail, as I am of the view that an analysis of the respondent's case, with particular reference to the onus resting on the respondent in criminal cases, makes it unnecessary to do so, as the respondent's case cannot sustain itself, even without much reference to the appellant's testimony.

[30] In the evidence above, I find that the following facts are undisputed:

1. The complainant, who was married to her husband for approximately 14 years, with whom she had two children, cheated on him in an extra-marital affair with the appellant, and the affair had been in existence for some time.

2. Every time that the complainant met the appellant, they engaged in sex.

3. When the complainant met the appellant on the afternoon of Saturday the 22nd November 2008, this was per appointment or arrangement between her and the appellant. In the circumstances, it is clear that she expected the appellant to come and collect her from where she waited for him.

4. The complainant had left her house under the false pretext that she was going to buy groceries.

5. The complainant had phoned her husband on Sunday the 24th November 2008 in the presence of the appellant, to inform him that he must leave the keys of the house as she was coming to collect her clothes.

6. The husband of the complainant told her that when she came to collect her clothes, she must not come with the appellant, but alone.

7. A police officer pretending to be a social worker phoned the complainant to inform her that her children had been taken to social workers by her husband.

8. The police refused to open a case of a missing person as the report by the husband showed that the two were in constant contact and communication telephonically, and when they phoned the complainant, they did not try to find out where she was, but did tried to lure her back.

9. The complainant's husband only reported the missing wife on Monday, at least after two days of her going missing, and in circumstances where he could communicate with both her and the appellant.

10. The complainant and the appellant met another person at the Basotho hostel on Saturday and she did not ask him for help, and no explanation was given for this omission.

11. The complainant and the appellant met another person at the Soweto hostel and she did not ask him for help, and no explanation was given for this omission.

12. The complainant and the appellant met the sangoma in Vosloorus before proceeding to Soweto and she did not ask him for help, and no explanation was given for this omission.

13. Despite the arrest of the appellant, no knife was traced or found in his vehicle, despite the report that he took a cloth and knife when leaving Soweto, which were apparently going to be used to kill the complainant.

[31] There are many factual disputes between the two versions, but the central points in dispute are (a) whether the complainant was forced or coerced to go with the appellant, and (b) whether the sexual intercourse took place with or without consensus.

[32] The above-mentioned facts show that it was appellant, and not the other way around, who phoned the complainant to arrange the meeting of the 22nd November 2008 nest to Goldspot shopping centre. The facts show that the intention to go somewhere else in the appellant's vehicle. Furthermore, the complainant, who stood on the other side of the road when the appellant came to fetch her, walked across the road and climbed into his vehicle voluntarily. Irrespective of which version to believe or not, the objective facts show that the parties agreed to go somewhere from where they met, and as they did so, the complainant sat in the front passenger seat next to the appellant, and the doors of the vehicle were not locked.

[33] Up to the date in issue, the two were apparently madly in love, with no history of problems in the love affair. Whenever they met, they engaged in sexual intercourse.

[34] There is no evidence of the complainant behaving in a manner suggesting that she did not want to go to the hostel with the appellant. When they came across other people, like the man at the Vosloorus hostel, the man at the Soweto hostel, and the sangoma, the complainant never raised alarm or behave in any other manner showing or suggesting that she was in the appellant's company involuntarily.

[35] The appellant never showed the complainant any weapon before the Tuesday and no existence of any weapon belonging to or associated with was alleged or proven. The complainant had her cellphone in her possession at all

or at least most material times when in the company of the appellant, and she has access thereto and in fact phoned her husband several times to give him messages about her whereabouts, mentioning specific places.

[36] I cannot understand why the complainant's husband, who was told by her on Saturday night, after his wife had left the common home around 14h00, as to where she was, in the vicinity as the hostel mentioned was also in Vosloorus, did not do something about it immediately or report the matter to the police or anybody else, but keeps mum about it until Monday when he has to go to work, and thus forced to do something about the children, including asking the police to disguise as a social worker.

[37] When the appellant spoke to the complainant's husband on the phone, he readily disclosed his name and where he hailed from. The appellant went to a sangoma in Vosloorus (where the complainant stayed) with the complainant in broad day light, travelling in the unlocked vehicle, whilst she sat in front next to him.

[38] Coupled with all the above facts, the respondent did not obtain or lead the evidence of the men the parties met at the two hostels, or the lady at the house in Soweto or the sangoma, whose identities were either known or easily ascertainable, in circumstances where, in my view, their evidence could have helped to shed more light on the murky waters of this matter.

Even the learned magistrate was either indifferent or oblivious towards these potential witnesses. Nothing stopped the magistrate from calling these people as witnesses whose testimony could have been to the advantage or disadvantage of either side, but to the potentially very useful evidence to the court to clarify many unexplained or unclear issues.

[39] The cumulative effect of all the above facts, some to a greater degree than others, is such that, in my view, have the result of militating against a finding that the complainant was forced to go with the appellant. She could, and she should have

raised alarm with some or all the above-mentioned people. Particularly as nothing shows that she never had the opportunity to do so.

[40] I have carefully considered the appellant's version on the same aspects, and I remain unimpressed with the veracity and/or truthfulness of his version thereon. There are even instances where I would have preferred the complainant's version on aspects, as her version is more probable on them than that of the appellant. For an example, I am inclined to believe that the appellant indeed sped off the scene after the complainant threw herself out, and that there is no reason to disbelieve the evidence of the constable who arrested him. However, even this criticism does not detract from the fundamental aspect that the respondent needs to prove each and every element of the crime beyond reasonable doubt, and that there is no onus on the appellant to prove his innocence. It is not necessary for me to believe him, or believe him in every material respect. It is sufficient if the court finds that his evidence is reasonably possibly true, to acquit him.

[41] I am thus of the view that the respondent failed to prove that the complainant was forced to go with the appellant to any of the places they went to.

[42] For the same reasons or considerations, mutatis mutandis, I am of the view that the respondent failed to prove that the complainant was forced to engaged in sexual intercourse with the appellant. In fact, I find that it is more probable than not that the sexual intercourse occurred with the consent and active participation of the complainant. The appellant's explanation that he slept in clothes on Monday night (the night on which no sexual intercourse took place) and the complainant queried why he did so, whilst the complainant testified that they were both naked, is more probable and consistent with the other proven objective facts.

[43] Added to the above, in respect of both charges, are the following factors: There were many material contradicting and/or unsatisfactory features and/or inconsistencies in the evidence of the complainant in relation to what her report was to captain Motshoane. For an example, she told her that the threat to go and kill her

happened as they left Soweto, whereas she testified in court that the threat only came as a change of mind after they had arrived back in Vosloorus after he went past where she was supposed to get off. She told the captain that he took a cloth and a knife then in Soweto to go kill her, but she made no mention of this fact in court. The significance of this contradiction lies in the fact that the complainant's said explanations relate to why she threw herself out of the moving vehicle. If the threat to kill her was indeed done, it is important to determine when such threat was made. On the available evidence, it is impossible to say when such threat was made; In Soweto or in Vosloorus. She is contradicted by her husband regarding the sequence of the telephone calls and the nature of the discussion on the phone.

[44] The circumstances of this matter call for the exercise of caution.

[45] Whilst a court may convict on the credible evidence of a single witness as provided for in section 208 of our Criminal Procedure Act 51 of 1977, the cautionary rules also apply to the evidence of a single witness, which must also be reliable in every material respect.

[46] The complainant clearly gave what at times was an incoherent version. The magistrate was obviously alive to the said deficiencies, but sought to undermine and under-play them by finding that she was an unsophisticated witness. This approach, in circumstances where no explanation or excuse was placed on record, and where no mental deficiency was proven on the part of the complainant, was clearly wrong. The application of this sort of approach, in my view, is a direct opposite and displacement of the cautionary rule.

[47] In fact, I may remark in passing, that a proper reading of the record will show that the magistrate was unduly, form the commencement of the trial, predisposed towards the complainant, and towards the state's case. He, at times, suggested answers to the complainant, albeit indirectly. In my view, this constituted a material misdirected on the part of the magistrate. He failed to give due consideration and weight to the unsatisfactory features of the evidence of the complainant, but rushed to finding excuses or explanations for her conduct. An example of this fact is where the magistrate remarked, when the captain was testifying, and having told the court

that the complainant told her that the appellant took a cloth and a knife before leaving Soweto, remarked that her evidence was the same in court. This remark shows that the magistrate had completely lost sight of the fact that the complainant's testimony on this point was contradictory.

[48] In the light of the misdirection mentioned above, this court, acting as a court of appeal, is entitled to consider what its judgment would have been on the evidence before it.

[49] Applying the cautionary rule to the evidence of the complainant, I find that the appellant's version, whilst not without its own problems, cannot be dismissed as not being reasonably possibly true. The fact that he ran away when pursued by the police may well have been an act of panic. After all, the complainant had all the hallmarks of a skilful manipulator. She could cheat on her husband without detection, and even when she left the common home on Saturday she pretended she was going to buy groceries. After all, it is clear, from the circumstances of this case that she had to offer some dramatic explanation for her to be accepted back by her husband with impunity. It is thus not only unfair, but also wrong to place undue weight to the fact that she performed an apparently life threatening stunt. Life is riddled with examples of some people actually going to the extremes of committing suicide when confronted with certain challenges.

[50] I also cannot find that the complainant's evidence is sufficiently reliable to can convict thereon.

[51] This court need not even believe the appellant in order to acquit him; it is sufficient in order to acquit him if the court finds that his version, albeit not without criticism, is reasonably possibly true. Where there exists doubt, like as

to the reason why the appellant ran away when pursued by the police, the benefit of such doubt has to accrue in favour of the appellant.

[52] In my view, the state has not succeeded in proving its case beyond reasonable doubt, thus entitling the appellant to his acquittal.

[53] In the light of my finding as regards the conviction, it is unnecessary to consider the grounds of appeal on sentence.

[54] Consequently, I hereby make the following order:

1. The appeal against both convictions and sentences is upheld, and the appellant is found not guilty and discharged

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I. MOTLOUNG

(ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA)

I CONCUR

_____

M.P TSOKA

(JUDGE OF THE HIGH COURT OF SOUTH AFRICA)

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO. A191/2010

In the matter between:

MKHIZE BONGANI VICTOR **Appellant**

vs

THE STATE **Respondent**

JUDGMENT

MOKGOATLHENG J:

(1) I have had the benefit of reading the judgment of my colleague Motloung AJ with which Tsoka J concurs. I however, regret that I cannot "*agree with his approach to the evidence or with his conclusions*" My colleague and I differ in our approach and evaluation of the details of the appellant's evidence, and the State's evidence. "*The difference between us is fundamental in that it lies in our approach to the essential situation of the complainant's evidence which depicted the complainant"* as a married woman who according to her

version freely admitted to cuckolding her husband by having an affair with the appellant and agreed to a tryst with him on the 22 November 2008, with the purpose of ending the relationship, but that such tryst precipitated tension and disagreement with the appellant, which manifested itself in the deprivation of her liberty and being forced to have non-consensual sexual intercourse. In contradistinction the appellant's version is that the mutually agreed to meeting was purely a lover's tryst, which ended in consensual sex.

(2) I agree with Cameron JA sentiments in ***S v M 2006 (1) SACR 135 at 165 para [237]*** that in approaching a matter such as this, a fact-finder must be alive to the fact that:

> *"[237] It surely needs no argument that our capacity for evidentiary appreciation should embrace situations that involve a sexual advance made upon a victim who may already be in a position of deep sexual, emotional and even physical compromise when sex is proposed. Such a position of compromise may derive from a pre-existing consensual or semi-consensual interaction with the perpetrator. 'Date rape' is the best-known instance: the parties may have seen each other socially, and even have engaged extensively in intimate physical contact (petting). When one party refuses to 'go all the way', nothing approaching violence or physical coercion may be involved, and to seek it may be gravely mistaken. The emotional and physical complexities are less crass, and demand a proportionate response from the fact-finder."*

(3) I further agree with the Learned Judge that the fact-finder must guard against: *"an attempt to apply the wrong conceptual model (or 'paradigm') to the violation this case involves".* The fact-finder must be

wary of *"an approach to the complainant's evidence that in my view does not justly appreciate the situation it evoked" or "to mistake complexity for contradiction, and nuance for incoherence."*

LEGAL PRINCIPLES

(4) Before traversing the evidence, perhaps it is apposite to restate the legal principles applicable to the present matter. ***Van der Merwe (DJP)*** in the case of ***State v Zuma 2006 (2) SACR 191 at 208i-211f*** has succinctly re-enunciated the principles governing the analysis and evaluation of evidence, and adjudication in criminal matters. I hereby for emphasis restate these legal principles by quoting the learned Judge verbatim:

"In this particular matter it is necessary to refer to the State's burden of proof and the way in which a court should approach the evidence where a court is faced with two conflicting, in some instances, mutually destructive, versions.

In *S v Ntsele* 1998 (2) SACR 178 (SCA) ([1998] 3 All SA 517) the Supreme Court of Appeal deals with the *onus* of proof on the State, the adequacy of proof and the trial court's evaluation of evidence. At 182b-f (SACR) Eksteen JA says the following:

> 'Die bewyslas wat in 'n strafsaak op die Staat rus is om die skuld van die aangeklaagde bo redelike twyfel te bewys - nie bo elke sweempie van twyfel nie. In *Miller v Minister of Pensions* [1947] 2 All ER 372 op 373H stel Denning R (soos hy toe was) dit soos volg:
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> > "It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the

> sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt. . . ."

> Ons reg vereis insgelyks nie dat 'n hof slegs op absolute sekerheid sal handel nie, maar wel op geregverdigde en redelike oortuigings - niks meer en niks minder nie (*S v Reddy and Others* 1996 (2) SASV 1 (A) op 9b-e). Voorts, wanneer 'n hof met omstandigheidsgetuienis werk, soos in die onderhawige geval, moet die hof nie elke brokkie getuienis afsonderlik betrag om te besluit hoeveel gewig daaraan geheg moet word nie. Dit is die kumulatiewe indruk wat al die brokkies tesame het wat oorweeg moet word om te besluit of die aangeklaagde se skuld bo redelike twyfel bewys is (*R v De Villiers* 1944 AD 493 op 508-9).'

The reference to *S v Reddy and Others* 1996 (2) SACR 1 (A) reads as follows:

> 'Lord Coleridge, in *R v Dickman* (Newcastle Summer Assizes, 1910 - referred to in *Wills on Circumstantial Evidence* 7 ed at 46 and 452-60), made the following observations concerning the proper approach to circumstantial evidence:

> > "It is perfectly true that this is a case of circumstantial evidence and circumstantial evidence alone. Now circumstantial evidence varies infinitely in its strength in proportion to the character, the variety, the cogency, the independence, one of another, of the circumstances. I think one might describe it as a network of facts around the accused man. That network may be a mere gossamer thread, as light and as unsubstantial as the air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture, that no efforts on the part of the accused can break through. It may come to nothing - on the other hand it may be absolutely convincing. … The law does not demand that you

> should act upon certainties alone. … In our lives, in our acts, in our thoughts we do not deal with certainties; we ought to act upon just and reasonable convictions founded upon just and reasonable grounds. … The law asks for no more and the law demands no less." '

In *S v Singh* 1975 (1) SA 227 (N) the Court discussed the approach of a court where there is a conflict of fact. The learned Judge says the following at 228F-H:

> '[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 witnesses 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 to 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.'

An extremely helpful summary also appears in the headnote of the judgment in *S v Radebe* 1991 (2) SACR 166 (T) at 167j-168h. The summary reads thus:

> 'A criminal court does not judge an accused's version in a vacuum as if only a charge-sheet has been presented. The State case, taking account of its strengths and weaknesses, must be put into the scale together with the defence case and its strengths and weaknesses. It is perfectly correct that the State case cannot be determined first and if found acceptable regarded as decisive. The State case, if it is the only evidentiary material before the court, must in all cases be examined first in order to determine whether there is sufficient evidentiary material in respect of all the elements of the offence and whether there is not perhaps in any event a reasonable possible alternative hypothesis appearing therefrom. Precisely the same approach is applicable if the defence puts forward a version. Taking into account the State case, once again it must be established whether the defence case does not establish a

reasonable alternative hypothesis. That alternative hypothesis does not have to be the strongest of the various possibilities (that is, the most probable) as that would amount to ignoring the degree and content of the State's *onus*. The State's case must also not be weighed up as an independent entity against the defence case as that is not how facts are to be evaluated. Merely because the State presents its case first does not mean that a criminal court has two separate cases which must be weighed up against one another on opposite sides of the scale. The presentation of the two cases in that sequence is the result of considerations of policy and effectivity. The criminal court ultimately has a conglomerate of evidentiary material before it which is indicative of facts against or in favour of the innocence of the accused. Some exculpatory facts may appear from the State case whilst incriminating facts might appear from the defence case, for example admissions made during cross-examination. The correct approach is that the criminal court must not be blinded by where the various components come from but rather attempt to arrange the facts, properly evaluated, particularly with regard to the burden of proof, in a mosaic in order to determine whether the alleged proof indeed goes beyond reasonable doubt or whether it falls short and thus falls within the area of a reasonable alternative hypothesis. In so doing, the criminal court does not weigh one "case" against another but strives for a conclusion (whether the guilt of the accused has been proved beyond a reasonable doubt) during which process it is obliged, depending on the circumstances, to determine at the end of the case: (1) where the defence has not presented any evidence, whether the State, taking into account the onus, has presented a *prima facie* case which supports conclusively the State's I proffered conclusion; (2) where the defence has presented evidence, whether the totality of the evidentiary material, taking into account the *onus*, supports the State's proffered conclusion. Where there is a direct dispute in respect of the facts essential for a conclusion of guilt it must not be approached: (a) by finding that the State's version is acceptable and that therefore the defence version must be rejected; (b) by weighing up the State case against the defence case as independent masses of evidence; or (c) by ignoring the State case and looking at the defence case in isolation.'

From the aforegoing, it must at this stage already be clear that there is no *onus* on an accused to convince a court of any of the propositions advanced by him. It is for the State to prove the propositions false beyond reasonable doubt.

See *R v Difford* 1937 AD 370 at 373:

> 'It is not disputed on behalf of the defence that in the absence of some explanation the Court would be entitled to convict the accused. It is not a question of throwing any onus on the accused, but in these circumstances it would be a conclusion which the Court could draw if no explanation were given. It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation be gives. If he gives an explanation, even if that explanation be improbable, the 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. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal . …'

All evidence requires a court to engage in inferential reasoning. Reference is hereinbefore made to circumstantial evidence. The question is: how should a court approach circumstantial evidence?

In *S v Mtsweni* 1985 (1) SA 590 (A) at 593E-I it is emphasised that only proven facts can form the basis for legitimate inferences. Furthermore, inferences can only be drawn if the logical dictates of *R v Blom* 1939 AD 188 at 202-3 are fully complied with. In the *Blom* case Watermeyer CJ states as follows:

> 'In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

THE EVIDENCE

(5) My Learned colleague has aptly summerised the evidence adduced in the court-a-quo. In determining whether the State has discharged its onus, I turn to consider the totality of the evidence, and in particular the reasons predicating my colleaque's conclusion that the State has failed to discharge the onus reposing on it beyond a reasonable doubt, by applying the aforementioned legal principles. It is instructive to bear in mind that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt.

(6) At the outset because my colleague has found that magistrate misdirected himself materially, this court is obliged to decide the case purely on the record (without having the benefit of seeing the witnesses) with the result that the question of onus becomes all-important ***(see R v Dhlumayo 1948 (2) 677 (A) at 706, principles 11 and 13).***

THE COMPLAINANT'S VERSION

(7) The complainant testified that after telling the appellant that she was terminating their relationship, he persuaded her to accompany him to a

hostel in Vosloorus under the guise of soberly discussing her decision, Events went awry when the appellant locked the door and refused to allow her to leave, and subsequently forced himself on her by having non consensual intercourse with her.

(a) According to the complainant the first non-consensual intercourse occurred on the 22 November 2008 at the Vosloorus hostel and subsequently at Diepkloof hostel after the appellant "*told her that she is not going home today.*" She testified that the appellant pushed her on to the bed, slapped her and instructed her to remove her clothes. She stated that she submitted to the appellant's demands because she was scared and thought the appellant was going to kill her.

She testified *"He then had sex with me only one round, when he had finished he had a rest, later he did the same for the second time now"* ***Record page 13 line 1 – 3***;

(b) The second non consensual sexual intercourse was in the early hours of the 23 November 2008. When the court asked the complainant *"Now this what you refer to as a second time was this obviously also after midnight – Yes your worship"* ***Record page 13 line 5 – 10;***

The complainant explained further that the appellant: *"had sex with me that Saturday night midnight or the first part he finished he had a rest that is when we continued with the argument, then he got on top of me early hours of Sunday"*

Record page 15 line 3 – 6;

Complainant further testified that in the*: "Early hours of Sunday early hours of the morning that is when he got on top of me and had sex with me for the second round"*

***Record page 15 line 10 – 13 and page line 22 –* 24;**

(a) The third non-consensual sexual *intercourse* the complainant testified happened *"On Sunday evening he then raped me again had sex with me again"*

Record page 18 line 20 – 24; and

(b) The fourth non-consensual sexual intercourse the complainant testified occurred *"then we slept there that night until in the morning, Monday following day then he locked, he got on top of me and he raped me as he did before*

Record page 18 line 24 – 25 and page 19 line 1 – 2

(8) The complainant testified that she jumped out of the appellant's moving vehicle because the appellant although he had undertaken to drop her at her residence, had driven past her residence and had threatened to kill her.

THE APPELLANT'S EVIDENCE

(9) In his plea explanation and his evidence in chief the appellant confirmed that he and the complainant had an agreement to meet at around about 14.00 on the 22 November 2008. The appellant never alleged either in his plea or evidence that he and the complainant also agreed to spend the whole weekend together. The fact that the complainant required a change of clothing demonstrates that there was no agreement to spend the weekend together. The complainant testified that on appellant's instructions she phoned her husband and told him to leave the house key in order to enable her to obtain or secure fresh clothing.

(10) In his plea explanation the appellant stated that he and the complainant went in his vehicle to Bamboga Squatter Camp to one of his friend's

place, where after all three had partaken of a meal prepared by the complainant, he and the complainant went to bed had consensual sex and thereafter slept in that hostel room.

(11) In his evidence in chief the appellant testified that *"I continued working until late at around about 20.00 in the evening. We were together the whole time when we went to my place where I reside, we went there to go and sleep there at my place together with her. During the night we had sexual intercourse and when we finished we slept until the early hours of the morning the following day"*

Record page 66 line 6 - 13

Later he contradicted himself and testified that; *"we went later to the hostel….my friend was there. He is the owner of the place…..we arrived late in the evening…..we ate, when we had finished eating we went to bed to go and sleep."* It is impossible if not improbable that the appellant and the complainant slept at two different places during the same time period.

(12) The appellant's counsel when leading him, put it to the complainant: "*Now accused also informs me that you told him that your husband had found another woman and that would mean that you are now free,"* ***Record page 27 line 17 – 19*** "*further that you told her that if she escaped you will go to her house and you are going to kill her husband.* The appellant responded *"No I disagree with that too because I did not know that she is a married woman she said the relationship had broken down……I would not say such things if I knew that they are still in love with her husband if the relationship was still on"* ***Record page 71 line 17 – 23***

(13) Under cross – examination the appellant contradicted this evidence when asked by the prosecutor: "*did her husband not know about the affair by the time you spoke to him (that is on the 22 November 2008) at about 21.25?* The appellant responded*, "Not at all, it was my first time to know that there is a husband when I was here in court when he was testifying,"* ***Record page 76 line 15 - 17***

(14) Under cross – examination when it was put to the appellant that the complainant indicated to the court that you had sexual intercourse with her four times, the appellant testified that "*No I disagree with that, it was only twice not four times," **Record page 76 line 8 – 10.*** The appellant when led by his counsel contradicted this assertion, he testified that: he had sexual intercourse with the complainant four times:

(a) ***The first sexual encounter:*** *"after talking to the complainant's husband had consensual sexual intercourse on the evening of the 22 November 2008', **Record page 70 line 1 – 9**;*

(b) ***The second sexual encounter:*** *"now close to midnight (that is the 22 November 2008) almost the next day (that is 23 November 2008) or the next day she said that you had sexual intercourse again with her – Yes I do not dispute that….but it was consensual sex……**Record page 70 line 20 0- 24;***

(c) ***The third sexual encounter:*** "*now on the next day (that is the 23 November 2008) she said was not dressed and you got on top of her again and had sex without her consent – She is lying that was not against her will, **Record page 71 line 4 – 6;***

(d) ***The fourth sexual encounter:*** *"she said, late, much later on Sunday night you had sexual intercourse again with her without her consent – we did as usual, there was nothing wrong.* ***Record page 72 line 8 – 10****.*

(15) The appellant's counsel put to the complainant that the appellant will deny that he took you to the sangoma ***Record page 33 line 1 – 2.***

When led by his counsel the appellant conceded that they both went to the sangoma, appellant testified that*".....there was no medication given to us, I am the one who wanted to go there seeing that she said she had problems with her husband. I said she should go and check herself there too"* ***Record page 73 line 5 – 9****.*

(16) The appellant testified that the police found him seated in his vehicle. The police did not chase him, he had stopped, the police assaulted him, because the accused him of having pushed the complainant out of his vehicle. He ran away because his life was in danger. This evidence was never proffered in his evidence in chief. Police reservist Mokoena testified that after the complainant had jumped out of the vehicle the appellant did not attempt to stop, he drove away, they chased his vehicle, appellant stopped got out of the vehicle, and ran away they chased him and arrested him. The court-a-quo correctly accepted the evidence of police reservist Mokoena.

(17) When asked by the prosecutor why the complainant would jump out of a moving vehicle endangering her life, the appellant responded that he did not know the reason but "*thinks it is because he got a phone call whilst they were in Soweto from a lady and the complainant said he is fooling with her"* ***Record page 78 line 1 – 9.***

(18) The appellant's improbable explanation should be viewed against the background that he admits that he drove past the complainant's residence and drove away with her because she was angry and not communicating with him, as opposed to the complainant's version that the appellant told her that he had changed his mind and was no longer going to drop her off at her residence because she was going to lay a charge and get him arrested.

MOTLOUNG AJ'S FINDINGS

(19) I respectfully disagree with the premises predicating my colleague's findings and I address some of them *ad seriatim*. It is not correct that the complainant's version is riddled with contradictions, inconsistencies and is not credible or reliable. There is consistency in the complainant's evidence which attests to her allegation that she was kept in Vosloorus and Soweto against her will and forced to have intercourse without her consent.

Record page 9 line 19 - 25

(20) The complainant's reason for jumping out of a moving vehicle and imperiling her life when she saw the police and thereafter contemporaneously making reports to Captain Moshoane and Police Reservist Mokoena are consistent with her version that she was held against her will. In contradistinction the appellant's proffered reason for complainant's accusation was: *"the complainant's reason to allege that he kidnapped and raped her is because she had already decided she wants to give false information so that she may lay a charge against me, she wanted me to be arrested, but I do not know*," or *that it was because that the complainant had, had an argument regarding the fact that he had spoken to a young woman in Soweto, or that the*

complainant was afraid of her husband. ***Record page 74 and page 76 line 3 - 7***

(21) When Captain Motshoane interviewed the complainant, she told her that the appellant had deprived her of her liberty, threatened to kill her and raped her, further the complainant related a comprehensive version similar to the one complainant testified to in court. ***Record page 43 – 46*** Captain Motshoane further testified that the complainant's emotional state was sad.

Record page 74 line 13 – 20

(22) The evidence attesting to the consistency in her version, finds support in the evidence of her husband Tsotetsi who testified that when the complainant spoke to him on the phone she was crying, that "*the appellant grabbed the phone and speaking in Zulu told him that "you could not be with your wife today because this wife is mine"* ***Record page 55 line 6 – 9 record***

(23) The complainant's husband Tsotetsi corroborates her evidence that the appellant "*was swearing at my husband….telling my husband that you are no longer going to get her back."* ***Record page 11 line 20 – 23***

(24) The complainant after having jumped out of the appellant's vehicle contemporaneously and spontaneously reported fully to firstly Mokoena that:

> *"He kidnapped me and he kept me for a few days at a certain place and he was raping me all the time*"

Record page 51 line 2 – 4

In ***S v Hammond 2004 (2) SACR 303 para [12]*** it was held:

"[12] It is often said that the fact that a complainant in a sexual misconduct case made a complaint soon after the alleged offences, the terms of that complaint, are admissible for two purposes, namely, to show the consistency of the complainant's evidence, and to negative consent. "See, also ***R v M 1959 (1) SA 352 (A) at 355G-H.***

(25) The complainant's ordeal spanned four days and should be understood in the context of the fact that she wanted to terminate her affair with the appellant; it is he who suggested that they should repair to Basuto Hostel in Vosloorus, subsequently to Diepkloof Hostel in Soweto. The complainant testified that she was threatened with death, that she believed these threats. She testified that she was constantly under the appellant's control and observation, and was told if she attempted to raise an alarm she and her husband would be killed.

Record page 21 line 18 – 23.

(26) It is incorrect to suggest that the complainant voluntarily telephoned her husband "*to inform him that she no longer wished to live with him, or that he must leave the keys of the house as she was coming to collect her clothes*." The complainant's evidence is that at about 21.25 hrs on 22 November 2008 the appellant "*gave her a cellphone, and instructed her that she should contact her husband and inform him that she does not want him any longer, as she has got a new boyfriend.*"

Record page 9 line 15 - 17

(27) To demonstrate that the complainant acted under compulsion, duress and on the appellant's instructions: On a question from the Court,

"*What did you say to your husband when you phoned him - My husband asked me what is happening or what is wrong then I said the accused has locked me into a room at the hostel, he is refusing that I should leave the room and go away home."* ***Record page 10 line 15 - 20.***

(28) The complainant's husband testified that during the telephone conversation on the 22 November 2008 with his wife she was busy crying at that time *"and she was angry"* ***Record page 55 line 6 and page 57 lines 24 and 25*** and further during this call the appellant grabbed the phone saying to him "*you could not be with your wife today because your wife is mine today*" ***page 55 line 2 – 8.*** Further on Saturday the appellant answered the phone and swore at him. ***Record page 55 line 11 – 13.***

(29) Further it is the complainant's evidence that on Monday morning: *"when he had finished raping me he picked up the phone, he gives it to me, he says phone your husband tell your husband to leave the key behind for you so that you must go and fetch your clothes at his place meaning my husband's place. I then did what he told me to do, I phoned my husband and told my husband to leave the key behind for me*."

Record page 19 line 1 - 5

(30) It is incorrect to state that the complainant and the appellant met another person at Vasatu Hostel Vosloorus and in Soweto (Diepkloof) Hostel and a sangoma but that the complainant did not seek help and no explanation was given for this omission. Further, the conclusion that the complainant could and should have raised an alarm with the male parties at the two hostels, the lady at the Soweto house, or the sangoma as nothing prevented her from doing so or there is nothing

that shows she never had the opportunity to do so misconceives the objective evidence.

(31) The Court posed the question *"Now just explain to us also to understand you are now walking the Streets of Vosloorus, why did you not raise an alarm?* The complainant answered*: "Your worship I was scared because he threatened me earlier on he said if I dare run away or raise an alarm to somebody he is going to kill me and kill my husband too, that is the reason why I did not raise an alarm"* ***Record page 19 lines 24 - 26 and page 20 lines 1 and 2****.*

(32) The fact of the matter is that the complainant solicited assistance from the lady in the Soweto house. The complainant testified that the appellant threatened her with death, and brazenly told her that nobody would come to her assistance at the hostels. In any event, the males at the two hostels were the appellants friends, these males didn't tarry long, and were only engaged by the appellant, and at no stage were these males in the presence of the complainant only. The appellant was in a dominant position over the complainant who was caught in the throes of his threats and her fear.

(33) Further the complainant testified*: "we left Vosloorus, we went to Soweto on our arrival in Soweto, I informed the owner of the house, whilst seated there I informed the owner of the house there and asked for assistance from her, she then said I am afraid of the accused, I cannot assist you there is nothing I can do."*

Record page 20 line 9 - 12

(34) Further the complainant testified *"I was busy crying the whole time, the accused said to me even if you can cry there is nobody who is going to assist you here at the hostel….if I continue making noise he will stab me with a knife, after stabbing me with a knife he will throw me underneath the bed at the hostel".* The complainant testified that she was scared and decided to comply with appellant's instructions.

(35) The complainant's further evidence is that *"at the Vasutu Hostel – Vosloorus is we arrived at the hostel…..after getting in the, accused the said guy (that is the owner of the room) was there but after we were seated there after a while he left and went off away and the accused locked the door"* ***Record page 9 line 8 - 14****.* Consequently, according to the complainant there was no opportune time to solicit assistance. In any event the persons she met were the appellant's friends, the complainant had resigned herself to her fate as she was constantly under the appellant's threats and control.

(36) It is incorrect to conclude that *"despite the arrest of the appellant, no knife (and cloth) was found…..which were apparently going to be used to kill the complainant."* Reserve Constable Mokoena did not testify that after chasing and arresting the appellant he searched him, neither did the appellant testify to that effect, this issue was simply never canvassed.

In ***S v M 2006 (1) SACR 135 (SCA) at para 272*** *Cameron JA said:"*

'Accused persons are entitled to be acquitted when there is reasonable doubt about their guilt. That does not make it necessary or permissible for motives to be freely imputed to sexual offence complainants at appellate level when these were not fairly and properly explored in their testimony. To permit this would threaten return to the indefensible days when complainants were treated as inherently unreliable, inherently inclined to false incrimination, and inherently disposed to

destructive jealousy in relation to their consensual male sexual partners.'

(37) It is incorrect to conclude that *"there is no evidence of the complainant behaving in a manner suggesting that she did not want to go to the hostel with the appellant or that……she was in the appellant's company involuntarily."* It is common cause that the parties mutually agreed to meet at Goldspot Shopping Centre, according to the complainant the purpose of the meeting was to terminate their love relationship or affair. The complainant testified *"I told him that I want us to end up because I am no longer interested in doing what I have been doing with you"* It was after this discussion that the appellant drove away and said to her *"let us go to the hostel so that we should go and talk over this problem with us"* ***Record page 8 line 8 and line 19-20.***

(38) The complainant testified that the appellant drove to Vasutu Hostel in Vosloorus whereat the complainant believed the appellant was going to discuss the termination of their affair, but instead *"after entering the room the appellant locked the door and thereafter threatened the complainant with death after locking the hostel room door and telling her that you are not going home today".* The complainant further testified she *"informed her husband that the (appellant) the accused has locked me into a room at the hostel, he is refusing that I should leave the room and go away home".* ***Record page 10 line 16 – 19***

(39) It is incorrect to conclude that the complainant had her cellphone in her possession at all material times when in the company of the appellant, or *"in fact the complainant phoned her husband several times……."* The evidence shows that the appellant was in control of the complainant's cellphone consequently in effective possession of the

complainant's cellphone. *The complainant testified that at Vasutu Hostel after the owner of the room had left, at about 21.25 "the accused gave me a phone, a cellphone, he said I should contact my husband……I scrolled my cellphone…..and I phoned him……."*

Record page 10 line 3 - 13

(40) Further the complainant testified that *"later the accused takes the phone himself phoned my husband"* – Further *"the appellant said she must inform her husband that "…you have got another boyfriend*," and she mero moto thereafter adviced her husband that the, *"accused has locked her into a room at the hostel and is refusing that she should leave the room and go home, the accused immediately took removed the phone from me and he kept it"* ***Record page 11 line 1-2.***

Later the complainant testified*: "because he got the phone it is in his possession he then phoned my husband again and he was swearing at my husband."* In my view these instances evidence the fact that the appellant was in effective control and consequently in possession of the complainant's cellphone, having regard to the fact that the complainant's evidence is that at all times the appellant was in her presence, and she submitted herself, to the appellant's authority and command.

Record page 11 line 10

(41) It is not correct that the complainant did not show an indication to go home. The complainant testified that *"we were having an argument….I was busy telling him the whole time that I want to go home, will you please leave me, I want to go home"*

Record page 14 line 3 - 5

(42) It is trite that submission without resistance does not necessarily indicate consent. See in this regard ***R v Swiggelaar 1950 (1) PH H61 (A)*** where it was held:

'Submission by itself is no grant of consent, and if a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realizes its useless.' Further the complainant testified that she was in fear because the appellant had threatened her with death if she dared to run away or raised an alarm, consequently she resigned herself to her fate.

(43) The conclusion by my colleague that he cannot understand why complainant's husband only reported the matter to the police by preferring charges of Kidnapping against the appellant and also reporting a case of a missing person, such conduct is more consistent with a version that says there were serious problems in the relationship hence the husband's indifferent conduct.

(44) From the record there is and no evidence suggesting that the complainant and her husband had marital problems prior to the 22nd November 2008 despite her adulterous affair with the appellant. The complainant's husband was desperate to find out where exactly the complainant was, he even utilised the services of a policeman to impersonate a social worker in order to establish the whereabouts of the complainant. He testified that *"I spoke to Constable Selema…..to phone my wife and pretend to be a social worker because I wanted to know their whereabouts …Then my wife answered the phone saying*

that we are at Soweto Hostel but I do not know the name of that hostel." ***Record page 56 line 18-21***

(45) The complainant's husband's version is corroborated by the complainant who under cross-examination testified that*: " immediately when we got to Soweto….one police officer phoned he was threatening me he said if he says he had given the children to the social worker the accused would release me so that I should come back home."*

Record page 37 line 13-16

(46) My colleague's conclusion that "*it is simply devastating against the respondent's case as to why did the husband say that if there are problems between them, she must discuss them with him, and not fetch her clothes in the company of the appellant*" is not borne out by the evidence.

(47) It must be recalled that the complainant's husband was confronted with and was grappling with the shocking reality that his wife was having an adulterous affair with the appellant whom she now accuses of depriving her of her liberty. He testified that*: "On the 22 November 2008 at about 21.30 at night I received a phone call…….(from his wife's phone) the male person who identified himself as Bongani, adviced him that he could not be with his wife today because she was his today."*

Record page 55 line 8 - 10

(48) My colleague's conclusion that *"unless there were serious marital problems then, and also unless the appellant's version was more probable the husband would have eagerly awaited and perhaps, waylaid the appellant when they came to fetch the clothes, or even*

better still, reported the matter to the police so that they can spring a surprise on the unsuspecting appellant." This conclusion with respect is based on hypothetical speculation not borne out by the evidence. The fact of the matter is the complainant's husband reported the matter at Dawn Park Police Station on the 24 November 2008 as a reasonable concerned, husband and left the matter in the hands of the police.

(49) Although my colleague finds that he is inclined to believe that the appellant indeed sped off the scene after the complainant threw herself out (of the moving vehicle) he does not at all deal with the reasoning which motivated and impelled the complainant at the risk of her life to do so.

(50) In my view this exigency has a direct bearing in the determination of whether the complainant's conduct is consistent with her version that she was kidnapped and the appellant had sexual intercourse with her without her consent, and whether the appellant's conduct in not coming to the assistance of the complainant who according to his version was still his paramour, is consistent with his version that sexual intercourse with the complainant was consensual.

(51) The finding that "*the fact that he ran away when pursued by the police may well have been an act of panic. After all it is clear from the circumstances of this case that the complainant had the hallmarks of a skilful manipulator, and had to offer some dramatic explanation for her to be accepted back by her husband with impunity."* With respect these findings do not accord with the evidence. The appellant in his evidence in chief testified that he did not run away, that he only ran away when the police assaulted him rendering his life in danger. Reserve Constable Mokoena was never confronted with this version, which attests to the fact that it is a recent fabrication. The

complainant's evidence is that: "*on the 25 November 2008" when we came into Vosloorus….when I was about to get off so that I should go to my place, the accused changed his version he said no you are no longer getting off because you are going to lay a charge against me and the*

police will arrest me. He was now driving towards Kliprivier."

Record page 21 line 18 – 22

(52) In ***S v Sauls and Others [1981 (3)] SA 172 (AD) [Diemont JA]*** held:

"The State is, however, not obliged to indulged in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the face it s incriminating. And when the accused misleads the Court by lying arguments based on improbable inferences are not calculated to impress a trial Judge. A passage in a minority judgment given by Malan JA ***in R v Mlambo 1957 (4) SA 727 (A) at 738*** *is apposite. I may add that two paragraphs in this passage were cited with approval by Rumpff JA in* ***S v Rama 1966 (2) SA 395 (A) at 401****:*

> *"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.*
>
> *An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive*

evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."

(53) In his evidence in chief the appellant did not testify as to what efforts he made to come to the assistance of the complainant after she jumped out of the vehicle. Under cross – examination he testified that *"he tried to stop,…..and whilst doing that, those police officers who drove past had already made a u – turn and were following" me from behind…..the police did not give chase to me they found that I had parked the vehicle and had stopped they were busy hitting me……now my life was in danger I decided to run away from them."*

Record page 79 line 10 - 16

(54) Reserve Constable Mokoena testified that the appellant did not stop, he drove away, they gave chase, the appellant stopped the vehicle got out and ran away, they gave chase, arrested him and brought him back to the scene where the complainant was lying. The complainant made a report to him: *"she said he kidnapped me and he kept me for a few days at a certain place and he was raping me all the time."*

Record page 51 line 2 - 4

(55) Captain Motshoane testified that on the same day that she interviewed the complainant who was in an ambulance, she asked her what actually happened: The complainant told her: "*she was kept from the 22 November 2008 until Monday "and the guy was having sex with her without her consent"* ***Record page 45 line 9 – 12.*** Further that*: "she informed the appellant that they should stop their love affair because she now felt it was not right".* ***Record page 43 line 17 – 24.*** The Captain when asked about the complainant's emotional state, answered that she was sad.

(56) It is incorrect to find that *"the significance of this contradiction lies in the fact that the complainant's said explanation relates to why she threw herself out of the moving vehicle".* Fact of the matter is, if it is accepted that Captain Motshoane is correctly relating what the complainant told her regarding this exigency, was the complainant telling a lie on this aspect. The complainant was never confronted with this version.

(57) Differently stated, is the complainant's testimony on this aspect a material contradiction that vitiates the whole of her evidence? I do not believe so. In my view it is not possible that the complainant would have jumped from the moving vehicle at the risk of endangering her life without a compelling reason.

(58) *Judge H C Nicholas delivered a lecture on 'Credibility of Witnesses' at 1984 Oliver Schreiner Memorial Lecture. The learned Judge dealt succinctly with factors a court takes into account in assessing witness credibility, focusing on veracity, reliability and probability:*

(a) *"A witness is proved to be in error where his statements are contradicted by the proved facts or where he is guilty of self-contradiction. Where he has made contradictory statements, since both cannot be correct, in one at least he must have spoken erroneously. Yet error does not in itself establish a lie. It merely shows that in common with the rest of mankind the witness is liable to make; mistakes. A lie requires proof of conscious falsehood, proof that the witness has deliberately misstated something contrary to his own knowledge or belief.'…… ;*

(b) *There is no proof of conscious falsehood on the part of the complainant or Captain Motshoane. In order for a court to reject the complainant's evidence, more is required than the pointing to this contradiction; there must be proof that this contradiction was the result of a deliberate and conscious falsehood. Such proof does not exist. In the absence of proof of deliberate fabrication a court cannot find that the complainant or Captain Motshoane were mendacious and reject their evidence on this basis. Their contradictions on this aspect are of such a nature that they are in all likelyhood the result of an honest mistake.*

(c) *Where there is proof of a witness's mendacity on one or more occasions, this is not a ground for rejecting the witness's testimony in its entirety. The maxim falsus in uno falsus in omnibus (false in one thing, false in all) has been rejected in South African law as unreliable and illogical.*

(d) *Wigmore has said of the maxim:*

> *'It is untrue to human nature. It is not correct that a person who tells a single lie is therefore necessarily lying throughout his testimony, nor that there is any strong probability that he is so lying. This would not entitle the court to reject automatically all of the complainant's evidence as untrue. Of importance in this regard is the fact that The 'material contradictions' referred to by my colleague in evidence did not relate to the essential elements of the offences. The contradiction in the complainant's evidence if any is insufficient to impugn fatally the credibility of the State's case or to preclude proof of the state's case beyond a reasonable doubt; and*

(e) *as Judge Nicholas observes:*

> *'The question is not whether a witness is wholly truthful in all that he says, but whether a court is satisfied, beyond a*

reasonable doubt in a criminal case, or on a balance of probabilities in a civil matter, that the story which the witness tells is true in its essential features.'

(59) It is trite that "*in the adjudication of sexual cases there has grown up a cautionary rule which requires (a) the recognition by the court of the inherent danger of relying on the testimony of a complainant, and (b) the existence of some safeguard reducing the risk of wrong conviction, such as corroboration of the complainant in a respect implicating the accused, or the absence of gainsaying evidence from him, or his mendacity as a witness, while there is always need fir special caution in scrutinizing and weighing the evidence of young children, complainants in sexual cases, accomplices and generally the evidence of a single witness, "courts must guard against their reasoning tending to become stifled by formalism" the exercise of caution should not be allowed to displace the exercise of common sense**. See S v Snyman 1968 2 SA 582 (A); R v J 1966 1 SA 88 (RA) 90; S v Artman 1968 3 SA 339 (A)."***

(60) In ***S v Sauls and Others (supra)*** it was held:

*"The absence of the word "credible" in **section 208 of the Criminal Procedure Act 51 of 1977,** which provides that "an accused may be convicted on the single evidence of any competent witness", is of no significance; the single witness must still be credible but there are, as Wigmore on **Evidence vol III para 2034 at 262** points out, "indefinite degrees in this character we call credibility". There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been*

told. The cautionary rule referred to in ***R v Mokoena 1932 OPD 79 at 80*** *may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, 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".*

See also ***R v Gumede 1949 3 SA 749 (A) 756 and S v Mokonto 1971 2 SA 319 (A) 323A. See also Colin v De Guisti 1975 4 SA 223 (NK) 228D and Carpede v Choene 1986 3 SA 445 (O) 451, and S v Mafaladiso 2003 (1) SACR 583 (SCA) at 593e-594H.***

cf S v Oosthuizen 1982 3 SA 571 (T) Cf also Merula Manier van Procederen 4 65 16: *"Vascheid in eenig Deel krent 't Geheel van de Depositie" (falsity in any part detracts from the whole deposition)*

PERCEIVED CONTRADICTIONS

(61) My colleague's conclusion that *"There were many material contradictions and/or unsatisfactory features and/or inconsistencies in relation to what her report was to Captain Moshoane for an example, she told her that the threat to go and kill her happened as they left Soweto, whereas she testified in Court that the threat only came as a change of mind after they had arrived back in Vosloorus after he went past where she was supposed to get off"* is a material contradiction is not correct.

(62) There is no material contradiction in the report the complainant made to Captain Motshoane and her evidence in Court. Firstly it must be recalled that Captain Motshoane conducted what she called a *"short interview" with the complainant "who was sad and in pains"* and was injured after her traumatic experience of jumping out of a moving vehicle.

(63) Secondly Captain Motshoane initially tendered her evidence in English, and it became obvious that she was not proficient in the language to such an extent that the magistrate requested her to testify in her mother language. Captain Motshoane was struggling to coherently and intelligently express herself hence the Court asked her *"do you not*

prefer speaking in your own language, it will be so much easier….Ms interpreter please help us."

Record page 45 line 23 – 25

(64) The complainant in her evidence in chief testified that on the 22 November 2008, at 21.25 after the appellant gave her cellphone to contact her husband and inform him that she no longer wants him as she has a new boyfriend, because she was busy crying, the appellant warned her that*: "if I continue making noise he will stab me with a knife, after stabbing me with a knife he will throw me underneath the bed there at the hostel."*

(65) Critically it was at the stage when Captain Motshoane testified that on Tuesday morning the appellant took the cloth and knife and told complainant that today he was going to kill her, that the Court interjected that Captain Motshoane testify in her own language, further just before then the prosecutor had remarked that "*I do not follow you now, what are you saying."*

Record page 45 line 13.

(66) In my view this evidence shows that the complainant did mention a knife in her evidence in chief consequently it cannot cogently be argued that when she mentioned to Captain Motshoane (if the latter is

correctly enunciating the complainant's report) that the appellant before leaving Diepkloof Hostel – Soweto took a cloth and knife and said today I am going to kill you, that assertion can be construed as an intentional falsehood or a material contradiction if regard is had to the probabilities pertaining to the complainant's and the appellant's versions.

(67) My colleague's conclusion's premise is incorrect because the assumption underpinning it, is that only one death threat was made by the appellant, and that was the threat testified to by Captain Motshoane. However, a perusal of the record shows that even if the complainant did not in court testify about this threat at Diepkloof Hostel Soweto, as testified to by Captain Motshoane in court she did testify that the appellant instead of dropping her off at her residence, told her that he had changed his mind, drove away with her saying that the complainant and her husband were going to lay criminal charges against him, consequently, he had decided that he was going to kill the complainant to prevent that.

(68) It is erroneous to conclude that it is impossible to say when such threat was made either in Soweto or Vosloorus. The probabilities favour the complainant's version that she jumped out of a moving vehicle endangering her life in the process, because the appellant drove past the complainant's residence and had threatened to kill her. More so, if one has regard to the fact that the appellant's conduct despite professing not having made the threat, drove away after the complainant jumped out of his vehicle and did not stop to offer her assistance or investigate the extent of her injuries, and despite the police chasing him, did not stop his vehicle is inconsistent with his version that he did not deprive the complainant of her liberty and had consensual sex with her.

(69) When regard is had to the fact that as at the 22 November 2008, the complainant had told her husband that *"the accused has locked me into a room at the hostel, he is refusing that I should leave the room and go away home,"* there was totally no reason why she would jump out of the vehicle in order to concoct a plausible reason for the edification of her husband regarding her absence from the marital home.

Record page 10 line 18 - 19

(70) In order words the complainant's husband already knew that the complainant was in the company of the appellant more so the appellant himself testified under cross – examination that he told the complainant's, husband that he did not know that the complainant was married. In my view, therefore there is no compelling reason why the complainant would jump out of a moving vehicle at the risk of her life in order to contrive a reason by risking death to convince her husband that she was indeed kidnapped and raped by the appellant when he was already aware of such exigency as from the 22 November 2008.

(71) Surely this is not the conduct of an innocent observer to the complainant's inexplicable and unexpected unfolding drama. In these circumstances, an innocent reasonable concerned lover would be expected to stop, find out the reason of such outrageous unsolicited behavior, and commiserate with the complainant who according to appellant's version was still his lover, and investigate the extent of her injuries and solicit medical assistance for her.

THE COURT'S PERCEIVED BIAS

(72) A court of appeal should not on the basis of mere assumptions and in the absence of clear evidence find that a trial court has committed an irregularity in any event not every irregularity viates the proceedings. The conclusion that the court was unduly predisposed towards the complainant and the State's case is not born out by the record. The court a quo had the advantage of viewing the complainant testify and its observation that the complainant was not familiar with court procedure is well founded having regard to the fact that the court that did not sit supine, it was aware of the issues, it understood the language spoken by the complainant, he sought clarity and sought to get to the crux of the disputed facts.

Page 15 line 20 – 23.

(73) In ***Rex v Hepworth 1928 [Curlewis, J.A.]*** held:

" A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognized rules of procedure but to see that justice is done."…….The intention of section 247 seems to me to give a judge in a criminal trial wide discretion and power in the conduct of the proceedings, so that an innocent person be not convicted or a guilty person get free by reason inter alia, of some omission, mistake or technicality."

THE MAGISTRATE'S FINDINGS

(74) In my view an analysis and evaluation of the complainant's version shows that in its essential features it has the hallmarks of the truth as to how the concatenation of events on that fateful weekend played

themselves out, it is too detailed to lend itself to fabrication. The defining salient features of her evidence are consistent with her testimony that she was deprived of her liberty and forced to have sexual intercourse without her consent.

(75) I concur with the court a quo's conclusion that "*the complainant never deviated from her version, that the appellant's counsel's thorough cross – examination had no adverse effect on her testimony, that she stood rigidly by her evidence*." In contradistinction the court-a-quo correctly found that the State had proven the case against the appellant beyond reasonable doubt, and correctly rejected the appellant's version as false beyond reasonable doubt.

(76) In the premises it is my view that the appeal both on the conviction and the sentence should have been dismissed.

Dated at Johannesburg on the 15th November 2010.

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MOKGOATLHENG J

JUDGE OF THE HIGH COURT

For Appellant:	Adv Cosyn
Instructed by:	Legal Aid South Africa: Johannesburg
For Respondent:	Adv Serepo
DATE OF HEARING:	25 October 2010
DATE OF JUDGMENT:	15 November 2010