

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

21/11/16

CASE NO: A498/15

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

NKABINDE XOLANI CYPRIAN

Appellant

and

THE STATE

Respondent

JUDGMENT

TEFFO, J:

[1] The appellant was convicted in the regional court, Bethal, of one count of rape of a 25 year old female person. He was sentenced to 10 years imprisonment. He now appeals against his conviction with leave having been granted by the trial court.

[2]The issues raised in the appeal were that the trial court erred in finding that the state proved the guilt of the appellant beyond a reasonable doubt while attaching insufficient weight to the fact that the complainant was a single witness with regard to the incident of rape and that her evidence was to be treated with caution. It was submitted that the trial court did not approach the complainant's evidence with

caution. Her evidence that the appellant used a stick which he pressed against her neck with his one hand while he used his other hand to take off her skirt, tight, panties also lowering his pants and penetrating her, was criticised as not being probable. There were also criticisms to her evidence to the effect that although she testified that she sustained bruises on her neck caused by the strangulation, she did not mention the injuries to the doctor who examined her after the rape and the injuries thereof were not mentioned on the J88 medical report. It was argued that she testified that her mother also saw the bruises on her neck but her mother's evidence was that she did not observe any bruises on her neck. It was therefore pointed out that her evidence was not credible. It was also submitted that the trial court erred in convicting the appellant, rejecting his evidence as not being reasonably possibly true without laying any basis thereof and accepting that such evidence corroborated the complainant's version in certain aspects.

[3] The state disagreed with the submissions on behalf of the appellant and argued that he was correctly convicted.

THE EVIDENCE

[4] The state presented the evidence of two witnesses, namely, Ms G. J. M. (the complainant) and Ms P. B. Z. (the complainant's mother) in support of its case while the appellant testified on his own without calling witnesses. It is common cause between the parties that the complainant and the appellant worked for the same employer at one place at the time of the incident where she was employed as a domestic worker and the appellant as a gardener. It is also common cause that on the day of the incident both the complainant and the appellant were at their place of work and they had sexual intercourse. The appellant contended that the complainant consented to have sexual intercourse with him while the complainant disagreed. The complainant testified that on Friday 31 January 2014 while their employer was out of the house to the shops, the appellant entered the house and as she was busy with her duties collecting a duvet from one of the bedrooms, he approached her from behind, pulled her with her long hair at the time, to another room where he put a curtain stick on her neck, throttled her, pulled her skirt, took off her tights and panties on one leg, lowered his pants after pushing her to the bed and had sexual intercourse with her without her consent. After ejaculating, he stopped and when she asked him what was he doing, he said he was playing with her. The appellant requested her not to tell their employer what happened. She tried to go to the neighbours to seek assistance but the appellant pleaded with her

not to go and promised to give her his whole salary. He then left and the complainant telephoned her mother after realising that the sim-card that she had at the time, did not have the telephone numbers of her employer. As she was talking to her mother on the phone, her mother gave her employer the phone as she was screaming telling her what the complainant was saying to her. Her mother and her employer came to her place of work. They checked and observed her. They advised her not to change her clothes as they were calling the police. She was vomiting and powerless at the time. Her employer also arrived. They did not find the appellant as he had long left the place. She told them what happened and they called the police. Eventually the police arrived, asked her what happened and she told them. They took a statement from her. She did not sustain any injuries as a result of what happened in the house. She was later taken to the hospital. She did not know how the appellant was arrested.

[6] She denied that the sexual intercourse was with her consent and maintained that if it was with her consent she would not have reported the incident to her mother and/or her employer. When asked as to why did she listen to the appellant when he pleaded with her when she wanted to go to the neighbours and ended up not going, she said she did go but she did not find anyone. She testified that she was still working for the same employer and that the appellant did not return to his place of work after the incident. She also stated that the incident happened in the morning although she did not check the time.

[7] Under cross-examination she testified that she did not see the appellant coming to her at the time of the incident. She only saw him when he was already behind her. He pushed her while he was grabbing her with her hair and she fell on her back to the bed. After she fell on the bed, he took off her tights and panties only on one leg and inserted his penis inside her thereby raping her. He was at the time throttling her with a stick which he got on the headboard in the bedroom where the incident took place. She did not resist because she was scared and shocked. The stick was about 35 centimetres long and its thickness was 5 cm in diameter. The appellant was pressing the stick against her throat. He kept on pressing it for some time while he was busy raping her and she felt pain. She did not try to escape as she was scared. She sustained bruises as a result of the strangling. Her voice was not well after the incident. She told the doctor or nurse who examined her at the hospital that she was raped but said nothing about being strangled as she was scared. She showed her mother where she felt pain as a result of the throttling. After returning from the neighbours, she phoned her mother 15 minutes thereafter

to inform her about the rape and also requested her to phone her employer. At that time the appellant, who was not near her, was calling her. He initially left, went out of the gate and returned in order to apologise for what he did. He returned after she came back from the neighbours and after she had phoned her mother. She did not phone any other person except her mother on that day after the incident.

[8] She disputed that D. who worked in the vicinity was her boyfriend and that she has kids with him. The appellant left the stick he pressed against her throat in the bedroom where the incident took place on the bed and she showed it to her mother. From the bedroom she went to the kitchen to get some water but she vomited in the presence of the appellant who was at the time pleading with her not to tell her employer what happened. She was also crying at the time. She disputed that she and the appellant occasionally had sexual intercourse at their place of work and/or after work. She also denied that she was at the time of the incident having sexual intercourse with him for the third time. She conceded that the appellant pleaded with her to stop crying. She denied that after the intercourse she made tea, she and the appellant went to sit outside, her phone rang, she took the phone and moved away from the appellant and suddenly she was swearing at someone on the phone. She also denied that after answering her phone she went to the appellant and accused him of taking her for a fool as he sleeps with her and goes around with other girlfriends. Further to this she also disputed that she was angry because of the call she received from the appellant's girlfriend and reiterated that nobody called on her phone after the incident. She maintained that she only called her mother for help after she did not find any one in the neighbourhood. She also denied telling the appellant that she was going to tell D. that he raped her. She denied ever phoning D. on that day.

[9] The complainant's mother corroborated her evidence with regard to the phone call she made to her, what she told her about the rape, that she was crying, the fact that she gave her employer the phone when she was speaking to her, that she and her employer eventually went to her place of work where they found her crying and did not find the appellant. She testified that the complainant told her that the appellant fled after the incident. She testified that upon their arrival at her place of work, they found her outside. She went with her inside the house where she showed her the footprints of the appellant on the corridor. The complainant was crying and she opened her legs when she was walking. She was able to see the vomit in the kitchen and the stick the appellant used to throttle her in the bedroom where the incident took place. She did not see where she was injured on her body

save to say that she noticed that her t-shirt was creased at the back. When told under cross-examination that the complainant testified that she showed her bruises on her neck caused by the strangulation, she stated that she only noticed the t-shirt and that even though she could have shown her the injuries, she did not notice them because she was shocked.

[10] Under cross-examination she testified that she saw mud and/or sand in the house which ended on the corridor towards one of the bedrooms.

[11] The appellant also testified. His evidence was briefly as follows: He had a love relationship with the complainant and that on the day of the incident he arrived at work where he found the complainant and greeted her. He asked her about the whereabouts of their employer. After he was told that their employer was not there, he requested to have sexual intercourse with the complainant. She accepted the proposal, they started to hug each other, kissed and eventually went to one of the bedrooms where they had sexual intercourse. When they were done, they proceeded to the kitchen where he requested her to make tea for him. The complainant made tea for both of them and they went out of the house where they sat together and drank the tea. She later left him and told him that she was going to put the washing in the machine. Subsequently, his girlfriend phoned on the complainant's phone and requested to speak to him. The complainant asked her who she was and his girlfriend informed her that she was his girlfriend. The two started swearing at each other over the phone.

[12] When asked as to how did it come that his girlfriend phoned him on the complainant's phone, he said he gave her the complainant's numbers as he had intended to go and buy himself a phone that afternoon. At that time his phone was broken and the complainant had left her phone with him a day prior to the incident as she wanted her employer to buy her a new phone.

[13] After the phone call from his girlfriend, the complainant came to him and accused him of undermining her. She also asked him as to why did he give his girlfriend her phone numbers. He told her that that was not something that should make her angry because she also had a boyfriend who was also working in the neighbourhood and that both of them were helping each other. He was giving her money and she allowed him to have sexual intercourse with her occasionally. He left her and continued with his duties. At some stage he approached her again. He found her crying. He asked her two times as to why was she crying. She did not

respond. She took out her phone and called her boyfriend, D. and told him that he raped her. When he heard her saying that on the phone, he told her that she was going to cause problems between him and D. as they walked together home every time after knocking off. The complainant continued crying and informed him that she was going to tell their employer about the incident. He pleaded with her not to tell their employer about the incident because she was going to fire him. Eventually he told her that he was leaving because there were going to be problems between her and their employer when she returned. He ultimately left.

[14] He met his employer in town and she asked him why was he there at that time. He informed her that he was sick and asked some money from her. He did not tell her about the incident. His employer trusted him. He was scared that if he informed her about the incident, she was going to ask him where did they have sexual intercourse. After the incident he got another job. He never returned to the place where he used to work with the complainant. He was later arrested.

[15] He denied that he raped the complainant, strangled her with a stick on her neck, took off her skirt, tights and panties.

[16] Under cross-examination he testified that he did not know where his girlfriend who phoned him on the complainant's phone on the day of the incident, resided. He also did not have her cellphone numbers. He further testified that the love relationship that he had with the complainant, was only at their place of work because she also had a boyfriend with whom she had a child and the two had sexual intercourse three times prior to the incident. He denied that there was a curtain stick in the room where the incident took place and that the complainant telephoned her mother after the incident. He was adamant that she telephoned her boyfriend. He also denied that the last time he saw the complainant was on the day of the incident and said he met her in town prior to his arrest. He conceded that the day of the incident was his last day at work as he never returned after the incident. He denied that he left his place of work after the incident because he raped the complainant and said he was afraid that his employer was either going to shoot him or call the police the minute he told her that they used to have sexual intercourse on her bed in her house. He maintained that there were no problems between him and the complainant after the incident until her phone rang when his girlfriend requested to speak to him. He testified that he used to give the complainant money.

[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 a 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 said 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 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."

[19] The evidence about the rape is that of a single witness. The evidence was short and clear and the trial court found that the complainant's evidence was credible and could be relied upon after it was corroborated by her mother and her conduct after the incident which was in my view consistent with the conduct of a person who was raped. The complainant's mother testified that when she spoke to her over the phone, she was crying, she also found her crying outside at her place of work and she was walking with her legs open. This evidence that she was crying after the incident was corroborated even by the appellant himself who testified that he asked her why was she crying on two occasions and she did not respond. Coupled with this evidence, there was also evidence that the complainant also tried to seek help from the neighbours unfortunately she did not find anyone at the neighbours. She then phoned her mother and made the first report to her. Her mother and her employer went to her place of work and she saw the vomit in the kitchen that the complainant spoke about and the curtain stick in the bedroom where the rape took place which the appellant pressed against the complainant's

neck when he was raping her.

[20] It was argued that the complainant did not tell the doctor or nurse who examined her at the hospital after the rape that she had bruises on her neck which were caused by the strangulation, that the bruises were not mentioned on the J88, that she testified that she even showed her mother the bruises on her neck but when her mother testified she stated that she did not observe any injuries on her neck. It is important to note that a stick could have been a blunt object. The way it was pressed against the complainant's neck according to the evidence, could not have caused an open injury. At the least depending on the amount of force used, it could have caused a bruise on the neck. The amount of force used, can only determine the extent of the bruise. In her evidence-in-chief, the complainant testified that she did not sustain any injuries as a result of what happened to her in the house (record, page 36 line 24-25). Under cross-examination (record, page 42 line 16-18) the following has been recorded:

" Question: Did you maybe get bruises from the strangling on your neck?

Response: Court: Response:

Yes on the day my voice was waned a bit. Listen madam, bruises ...

Yes there were bruises."

In my view the manner in which these questions were asked, was leading and/or suggestive of an answer. This is demonstrated by the manner in which the complainant answered. She just said " Yes' .

[21] Her mother's evidence was that she did not see where she was injured on her body save to say that she noticed that her t-shirt was creased at the back. Under cross-examination she testified that even though the complainant could have shown her the injuries, she did not observe/notice them because she was shocked. In my view if the complainant had sustained a bruise which was visible, her mother could not have observed/noticed it because according to her evidence she was shocked about the rape itself. Sight should not be lost of the fact that the complainant testified on her own that she did not sustain injuries as a result of what happened to her in the house. She further testified that she did not tell the doctor or nurse who examined her after the rape about the bruises on her neck. No J88 medical report was handed in to form part of the record. To complain that the injuries were not mentioned on the J88 is misleading. The prosecutor at the court *a quo* was asked if he was going to hand in the J88 medical report. He said he was

not going to because the intercourse was admitted (record, page 58 line 21, line 25 to page 59 line 1).

[22] There is no reason why the complainant can just out of the blue, implicate the appellant. According to the evidence there were no problems between the two of them prior to the incident. In fact the appellant wanted the trial court to accept that there was nothing wrong between him and the complainant even after the incident up until her phone rang. I will deal with his evidence later in the judgment. In my view the trial court correctly accepted the single evidence of the complainant as credible and satisfactory in all material respects. There is overwhelming evidence that the appellant raped the complainant. In any event the fact that a witness lied about one thing in her evidence does not mean that the whole of her evidence is a lie (*S v Mkhohle* 1990 (2) SACR 95 (A)).

[23] I only found minor discrepancies in the complainant's evidence, which I did not find material, relating to whether she went to the neighbours and also phoned her mother when the appellant was still at their place of work or not. In her evidence-in-chief she testified that after the appellant had left she went to the neighbours to seek assistance and because she could not find anyone, she decided to telephone her mother after realising that she did not have her employer's phone numbers on the sim-card she was using. Under cross-examination her evidence was that she tried to go to the neighbours, the appellant pleaded with her not to go but she ultimately went. The appellant, who left the premises, came back and when she was phoning her mother he was in the premises although far from where she was, and he was calling her.

[24] The version of the appellant to a large extent corroborated that of the complainant. The fact that he pleaded with her not to tell her neighbours and their employer about the incident, and that she was crying after the incident. If his version that the sexual intercourse was with consent and that he and the complainant used to have sexual intercourse at their place of work was correct, why would the complainant behave the way she did on the day of the incident while she never behaved the same way previously. The appellant is not saying on the day in question, they had sexual intercourse and he did not give her money. In my view the court *a quo* correctly rejected his version that the complainant was angered by the telephone call from his girlfriend. It surely did not make sense as to how he could give his girlfriend the cellphone number of the complainant. I am satisfied under the circumstances that the trial court correctly rejected the

appellant's evidence as not being reasonably possibly true and accepted the complainant's evidence which had some corroboration as discussed above. The trial court correctly found that the state proved its case beyond a reasonable doubt against him and convicted him of rape. I therefore cannot find any misdirection on the part of the court *a quo*. Accordingly the appeal against conviction falls to fail.

[25] In the result I propose the following order:

25.1 The appeal against conviction is dismissed.

M J TEFFO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree:

N J KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Appellant

Instructed by

For the Respondent

Instructed by

Date of Judgment

M M P Masethe

The Pretoria Justice Centre

H A Thenga

The Director of Public Prosecutions

21 November 2016