NORTH WEST HIGH COURT, MAFIKENG

CASE NO. CA 28/2012

In the matter between:

PHILLIP MORE APPELLANT

and

THE STATE RESPONDENT

FULL BENCH
LANDMAN J, KGOELE J AND GUTTA J

CRIMINAL APPEAL

GUTTA J.

A. INTRODUCTION

[1] The appellant was convicted on a charge of rape by the Regional Court Magistrate, K.A. Sephuti, at the Regional Court, Ga-Rankuwa on 23 September 2009 and was sentenced to 10 years imprisonment, half of

which was conditionally suspended for a period of 5 years, and the appellant was declared unfit to possess a firearm in terms of Section 103 of the Firearms Control Act 60 of 2000.

[2] On 24 February 2010, the appellant was granted leave to appeal the conviction only.

B. COMPLAINANT'S CASE

[3] The complainant, who is a police reservist, in brief testified that:

3.1 on 05 October 2008 at approximately 01h50, she was at a pub in Bethani with her two friends, namely, M N ("M") and one Lerato. They were having a girl's night out;

3.2 at approximately 02h00, she informed M that she had to return home as she had a daughter to take care of. While having a conversation with M, the appellant overheard their conversation and offered her a lift home. She agreed to take the lift as she lived a distance away. Although she did not know him personally, she had seen him before. While in the appellant's vehicle, she observed that he turned left instead of turning right at the gate of the tavern. He told her that he had to fetch something in the house and will thereafter drop her off at her home whereafter he will return to the tavern. She agreed to this arrangement. The appellant drove the motor vehicle into the yard. She enquired why he was parking the vehicle inside the yard instead of leaving

the vehicle outside and he replied that it was not safe to leave the vehicle outside and he would rather park his vehicle inside;

3.3 he left her in the vehicle for approximately 5 minutes, whereafter he returned and approached the door on the passenger side where she was seated. He opened and offered her to come into the house and she refused and told him that she wants him to drop her off at her home. He then grabbed her, by the back of her neck and pulled her out of the vehicle. He put his arm around her neck trying to strangle her. She tried to remove his arm from her neck but was unsuccessful as he was stronger than her;

3.4 he took her into the bedroom, where he threw her onto the bed and removed his pants. She attempted to get off the bed whereafter he slapped her across her face with an open hand and pushed her back onto the bed holding her hands up against her head. He undressed her off her pants whereafter he had forceful sexual intercourse with her without her consent;

3.5 they both dressed and entered the motor vehicle, whereafter the appellant took her, at her request, back to the tavern. On their arrival at the pub, the appellant approached his friends where she observed them giving each other handshakes. The complainant went to her friend, M, and explained to her what happened;

3.6 the police arrived at the tavern because there was a fight and

someone had been injured. The complainant and M reported to the police that she had been raped. The police officer enquired from her whether she could recognise the person who had raped her, and she pointed to the appellant. Both the appellant and the complainant went to the police station. After several hours, the complainant was taken to the Brits Hospital where a medical examination was conducted and a medical report was completed by the medical practitioner.

[4] The complainant was cross-examined on the statement she made at the police station on the same day that she was raped. She testified that the statement which was written in English was not read back to her but she is fluent in English and read the statement before she signed it. The statement was also commissioned.

[5] On cross-examination, the complainant was questioned about several contradictions between her evidence in chief and the written statement made to the police. As this case to a large extent turns on the contradictions, it is prudent to repeat the statement:

"3
On Sunday 2008-10-05 at about 02:50 I was at Baphuting tarven [*sic*] enjoying myself with friends. Then at about 02:55 I decided to go home as I know that I have a little child aging two years, seven month, whom I left at home and have to take care of. After making that decision, I approached a man by the name of Basimane to take me home with his own car as I was afraid to walk home alone in the dark.

5

After requesting Basimane to take me home, he agreed and drove to the direction where I stay, but to my surprise when he was suppose [*sic*] to turn to the street where I was suppose to climb off, he drove straight to Bethanie east, then I asked Basimane where he was driving/taking me to. He replied by telling me that where do I think he can take me to and that he cannot just take me home.

5

Then he drove to the other house which the number is unknown to me. He then instructed me to get out of the car or otherwise he will assault me. Then I get [*sic*] out of the car and he grabbed me with my neck and instructed me to go into the house. He then took me straight to the bedroom still grabbing me with my neck.

6

On our arrival in the bedroom Basimane started to undress me, and I requested him to leave me but insisted to continue with what he wanted to do. After undressing me he pushed me onto the bed, and I tried get [*sic*] him off me, but he was too strong for me to can help myself. I tried to beg him to leave me but he refused and telling me who do I think I am.

7

He then started to undress himself and continuing to threaten me. Afterwards he get [sic] himself on top of me while naked and inserted his penis into my vagina and started to do the up and down movement without even putting a condom on his penis, he then ejeculated[*sic*] inside my vagina.

8

After Basimane raped me, he took me back to Baphuthing.

9

I did not give anyone permission or right to touch my body. I therefore request police assistance to do further investigations on this matter."

[6] Her explanations for the contradictions between her statement and her oral evidence is that she was at that stage terrified, scared and in shock and wanted to go home. She also testified that when she gave the statement she spoke in Setswana and she does not know Setswana that

well.

[7] The complainant, under cross-examination, testified that:

7.1 as a police reservist she was familiar with the procedure of making a statement, having it read back and then commissioned. She admitted that she is conversant in English and read the statement and signed it;

7.2 the appellant knows her house as he had attended her cousin's party at the house. She also knows where his mother stays;

7.3 she did not sustain any injuries or bruises. She also testified that she has a dark skin and although it was sore, there were no visible bruises on her neck.

[8] The complainant was also cross-examined about a statement made by her friend M. M was not called as a witness, hence reference to the content of the statement is hearsay.

[9] The complainant denied that she was in a relationship with the appellant and testified that she is in a relationship with her child's father, and that she has never broken up with him nor has she cheated on him.

[10] A J88 form, compiled by Dr Louw, was handed in as an exhibit, by consent between the state and the defence. On the J88 form, no injuries were reported, there were no abnormalities detected on the

clitoris, erectile orifice, labia minora, there was no scarring, no bleeding, no swellings, no fresh tears and no bruising. What was noted was that there were some bumps and some cracks. The conclusion reached by the medical doctor was that "forced penetration by the vagina cannot be excluded".

C. APPELLANT'S CASE

[11] The appellant testified briefly that he was in a relationship with the complainant for a period of eight months and that they were lovers. He went to the tavern on the day in question as the complainant called him and asked him to meet him there. He went with his brother-in-law. On his arrival at the tavern, the complainant approached him and they agreed that she would sit and enjoy herself with her friends and he would sit with his brother-in-law and that they would leave together to his parental home. At some stage he approached her and she told him that it was late and that they should leave. The complainant accompanied him in his vehicle and they went to his home where they had consensual sexual intercourse. Thereafter, she wanted to return to the tavern to leave a message with her friend.

[12] On arrival at the tavern, she alighted from the vehicle and entered the tavern. He waited for her inside the vehicle. A certain boy came running towards him and requested that he transport someone who had been stabbed to the hospital. The police were called, and they approached the appellant and enquired what he had done. He thought that they were referring to the fact that his vehicle was parked

in the middle of the road. The police requested that he accompany them to the police station, where he was informed that the complainant had accused him of raping her.

[13] On cross-examination, he denied knowing that the complainant was on a girl's night out and testified that when he arrived at the tavern he found her there seated with other lady friends.

D. SUBMISSIONS

[14] Counsel for the appellant, Mrs Zwiegelaar, relied on her heads of argument, wherein it was submitted that there were two mutually destructive versions between the complainant's and the appellant's version. She relied on the case of ***S v Singh*** **1975 (1) SA 227 (N) at 228**, where the Court held:

> "Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witness and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner in the abovementioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses."

[15] The following submissions were made on behalf of the appellant:

15.1 the Court *a quo* not only misdirected itself by wrongly burdening the appellant with the onus of proof, but also failing to adopt the approach as set out in the ***S v Singh*** matter *supra*. Thus, she said the Court *a quo* erred in its reasons for judgment by considering why the complainant would lay a false charge against the appellant;

15.2 the Court *a quo* was not entitled to draw any inference adverse to the appellant's credibility from the fact that he could not offer an explanation as to the complainant's possible motive. See ***S v Lesito*** **1996 (2) SACR 682 (O) at 687H–688A**; ***S v Lotter*** **2008 (2) SACR 595 (CPD) at 603C–604D**;

15.3 the appellant was a good witness. His evidence was without any contradictions and there were no improbabilities inherent in his version;

15.4 there is no evidence which supports the evidence of the complainant and which renders the evidence of the appellant less probable on the issue of consensual sexual intercourse. See ***R v W*** **1949 (3) SA 772 (A) at 778–779**; ***S v Gentle*** **2005 (1) SACR 420 (SCA) at 430J–431A**;

15.5 the fact that the complainant, shortly after the incident, reported it

to the police and pointed the appellant out can also not be used as creating a probability in favour of the State case, i.e. it cannot be argued that because she had done so, it is probable that the sexual intercourse took place without her consent. See ***S v Hammond*** **2004 (2) SACR 303 (SCA) at 307J to 310F**; ***S v Gentle*** *supra* **at 431D–E**;

15.6 the fact that the J88 form, completed by Dr Louw, states that "forced penetration by the vagina cannot be excluded", can also not serve as corroboration for the complainant's claim that the appellant raped her as it does not rule out the possibility of consensual sexual intercourse.

[16] Mrs Zwiegelaar contended that the absence of any visible injuries is inconsistent with the complainant's evidence that the appellant strangled her so hard that she could not scream for help. Further, the complainant, who is a police reservist, did not mention to Dr Louw that she was assaulted by the appellant.

[17] It was submitted on behalf of the appellant that the failure of the State to adduce the evidence of M warrants the drawing of an inference adverse to the credibility of the complainant for the following reasons:

17.1 M would have been able to corroborate the complainant's version of events immediately before she left the tavern in the appellant's company, as well as her denial that she and the appellant were lovers;

17.2 she would have corroborated the complainant's version when she returned from the appellant's home after she had been raped and on first reporting the rape to M;

17.3 M had made a statement to the police and the complainant disputed the truth and correctness of the contents of the statement.

[18] It was further submitted on behalf of the appellant that it is improbable that the appellant would have raped the complainant and taken her back to the tavern where there were many people and that he would have remained in attendance even after the arrival of the police.

[19] Mrs Zwiegelaar also stressed the fact that the complainant is well versed in the English language, testified in English and confirmed that she had signed her witness statement, which had been written in English, after having read it and satisfied herself of the content and that any protestations that the circumstances under which she made her statement caused her to make incorrect and untrue statements is so farfetched that it has to be rejected. The fact that the complainant is a police reservist, stationed at the Bethani police station, which is the same police station where the complainant made her witness statement was also significant.

[20] The appellant submitted that the discrepancies are such that they cast

serious doubt on the veracity of the evidence of the complainant and that the Court *a quo* erred in not rejecting the complainant's evidence as incredible on the basis of the discrepancies between her evidence and the content of her witness statement. See ***S v Mafaladiso en Andere*** **2003 (1) SACR 583 SCA**.

[21] Counsel for the State, Ms Maila, conceded that the State did not prove its case beyond reasonable doubt based on the following reasons:

21.1 The complainant was a single witness, and according to the cautionary rule, the evidence of a single witness had to be clear and satisfactory in every material respect. She relied on the case of ***S v Janse van Rensburg & Another*** **2009 (2) SACR 216 (C) at 220 paragraph 9**, wherein it was held that the evidence must not only be credible but must also be reliable and submitted that it cannot be said on the facts of this case that the complainant's evidence was credible and reliable, in that the contents of her statement contradicted her testimony on the following material aspects:

a) she testified that the appellant overheard her conversation and offered her a lift and in her statement, she stated that she requested the appellant to accompany her home;

b) she testified that the appellant turned left at the gate of the pub instead of turning right, while in her statement she stated that the

appellant drove in the direction of her house;

c) she testified that the appellant grabbed the back of her neck and pulled her out of the vehicle and in her statement she stated that the appellant instructed her to get out of the vehicle and she got out of the vehicle, whereafter the appellant grabbed her by the neck;

d) she testified that she was assaulted by an open hand, which was not mentioned in the statement.

21.2 the complainant is well conversant with English and she read the statement before signing it. She is a police reservist with inside knowledge about exercising caution when taking statements. She referred the Court to the case of ***S v Govender*** **2006 (1) SACR 322 (E)**, where it was held that statements are often written in the language other than that of the witness and tend to be a summary of what the witness said to the police officer, therefore it is not surprising that there will be discrepancies between witnesses' evidence and the contents of the police statement. She submitted that the decision of the ***S v Govender*** case *supra* does not apply in that the police officer and the complainant spoke Setswana and have the same cultural background and further that the witness understood English which is the language the statement was written in.

[22] Ms Maila submitted that the version of the appellant is reasonably

possibly true and probable. The appellant alleged that there was a love relationship between himself and the complainant, and that they had consensual sexual intercourse. His version is corroborated by the following facts:

22.1 the complainant's statement indicates that she requested the appellant to accompany her home;

22.2 after the alleged rape, it is improbable that appellant would take the complainant back to the place where everyone saw them leave together and wait for her at a place where the complainant can report the rape and he waited at the tavern knowing that the police were called. This conduct does not indicate a conduct of a guilty mind.

E. THE LAW

[23] In ***S v Bailey 2007*** **(2) SACR 1 (C)**, the Court held that the powers of a Court of appeal to interfere with the factual findings of a trial court are strictly limited. If there had been no misdirection on the facts, there was a presumption that the trial court's evaluation of the factual evidence was correct. Bearing in mind the advantage the trial court had in seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal would be entitled to interfere with the trial court's evaluation of oral testimony. In order to succeed on appeal, the appellant would have to convince the court of appeal that the trial court had been wrong in accepting the evidence of the State witnesses,

a reasonable doubt would not suffice to justify interference with the trial court's findings. Also see ***R v Dhlumayo & Another*** **1948 (2) SA 677 (A)**.

[24] The complainant in *casu* was a single witness in respect of the rape. In terms of Section 208 of the Criminal Procedure Act 51 of 1977, an accused can be convicted of any offence on the single evidence of any competent witness.

[25] In ***S v J*** **1998 (2) SA 984 (SCA)**, the Court held that when evaluating the evidence of an alleged victim of rape or sexual assault cases, a Court need to do no more than exercise the caution that is necessary when there is only one witness to the offence alleged.

[26] Diemont JA in ***S v Sauls & Others*** **1981 (3) SA 172 (A) at 180E–G** referred to the cautionary rule and stated the following:

> "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber* . . .). 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 has been told. The cautionary rule referred to by De Villiers JP in 1932 [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' (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[27] It is trite that the evidence of a single witness must be clear and

satisfactory in every material respect before the Court can place reliance thereon. Also the evidence must not only be credible but must also be reliable. See ***S v Stevens*** **[2005] 1 ALL SA 1 (SCA) at 5d–h**; ***S v Gentle*** **2005 (1) SACR 420 (SCA) at paragraph 17**.

[28] In ***S v Shackell*** **2001 (4) SA 1 (SCA) paragraph 30**, Brand AJA said the following:

> "It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court *a quo* its reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain improbabilities in the appellant's version, the reasonable possibility remains that the substance thereof may be true" (See also *S v V* 2000 (1) SACR 453 (SCA) paragraph 3).

[29] When evaluating evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider. As Nugent J (as he then was) in ***S v Van der Meyden*** **1999 (1) SACR 447 (W) at 450**, stated:

> "What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and

> some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored."

F. EVALUATION

[30] The crux of the matter is whether or not the sexual intercourse was consensual, as alleged by the appellant.

[31] It is common cause that there are several contradictions between the complainant's oral evidence and the written statement she made to the police after the rape.

[32] The case of ***S v Mafaladiso en Andere*** **2003 (1) SACR 583 at 593E–594H** considers the material differences between witnesses' evidence and prior statements and the juridicial approach to the contradictions between the statement and the evidence. The Court held:

> "The juridicial approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, *inter alia*, between her or his *viva voce* evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if

> ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions – and the quality of the explanations – and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. **Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the *viva voce* evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings**."
> (Own emphasis)

[33] On the one hand, we have the complainant's explanation for the contradiction in paragraph 6 *supra*, and on the other hand, the complainant testified that she is a police reservist who understands the importance and significance of the police statement. The statement was written in English and the complainant is fluent in English. She testified that she satisfied herself that the content was true and correct and signed it after reading it.

[34] Although it appears that the Magistrate in *casu* treated the complainant's evidence with caution and considered the contradictions, it however does not appear that the Magistrate critically evaluated the complainant's evidence as a single witness nor did he consider all the evidence and decide whether it is reliable or not.

[35] The Magistrate only referred to three contradictions, namely:

35.1 whether the complainant approached the appellant to take her home or whether the appellant approached the complainant to take her home;

35.2 the direction in which the appellant drove his vehicle after leaving the tavern;

35.3 in her oral evidence, she testified that when she asked the appellant where they were going to, he replied, "to pick something up first before dropping her off", while in her statement she said that the appellant said "he could not take her home for free".

[36] Other contradictions that the trial court omitted to mention, which are material, are the following:

36.1 the complainant testified that at the house the appellant grabbed her by the neck and pulled her out of the motor vehicle, and in her statement she said she alighted from the vehicle and then he grabbed her by the neck;

36.2 she testified that in the bedroom she tried to get off the bed when he slapped her with an open hand. This was not mentioned in the statement;

36.3 she further testified that he first removed his pants and thereafter undressed her pants. In her statement she stated that on arrival in

the bedroom, he started to undress her and after undressing her, he pushed her on the bed, and he then started to undress himself and he was on top of her naked.

[37] When considering and evaluating the contradictory version on a holistic basis, including the circumstances under which the statement was made and the explanation for the contradictions, I am of the view that the complainant's evidence was unsatisfactory and that the contradictions affected the complainant's reliability and credibility. The Magistrate's findings were largely based on probabilities.

[38] Turning to the appellant's version, the Magistrate in *casu* found that it was "highly improbable that the complainant would have first phoned the accused to join her at the pub, would have voluntarily accompanied him to have consensual sexual intercourse which in any event was not for the first time, then would turn around and allege that the accused has raped her while in fact she was waiting for him to take her home".

[39] I have tested the appellant's version against the aforesaid inherent probability. The Magistrate adopted a very simplistic method of evaluating the evidence and I am of the view that the appellant's version cannot be rejected on the basis of the above improbability, and his version cannot be rejected on the basis that it is so improbable that it cannot reasonably possibly be true. I am of the view that the appellant's version is reasonably possibly true in substance.

[40] There are several gaps in the evidence adduced by the State. It is

unfortunate that the State did not pursue with their attempt to find the complainant's friend, M, who would have provided valuable evidence on the following:

40.1 whether the complainant approached the appellant to take her home or whether she approached the appellant;

40.2 the complainant's physical and emotional state when she returned to the tavern after the rape;

40.3 her first report of the rape.

[41] M's oral evidence could not be tested agaist the written statement she made to the police.

[42] The evidence in the form of the J88 form which states that, "forced penetration of the vagina cannot be excluded", is not conclusive evidence that the complainant had been raped.

[43] It would have also been helpful if the State had called the medical doctor, who examined the complainant, to explain his findings on the J88 form. The medical doctor could have also provided insight into the complainant's physical and emotional state during the examination.

[44] The doctor, under general examination, noted that there were no injuries

reported and that the complainant's health and emotional status was normal.

[45] The police officer who took down the statement should also have been called as a witness to testify on the complainant's physical and emotional state when making the statement.

[46] Accordingly, I am of the view that the State did not discharge the onus of proving beyond reasonable doubt that the appellant raped the complainant.

[47] In the circumstances, I am of the view that the appeal should succeed and the conviction should accordingly be set aside.

[48] A consequence of the conviction being set aside, is that the sentence should also be set aside, even though the appeal is on conviction only.

G. ORDER

[49] Accordingly, I make the following order:

a) The appeal is upheld.

b) The conviction and sentence are set aside.

_____
N. GUTTA
JUDGE OF THE HIGH COURT

I agree

_____
A.A. LANDMAN
JUDGE OF THE HIGH COURT

DISSENTING JUDGMENT

KGOELE J:

[1] I have read the judgment of my colleagues Landman J and Gutta J with which I respectfully am unable to agree. The background facts of this matter has been dealt with in their judgment and I am of the view that there is no need to repeat them here.

The trial court's findings

[2] Gutta J considers the approach the trial court (magistrate) adopted to the evaluation of the evidence to be "very simplistic". In paragraph 39 of her judgment the following appears:-

> "*I have tested the appellant's version against the aforesaid inherent probability. The Magistrate adopted a very simplistic method of evaluating the evidence and I am of the view that the appellant's version cannot be rejected on the basis of the above improbability, and his version cannot be rejected on the basis that it is so improbable that it cannot reasonably possibly be true. I am of the view that the appellant's version is reasonably possibly true in substance."*

The improbability referred to in the above quoted paragraph stems from paragraph 38 of her judgment which read thus:-

> *"Turning to the appellant's version, the Magistrate in casu found that it was "highly improbable that the complainant would have first phoned the accused to join her at the pub, would have voluntarily accompanied him to have consensual sexual intercourse which in any event was not for the first time,*

then would turn around and allege that the accused has raped her while in fact she was waiting for him to take her home".

[3] Yet, on the other hand, the following is found in paragraph 34 of her judgment:-

> *"Although it appears that the Magistrate in casu treated the complainant's evidence* ***with caution*** *and* ***considered the contradictions****, however it does not appear that the Magistrate critically evaluated the complainant's evidence as a single witness nor did he consider all the evidence and decide whether it is reliable or not.* [My own emphasis]

[4] Gutta J quite correctly in her judgment quoted the case of **S v Bailey 2007 (2) SACR 1 (c)** and **R v Dlumayo & Another 1948 (2) SA 677 (A)**, which authorities I find apposite in this matter. Of significance are the following remarks which are found in the majority decision of Dlumayo above:-

> "The principles which should guide an appellate court in an appeal purely upon fact are as follows:-
>
> 1. ……..
> 2. ……..
> 12. An Appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered".

[5] It is against this background that I am of the view that the conclusion by

Gutta J that the trial court's approach to the evaluation of evidence was simplistic is not justified. As indicated in paragraph 2 and 3 above, Gutta J acknowledges the fact that the trial court treated the complainant's evidence with caution and more importantly, considered the contradictions. As correctly pointed by Gutta J in paragraph 37 quoted above, the trial court also based its findings on probabilities. There is nothing wrong in this approach. See **S v Chabalala 2003 (1) SACR 134 (SCA) paragraph 15**. The fact that the trial court only referred to three contradictions, does not necessarily follow that the others that were mentioned by Gutta J and not by the trial court, had not been considered. The reasoning behind this will become more clearer when dealing with the effect of all the contradictions below.

Contradictions

[6] From the onset I wish to make it clear that the crux of the matter is not whether the complainant and the appellant had a love affair or not. As Gutta J correctly stated in her judgment, the crux is whether the sexual intercourse was consensual or not, as the sexual intercourse is common cause.

[7] The following is an extract from paragraph 35 of the judgment by Gutta J:-

"The Magistrate only referred to three contradictions, namely:-

35.1 Whether the complainant approached the appellant to take her home or whether the appellant approached the complainant to take her home;

35.2 The direction in which the appellant drove his vehicle after leaving the tavern

35.3 In her oral evidence, she testified that when she asked the appellant where they were going to, he replied , "to pick something up first before dropping her off", while in her statement she said that the appellant said "he could not take her home for free".

[36] Other contradictions that the trial court omitted to mention, which are ***material*** *are the following:-*

36.1 the complainant testified that at the house the appellant grabbed her by the neck and pulled her out of the motor vehicle, and in her statement she said she alighted from the vehicle and then he grabbed her by the neck;

36.2 she testified that in the bedroom she tried to get off the bed when he slapped her with an open hand. This was not mentioned in the statement;

36.3 she further testified that he first removed his pants and thereafter undressed her pants. In her statement she stated that on arrival in the bedroom, he started to undress her and after undressing her, he pushed her on the bed, and he then started to undress himself and he was on top of her naked. [My own emphasis]

[8] I fully agree with the trial court's findings that the contradictions it mentioned in its judgment are and as it correctly found, not material. They all relate to peripheral issues which do not at all assist this court in determining whether consensual intercourse took place or not.

[9] It is trite law that consent if there is any, should have been given at the time sexual intercourse took place. Whether the complainant approached the appellant or not for them to have left the tavern, does not assist this court at all in determining the issue before it. Equally does the directions in which they drove from the tavern, together with the reason that was given by the appellant when the car was driven to the direction other than the complainant's home. I am saying this because the fact that intercourse took place at the appellant's house is also common cause.

[10] The evidence of the appellant on the other hand does not even suggest that they agreed whilst at the tavern that they will upon arrival have sexual intercourse. At the least, it suggests that they agreed to go to his parental place together. This agreement, even if it was there, coupled with the fact that they were having a love relationship as alleged by the appellant, does not assist at all, as in our law rape can be committed by parties that are married to each other, including those that are in love relationship, as long as it can be proven that it was not consensual.

[11] The other contradictions that were said to have been overlooked by the magistrate, which are:-

36.1 the complainant testified that at the house the appellant grabbed her by the neck and pulled her out of the motor vehicle, and in her statement she said she alighted from the vehicle and then he grabbed her by the neck;

36.3 she further testified that he first removed his pants and thereafter undressed her pants. In her statement she stated that on arrival in the bedroom, he

started to undress her and after undressing her, he pushed her on the bed, and he then started to undress himself and he was on top of her naked.

are not necessarily contradictions. They only depict a differential sequence in which the complainant stated the events in her oral testimony and written statement. They are therefore immaterial.

[12] The only contradiction that remains which can be worth of being regarded as a contradiction is the fact that in her oral evidence complainant said she was slapped with an open hand in the bedroom, which fact was not mentioned in the statement. When considering and evaluating this contradiction alone against all the evidence before court, its effect is insubstantial and cannot therefore on its own have a detrimental effect on the complainant's credibility to such an extent that it warrants her evidence to be rejected. She had given an explanation of this contradiction; which in my view and as correctly found by the trial court, was plausible. I therefore do not agree with the view of Gutta J to the effect that the contradictions affected the complainant's reliability and credibility.

[13] More was said about the fact that the complainant was a police reservist who understood the importance and significance of the police statement and further that she understands English well. This suggestion is not justified. To my mind this submission manifests a misconception about the approach that has been provided as guidelines in the following cases:- **S v Govender and Others 2006 (1) SACR 322** and other cases including the case of **S v Xaba 1983 (3) SA 717 (A) at 730 B.C.**. In **S v**

Bruiners en Ander 1998 (2) SACR 432 (SE) at 437 (h) the following which in my view need emphasis was said at **page 730**:-

> "that **police statements** are, as a matter of common experience, frequently not taken with the **degree of care**, **accuracy and completeness** which is desirable …" [My own emphasis]

If what is said above in the Bruiners matter is the generally accepted approach to police statements, what more can we say about statement made by police reservist or reduced down to writing by them. To expect a police reservist who is not dealing with statement on a daily basis to understand the significance of a statement like a police officer is in my view far-fetched.

[14] That this evidence (of a single witness) has only to be satisfactory and not also perfect, is clear from a multitude of decisions. In **Abdoorham 1954 (3) SA 163 (N) E-F** it is put as follows:

> "The court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true. The court may be satisfied that the witness is speaking the truth notwithstanding that in some respects he is an unsatisfactory witness".

See also **Mokoena 1956 (3) SA 81 (A)**; **Snyman 1968 (2) SA 582 (A)**; **Van Vreden 1969 (2) SA 524 (N) 531**.

The trial court in my view correctly evaluated the credibility and reliability of the complainant's evidence having taken all this into consideration, and

against this background adopted the guidelines as outlined in these cases mentioned above.

M's statement and her not called to testify.

[15] It was submitted on behalf of the appellant that the failure of the state to adduce the evidence of M warrants the drawing of an adverse inference to the credibility of the complainant because M made a statement to the police and the complainant during cross-examination disputed the truth and correctness of the contents of the statement. Reference to the contents of M's statement in the proceedings before the trial court is totally not justified and is against the rules of Evidence in our law. It was not authenticated and admissibility thereof was not proven at all. See **S v De Villiers 1999 (1) SACR 297 (O).** The contents thereof cannot be used nor relied upon. Therefore no weight can be attached to it. See also the case of **Carpede v Choene 1986 (3) SA 445 (O) 454I 0 455A** wherein the following was said:

> "In order to attach any evidential value to the evidence emanating from the cross-examination, the document has to be authenticated, meaning in this context that what is stated in the document was actually stated by the deponent / author, irrespective of whether it was true or not. If the document is not authenticated as some state during the trial, the contents of the document cannot be used either as evidence or to attach any evidential weight to the discrepancies or other evidence emanating from the cross-examination.

[16] Adverse inference which had been taken by Gutta J from M not being called by the state is also unreasonable, when the state had explained to

the trial court the reasons why she was not called to testify. The suggestions that she could have provided valuable evidence about, whether complainant approached the appellant or not; the complainant's physical and emotional state when she returned; are sheer speculations and more importantly, could not have shared any light as to whether sexual intercourse was consensual or not. The need for a first report to be made to someone is not always necessary and fell away more especially in this matter because, shortly after this first report was made to M, complainant reported to the police who were in the same vicinity, and further, the complainant was taken to police where she made a statement the same day.

J88 Findings

[17] The J88 was handed in by consent of the legal representative of the appellant. He further indicated to the trial court that the findings and contents of said J88 are admitted. The J88 therefore forms part of the evidence before court. In paragraph 43 of the judgment by Gutta J, failure to call the medical doctor to explain his findings and the complainant's physical and emotional state during the examination is regarded as a gap in the state's evidence. Yet under paragraph 44 Gutta J stated that, "the doctor under general examination noted that there were no injuries reported and that the complainant's health and emotional status was normal". The reference to the "gap" is therefore not justified as the doctor could have upon being called just confirmed what he/she had written in the J88 which was not contested. Furthermore, the only gynaecological injuries that were seen by the doctor are on the J88. They

too were not taken as an issue by the appellant's counsel as indicated above, "he admitted the findings and contents of the J88". The reference to the fact that the police officer was not called as a witness to testify on the complainant's physical and emotional state when making a statement as a gap in the state's evidence is equally misplaced. The number of witnesses called by each party should not be the determining factor. In other words, their number should not be confused with the evidence as a whole. See **Els v Herbert 1952 2 PH L16 (N).**

[18] Gynaecological examination by the doctor reveals that there were "multiple Bumps" and "multiple clefts" seen during the examination. The doctor's conclusion was that "Forced penetration of the vagina cannot be excluded". Of significance is the fact that the complainant is an adult and was already sexually active as she has an existing child with her boyfriend. Furthermore, it needs first to be pointed out that physical injuries are not always a consequence of rape. It has been mentioned a lot of times in decided cases that at times if a victim is sexually active, the injuries she will sustain are sometimes minimal, but that should not be taken as a proof that there was consent.

[19] Likewise in this matter, the injuries the doctor observed on the vagina of the complainant are those that I enumerated in paragraph 17. Sexual intercourse is not a war, especially when it is consensual and when you are having a relationship. The multiple bumps and multiple clefts that the complainant sustained, together with the finding by the doctor that "forced penetration cannot be excluded, are in my view and as correctly found by the trial court, credible evidence which "confirms" or "supports" or

"strengthen" the complainant's version and renders it to be more likely that the sexual intercourse took place without her consent. Even if the conclusion that the doctor reached that "forced penetration of the vagina cannot be excluded" is not conclusive proof that the complainant had been raped, as Gutta J say it her judgment, this evidence cannot be simply ignored as it also renders the evidence of the appellant less probable, on the issue in dispute, namely, consent and not a peripheral issue to wit, whether they had a love relationship or not".

[20] In **SPP v Kilbourne 1973 ALL ER 440 447 H** the following was said in regard to the concept "corroboration" which in my view needs more emphasis.

> "the word 'corroboration' is not a technical term of art, but a dictionary word bearing its ordinary meaning" and 463 A-B: "Corroboration is therefore nothing other than evidence which 'confirms' or 'supports' or 'strengthens' other evidence….. It is, in short, evidence which renders other evidence more probable. If so, there is no essential difference between, on the other hand, corroboration and, on the other, 'supporting evidence' …"

Improbabilities

[21] The trial court found that it was "highly improbable that the complainant would have first phoned the accused to join her at the pub, would have voluntarily accompanied him to have consensual intercourse which in any event was not for the first time, then would turn around and allege that the accused has raped her while in fact she was waiting for him to take her home".

[22] In my view, the suggestion that the appellant's version cannot be rejected on the basis of the above improbabilities is not justified. I am saying this because the appellant did not profer any possible motive that the complainant could have to suddenly turn against him whilst they were in love.

[23] In the case of **S v M 2006 (1) SACR 135 SCA, Cameron JA** in his dissenting judgment said the following, which in my view, are apposite to this matter:-

> "……. The absence of any suggested or plausible motive here must in my view contribute to the weight of the State's evidence in this case….."

Therefore the presence or absence of a motive is one of the factors that need consideration in the adjudication of the offence of this nature. In addition, in the case of **S v Webber 1971(3)** S**A 754 (A)** the following was said:

> "The evidence of a single witness ought not necessarily be regarded as unreliable merely because he/she has "an interest or bias adverse to the accused"

The intensity of the bias if it is there, must be established and its significance must be determined in view of the evidence as a whole. If it is not offered, then it will be difficult for the court to conclude that there was any.

[24] The trial court was therefore correct to conclude that the absence of motive to implicate the appellant falsely added weight to the improbability mentioned in the above paragraphs and further, to the complainant's testimony that it can be believed.

[25] Furthermore, I respectfully differ from the submission made by Ms Zwiegelaar on behalf of the applicant that the fact that the complainant reported to the police and pointed the appellant shortly after the incident cannot be used as creating a probability in favour of the state, that sexual intercourse took place without her consent. In my view, this fact serve as an indication that the complainant was consistent in her allegations".

[26] It has also been submitted by Ms Maila on behalf of the respondent that, it is improbable that appellant would have taken the complainant back to the place where everyone saw them leave together and wait for her at a place where the complainant can report the rape, and further that he waited at the tavern knowing that the police were called. According to her this conduct does not indicate a conduct of a guilty mind. This might be so. But this argument looses sight of the fact that, the complainant's evidence is that she tried to offer resistance but was overpowered. She did not even scream because she was threatened with assault. This means that she ultimately submitted / succumbed to what the appellant was doing to her. It is therefore not surprising that she acted normally after the alleged rape and did not even try to run away. It was in the early hours of the morning, people were asleep, the possibility that she felt helpless or that nobody will come to her rescue cannot be excluded. In

addition, it has been firmly established in a number of studies and authorities on the impact of violence, including rape against women, that victims displays individualised emotional responses to such assaults. Some of the immediate effects are frozen, fright or cognitive dissociation, shock, numbness and disbelief. It is therefore not unusual for a victim to present a facade of normality and further, associate with the culprit. See **S v Monageng (2009) 1 All SA 237 (SCA).**

[27] This facade of normality and association with the appellant displayed by the complainant after the alleged rape, might explain the reason why appellant went straight back to the tavern as he might have entertained the thought that complainant will not report immediately or report at all. The criticism levelled by Gutta J that the trial court's findings were largely based on probabilities is not fair.

[28] The consideration that I made above in as far as the contradictions, corroboration, motive, J88, probabilities and improbabilities, if taken together by far outweighs the version of the appellant to an extent that it cannot be said that it is reasonably probably true, despite the fact that it was not criticised. It is quite obvious that the trial court evaluated the evidence before it holistically, not in a piecemeal fashion. Its findings cannot be faulted.

CONCLUSION

[29] In **S v Ntsele 1998 (2) SACR 178 (SCA)** it was held that the onus which rested upon the state in a criminal case was to prove the quilt of the accused beyond reasonable doubt – not beyond all shadow of a doubt. Our law does not require that a court had to act only upon absolute certainty, but merely upon justifiable and reasonable convictions – nothing more and nothing less. Further in **Miller v Minister of Pensions [1947] 2 All SA ER 327** on **page 373H** the following was said:-

> "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".

[30] Therefore, I come to the conclusion that, the verdict the trial court arrived at, that the appellant was guilty of the offence he was charged with, was based on factual findings which it had properly evaluated without committing any misdirection. It cannot be said that a reasonable court could never have made such a finding, or that the findings were patently incorrect. It is trite law that if there had been no misdirection on the facts, there is a presumption that the trial court's evaluation of the factual evidence was correct. Accordingly, a Court of Appeal is not entitled to interfere with the trial court's finding.

[31] Consequently, the appeal according to my view should be dismissed.

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A M KGOELE
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	: 15 FEBRUARY 2013
DATE OF JUDGMENT	: 22 MARCH 2013
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