

REPORTABLE

CASE NO.: SA 09/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ABRAHAM RUHUMBA

APPELLANT

and

THE STATE

RESPONDENT

Coram: Mainga JA, Strydom AJA *et* Mtambanengwe AJA

Heard on: 28/10/2011

Delivered on: 13/08/2012

APPEAL JUDGMENT

MTAMBANENGWE, AJA:

[1] This is an appeal against the refusal by the High Court (Damaseb J *et* Usiku AJ) to condone appellant's non-compliance with Rule 67 of the Magistrates' Court Rules. I have read my brother Strydom AJA's judgment dismissing the appeal in this matter and find myself unable to agree with him. I therefore set hereunder my reasons for so disagreeing.

[2] My brother Strydom AJA comes to the conclusion that the Court *a quo* correctly refused to condone the non-compliance of the appellant with the Rules of the Magistrates' Court and, consequently, dismisses the appeal. I concede that before coming to that conclusion my brother correctly related how this appeal came before us, and it is not necessary for me to repeat or deal with the events in that part of the judgment, save to repeat that the appeal before us is against the said refusal of the Court *a quo* to condone appellant's non-compliance with the provisions of the Magistrates' Court Rule 67. Secondly, my brother, also correctly found that although the merits of the appeal were fully argued "the Court *a quo* did not find it necessary to consider the prospects of success of the appeal because of the Court's finding in regard to the failure of the appellant to explain his non-compliance with the Rules". He then considered relevant cases on condonation and again correctly, stated that they show:

"...that a factor such as the prospects of success on appeal is of great importance and can be conclusive in certain circumstances."

He accordingly proceeded to consider:

"...appellant's prospect of success on appeal to determine whether it is such that it may convince the Court to nevertheless grant condonation notwithstanding the appellant's unsatisfactory explanation for the delay."

[3] In the Court *a quo* the appellant filed written heads of argument arguing that the regional magistrate who tried him did not evaluate the evidence properly; he was not cautious when he accepted the evidence of the complainant and the two eyewitnesses to the rape she complained she was subjected to by the appellant, seeing that they were under the influence of liquor at the time of the incident; he did not apply the probabilities emerging from the evidence in his favour or at all; that the evidence of the complainant and the other witnesses was inconsistent with statements they had made to the police and he had failed to state his finding in regard to the medical evidence. On that basis he concluded that the State did not prove its case beyond reasonable doubt.

The regional magistrate's judgment was extremely brief and can be quoted in full:

"I do not share the sentiments of the defence in this matter. It may be so that the complainant and the two other State witnesses who were eye witnesses were intoxicated but definitely not to such an extent that they could not observe what was going on there and the complainant's evidence is clear the accused did grab her, took her into the house, lock the door and undressed her and forcefully had sexual intercourse with her while he was in possession of a knife and with which he threatened her. The other two state witnesses try to interfere to intervene but certainly to a certain extent their state of intoxication did render them actually incapable of interfering but still they observed what happened and the accused person is convicted of the crime of rape without any doubt."

[4] Considering the fact that the complainant was drunk as well as the eyewitnesses, Fanie Benz and Anna de Klerk, when the events leading to the alleged

rape started unfolding, I am of the opinion that appellant was correct to complain that the regional magistrate did not evaluate the evidence properly, and was not cautious “when he accepted the evidence of the complainant and the two eyewitnesses, and that he did not consider the probabilities emerging from the evidence. In *Desmond Benjamin De Lange v The State*, Judgment No S.C. 74/83. i.e. a judgment of the Supreme Court of Zimbabwe, Georges JA sitting with Baron, ACJ and Gubbay, AJA (as they then were) stated at page 6 to 7 of the cyclostyled judgment:

“An appraisal of the probabilities inherent in the story given by a witness is an essential part of the evaluation of the truth of that story.

If on appraisal it can be concluded that a story is inherently probable and there is in addition corroboration of it, then very good reason indeed must exist for not accepting it.”

[5] The complainant and the two eyewitnesses to the events that occurred on the day of the alleged rape were heavily under the influence of liquor. Fanie Benz testified that at the time that Frans Angermund, complainant’s boyfriend or husband, left the scene (the house of Anna’s daughter) where the party composed of complainant and her boyfriend (Frans) Fanie and his girlfriend Anna de Klerk and the appellant had been drinking he was very drunk already. Anna de Klerk also testified, particularly under cross-examination that she and the others “were so drunk”. The time was late in the afternoon after Fanie and Anna had started drinking early that morning. The drunkenness admittedly affected their capacity to observe properly or correctly what took place and this, together with other factors I shall refer to later herein would or must inevitably, in my opinion, have a direct impact on the assessment or

interpretation of the evidence of complainant, Fanie and Anna. Where their evidence shows glaring contradictions and inconsistencies great caution is required whether it should be accepted. For this reason I consider it absolutely necessary to analyse the evidence in some detail.

The complainant's evidence

[6] The complainant's story as to when and how the alleged rape took place is told in three different versions, namely:

- i) Her evidence in chief;
- ii) Her evidence under cross-examination; and
- iii) Her statement to the police (given on the day the alleged rape is said to have occurred).

I will underline some of the contradictions, inconsistencies and uncertainties in the story. The complainant testified in chief that after a quarrel or argument between Frans and Fanie the former left the house asking her to go home with him. This was half an hour or forty-five minutes after they had been sitting down drinking. When she was outside appellant came and pulled her back inside the house and Frans then "walked home". She was asked and answered as follows:

"So he left?--- Yes he went home.

Although the accused dragged you into the house? --- Yes."

Her story was that appellant dragged her back into the house and locked the door behind him, he dragged her back into the house by grabbing on her arm. She was struggling against him. After he locked the door behind him he started to press her against him and there (at the door) he took her clothes off starting with her blouse and then her tracksuit trousers and her panty and when she was naked he then started to threaten her with a knife.

She was then asked and answered as follows:

“Did you see where he got that knife from? --- Your Worship I am not sure whether he found the knife in his pocket or whether he went to fetch it from the kitchen, it was a table knife.

Now if you say you are not sure whether he went to fetch it from the kitchen did you see him at some stage go into the kitchen? --- At a stage he was in the kitchen.

At what stage was that, was it after he pulled you into the house or was it before? --- It was after he undressed me Your Worship I was naked it is when he went to the kitchen.

Where were you in what part of the house or the room or whatever you can call it were you when this took place, when he was undressing you --- In the sitting room department.”

Asked what Fanie and Anna were doing “whilst this was taking place”, she said:

“Fanie and Anna want to help Your Worship at a stage Fanie came to pull him away from me and Fanie laid on me to try to protect me Your Worship but he came to pull Fanie away from me.”

The prosecutor asked her to clarify as follows:

“And what did Anna do, you see what I want to know is, I want you to think now clearly back as it happened. Did they sit there and watch while the accused was undressing you and then only helped you or was it before or when. I want you to think clearly because it is very important at which stage what happened?”

She answered:

“Your Worship they tried to help me and the last that Fanie did it was now the time he pulled Fanie away from me and Anna couldn’t stand well on her feetYour Worship”.

The prosecutor persisted to seek clarification:

“So at which stage did they start assisting you? --- The time he started undressing me
Your Worship.

Then they already started to try and assist? --- Yes.”

[7] The complainant went on to say that when appellant went into the kitchen “she went to the toilet but the toilet door could not lock and the appellant came and pulled her out of the toilet and again pressed me against the bed Your Worshipand there again we struggled, I went to the front door Your Worship where I also tried but it was also locked Your Worshipand there he then pushed me on my neck and in a bending position he had sexual intercourse with me”. Fanie and Anna “were seated and watching, they were frightened that maybe accused might injure us on the bed they only struggled he did not have intercourse with her on the bed after the intercourse he

opened the door and she went home". Asked: "when he bent you forward what were you doing" she said: she "just had to stand because he was pressing the knife on my head" Your Worship. I just stood there so that he couldn't injure me". When she went home she told Frans what had happened. She further testified that appellant did not physically injure her and that any injury on her was from scratching from the bed as he did pull me "from the bed and on the bed". The appellant only had clothes on the upper part. The complainant insisted that appellant raped her, "he did have sexual intercourse with me", she said. The appellant only had clothes on his upper part of his body, he did not have his trousers or under panty on when he had intercourse with her. According to this story the intercourse took place after a series of other events not immediately after she came back into the house. It took place only once.

[8] Under cross-examination, complainant confirmed that after the quarrel or argument between them Fanie ordered Frans to leave the house which event Fanie later also testified about. She testified that she had known appellant before and that he had been to her house before. She said, on this occasion she and Frans were already outside the house "...when the accused person called me and when I came nearby he pulled me into the house". She had followed Frans outside while appellant had remained inside. She added "while we want to leave accused called me in" and that "it was in the door way", that appellant took her by the hand and pulled her back into the house.

[9] The questions and answers continued as follows:

"Mr Rossow: Did you go to sit down at all again after the accused drag you back into the house? --- Your Worship we seated we drink one short and after that he started going on with me. I thought he called me in just to drink one short.

So you did not immediately as he pulled you into the house start grabbing you and trying to press you against him as you testified? --- No Your Worship we first did drink a drink and I was still busy when he started with me.

Where did you sit down to have this drink which you were busy with? --- On the sitting room bench.

The bed you say the sleeping place is also in the sitting room? --- Yes

Was anyone seated there on the bed? --- There were nobody on the bed.

Now you have to explain to us again what exactly happen then? --- Your Worship when we were drinking he then started troubling with me Your Worship like pulling me and later on he took off my blouse that I had on.

Did he speak to you at all? --- Your Worship he told me that he wanted to have sexual intercourse with me Your Worship and he was looking for a fifty dollars from me he said that he paid me for this Your Worship but I didn't receive any money from him.

Yes and then? --- Where he started struggling with me Your Worship and took all my clothes off Your Worship and he then later on went to get the knife.

Was this while he was still seated or what were you doing at that time? --- He already had me on the bed at that stage Your Worship when my clothes came off from my body."

The complainant was subsequently asked and answered as follows:

“Now Anna and Fanie know(s) that you have this relationship with Frans is that correct? --- Yes.

Did they not say anything while the accused person was still proposing you verbally and talking to you? --- Your Worship in the beginning they tries to stop this Your Worship but the accused didn't want to listen Your Worship so Anna and Fanie tried to their best Your Worship.

My question was, while he was still verbally proposing to you that he wanted to have sexual intercourse with you they know you had a relationship with somebody else did they say anything to this man? --- Your Worship Fanie told me to leave the house Your Worship and at that stage Fanie went to the door but the door was locked by that time and he had the keys in his pocket.

...

...

Now at what stage did the accused go into the kitchen? You say you do not know whether he actually got the knife from there but at which stage did he go into the kitchen? --- Your Worship after he already took off my clothes from my body Your Worship, from the bed he then went to the kitchen.

So he left you lying naked on the bed? --- Your worship when he went to the kitchen it is when I ran to the bathroom so I was naked Your Worship I ran to the bathroom while naked I didn't have anything on.

At that stage did he still have his trousers and underpants on? --- He only had his upper body clothes on Your Worship.

So when did he take off his underpants and trousers? --- It is from the beginning Your Worship when he undressed me he also took off his clothes.

Did you try to go out of the kitchen door in this process where you were running? --- Your worship I thought that I will go to the toilet and go through the toilet window. I thought I will lock it from the inside and go through the toilet window but the toilet door didn't have a key Your Worship, so he came in and then pulled me out.

I will repeat the question. Now so the first thing you did after you got up from the bed was to run to the toilet or the bathroom? --- Yes.

The accused drag you out of the toilet, did you manage to escape from his grasp at all after that? --- Your Worship when he took me back to the sitting room and on the bed I release myself from him and I went to the front but the door was locked by that time and he came there by the door where he had sexual intercourse with me.”

Again and according to her clear answers under cross-examinationso far appellant had sexual intercoursewith her only after a series of eventsthat took place after she returned into the house and not immediately after she said she was pulled back into the house.

[10] The rest of her evidence under cross-examination is recorded as follows:

“At which stage exactly did Fanie pull the accused from you and lay on top of you to try and protect you? --- Your worship it was in the beginning when he undressed me to have sexual intercourse with me on the bed and it is when Fanie came and lay on me to try and protect me.

So that was before the accused had a knife already? --- He already had the knife.

Can you explain to the court how the accused succeeded to take off your clothes and hold you down take off his trousers and underpants while Fanie and Anna were trying to assist you? --- Your Worship it was after Fanie pulled him off from me and thereafter Fanie went to sit because Anna told him that he must go and sit that the man will injure him Your Worship and it is when then he started undressing himself.

So at the time that Fanie pulled him from you the accused was still fully dressed? --- That's correct Your Worship after Fanie pulled him off he then undress himself.

But he had a knife at that stage already? --- Yes Your Worship.

And he went to the kitchen where he came back from with the knife without his underpants and pants on? --- When he went to fetch the knife he still was dressed Your Worship.

You thought of the possibility of climbing out of the window? --- The bathroom window?

Yes does this house or room or flat have any other windows? --- The sitting room windows and everything has got burglar bars.

Where exactly did the accused hold the knife against your head can you illustrate for us or show us or tell us exactly where? --- The knife was here on my head (top middle of head indicated).”

The complainant further testified in cross-examination that appellant had sexual intercourse with her while holding the knife on top of her head, after he finished “he unlocked the door and we went out following behind each other and on the way he offered to buy me cigarettes and liquor”. And what did you say? --- “I said no and I went home.”

She later said that “Your Worship after we left the house he did not come and look for trouble Your Worship. I walked in front and he behind me and I then walked home”.

She was later asked if Fanie opened the door to enable her to go out of the house. In answer to this she stated:

“Fanie did not open the door Your Worship it was the accused who unlocked the door Your Worship. It was there in front of the door where he took off my clothes Your Worship and my clothes – and my brazier was there at the door I put it on there at the door.”

She was invited to describe where the door was situated and in doing so she admitted that the sleeping part “is further away from the door where the bed was standing”.

Lastly complainant testified as follows:

“How did your clothes get from the bed where you were undressed to in front of the door? --- Your Worship when I ran to the bathroom I grabbed my clothes Your Worship, the T-shirt then fell and it is how my clothes came into the corridor.

Only the T-shirt? --- The short or my trouser, the trouser of mine I went to collect it in the sitting room.

And the clothes of the accused person? --- His clothes were there in the corridor in front of the door.

Is that also where he undressed? --- Your Worship I can't recall whether it is where he undressed himself but when the door was opened he dressed himself in front of the door".

This evidence is clearly full of discrepancies not to say internal contradictions which I have indicated also by underlining. In brief two completely different and irreconcilable stories emerge from the evidence in chief and that under cross-examination.

[11] The complainant's statement to the police was drawn to her attention in cross-examination. First when defence counsel asked her to confirm it was made on 1 May 1999, the day of the incident, there was no answer from her. She admitted she had read it that morning. In the course of being questioned about some apparent discrepancies between this and her evidence in chief or her evidence under cross-examination complainant repeated that when she went out of the house with Frans appellant "came out and called me". Part of the statement says "later on went to take a knife in the kitchen after he fetch the knife he undressed himself by pulling off his trouser, he then threatened me with the knife. He then undressed my green shirt and I was in my trouser. I managed to run away but the door was locked".

Defence counsel correctly put it to her that the "gist of that is that the accused first of all only undressed himself after he had the knife, that he only started to undress you after he already had the knife which is not what you testified. Can you explain this discrepancy or do you want to explain it"?

She answered:

"Your Worship I say that he took off my shirt Your Worship and he then went to fetch the knife and with the struggle he then took off my other clothes".

The other discrepancy defence counsel pointed out reads:

"I managed to run away but the door was locked. He then came towards me with the knife in his hand and pressed the knife against my head. He then pulled off my trouser together with my panty and pushed me forward. I was bended to the front he then had sex with me from behind."

When defence counsel said that that was not the exact version as she testified and that her testimony was that "you were already naked by the time that you ran away, totally naked", she answered --- "I was already naked". She could not explain the discrepancy but only repeated it by saying:

"As I already said Your Worship he first took off my blouse, we struggled and later he took off my panty and then I went to the bathroom and was already naked."

The statement gives a completely different story from her evidence in chief and also that gives under cross-examination. After dealing with other discrepancies defence counsel put appellant's defence to her, the essence of which was a denial that he had had sex with the complainant at all and which further alleged that she was assaulted by her boyfriend and that that was the reason why Fanie chased Frans out of the house.

Frans Angermund's evidence

[12] Frans testified that he was complainant's boyfriend for about fifteen years. He had known Fanie and Anna for a very long time, he had known appellant by seeing him at drinking places. He and Fanie grew up together at Rehoboth. Appellant joined their group (he, Elizabeth, Fanie and Anna) as they were on their way to Anna's daughter's house. At the house it was decided that they should buy liquor and appellant wanted complainant to go to do so with him but "I said Lisbeth will not go." Later on he said:

"... myself and Fanie involved in a light quarrel Your Worship and I told Anna that we must now go."

Asked what the quarrel was about he said:

"Your Worship it was just so about the liquor Your Worship it was not so and I became a little bit furious and I walked away."

He evasively admitted he was intoxicated. Asked where was Elizabeth then he said:

"Your Worship myself and Lisbeth were already out of the house when the accused came and grabbed her on the arm and say that he will show he will have sex with her today and he pulled her into the house and he locked the door, the house only have got one door."

Asked what he did, he said:

“So I stood there and knocked and they didn’t want to open I then walked to my room.”

Asked what he thought of appellant’s remark he said:

“Your Worship actually I wanted to go for help but when I came to the room I thought they are persons it won’t happen.”

Then he went to sleep and later Elizabeth came and reported that she was raped by the appellant and he told her let us go to the police. That day he did not ask her the details because he was angry, only the next day did she tell him that “when they went into the house the man started taking off her clothes and at a stage she had a knife on her head or something but I was not there I can’t recall.”

Asked what Elizabeth was like when she said she was raped he said:

“She came in there Your Worship and she started moving me waking me up Your Worship and I ask her whether she was drunk she said no I am raped.”

[13] Under cross-examination he related how he and the others had travelled to Anna’s daughter’s house drinking from place to place, how appellant joined them. He said he did not know that appellant had been to her house before. The quarrel between him and Fanie was “about the wine” he said, “I don’t know whether he did pour lesser wine or something I can’t recall well Your Worship”.

He said he became angry about that and added:

“Yes Your Worship and I told Lisbeth that she must come so that we can go home.”

Asked if Fanie told him to leave this house because of the quarrel, he said:

“Your Worship I can’t recall whether he asked me but I just decided I am going home”. Elizabeth went with him, walked out with him and appellant came afterwards. He was holding complainant on her hand “not that strongly” when appellant “grabbed her and pulled her inside the house. The last words he is (sic)are I will show you I will rape you today.”

Questioned did he say he will rape her or that he will have sexual intercourse with her he said?

“Sex Your Worship.”

He was asked what Elizabeth said to this and he said in reply:

“Your Worship there was no time for speaking or answering Your Worship because it was just there is only one door he was standing there at the door he pulled Lisbeth inside the house and locked the house.”

Frans went on to say that before appellant grabbed complainant he didn’t say anything “because he came and I thought maybe he will pass by but he just came here pulled Lisbeth out of my hands and he went in and the last words he said is I will show you I will have sex with you”. Before he was angry or before he left (the house)

there was no talk about appellant wanting to have intercourse or being interested in complainant. He said before he left he knocked three times and “heard her answering saying the door was locked. So I thought maybe they don’t want me to drink with them. There I didn’t have thoughts that will a man have sexual intercourse with a lady between other persons”. He repeated that he heard her answer before he then left. He did not hear her screaming or shouting for help. It was also his evidence that he had refused that the complainant should accompany the appellant to buy liquor. His evidence is not confirmed by that of complainant in respect of the exchange of words he talks of between him and her.

Fanie Benz and Anna de Klerk’s evidence

[14] I will confine the narration of their evidence to the events that unfolded from the stage Frans left Anna’s daughter’s house. To begin with both admit that they were already drunk at that stage. Fanie in his testimony in chief actually said in answer to a question by the prosecutor:

“I was yes very drunk already.”

And Anna also gave the fact that they were drunk as the reason why in some instances her evidence was unclear or uncertain. Fanie said that the complainant was also very drunk. He insisted “I was drunk” when the court suggested if he could still note what was going on around him “then you were not very drunk”. He said he

quarrelled with Frans over a work related matter and which he did not specify. Asked what happened in the house he answered:

“Your Worship I actually put him out of the house and he did also take Elizabeth with. When they were already outside the accused went to take Elizabeth from Frans.”

“And where were you” he was asked, he answered:

“At that stage I was in the house Your Worship the moment they were outside and he brought Elizabeth in then Frans left.”

Asked: “So what did Frans do when this man came and took Elizabeth, he said:

“Your Worship by that stage it was outside I don’t know how Frans’ reaction was or what he did there Your Worship but he brought Elizabeth in by force.”

“Yes and then?’ he was asked.”

He answered:

“He locked the door he took the key out of the lock and he started with Elizabeth, he started with his nonsense with Elizabeth.”

“What did he do?” he was asked. He answered:

“Your Worship he started taking off Elizabeth’s clothes Your Worship. There was a short wall he had Elizabeth on top of that wall.”

The Court asked:

“The clothes or what did he put on the wall?”

He answered variously:

“He started taking off Elizabeth’s clothes. There is a short wall (intervention). And at that stage he had Elizabeth on that wall. Your Worship it was not Elizabeth it was the accused who had Elizabeth over or not over on the other side of the wall but bent over the wall because he was busy stripping her.”

The questions and answers continued:

“Ms Fouche: Now Sir just tell me this when the accused locked the door what was the first thing he did? Did he immediately go to Elizabeth or what was the first thing that happened? --- Your Worship nothing happened, after he brought Elizabeth in and locked the door he started stripping Elizabeth.

What was Elizabeth doing when he did this?--- She shouted for help.

And what were you doing? --- Your Worship when Elizabeth shout for help I didn’t really bother but this struggling went on for a while but when they went to the room the sleeping room I then went to help there.

Now so in other words just correct because I am trying to find out what happened there that’s why I am not very successful. When you went just tell me, when you close

the door he brought in Elizabeth he immediately took her and he started taking off her clothes and then he bend her over a wall, was this like in one action or did it stop in between or was it by the time he put her over or bend her over the wall all the clothes removed. Just clarify that? --- It was one action Your Worship.

Okay so he grabbed this woman and started pulling of her clothes? --- Yes.

And then he bent over the wall? --- Yes.

By that time was all her clothes removed or did she still had some clothes on? --- All the clothes were already off Your Worship.

So he stripped her when she was naked and he bend over the wall? --- Yes.

But until that stage it still did not bother you? --- It bothered me.

What did you do about it? --- I wanted to go and help but I saw that I was too drunk Your Worship to fight together with the accused or against the accused.

But just remember we are at the stage now where he let Elizabeth bend over the wall. --- Yes.

Okay and at that stage you feel you were too drunk you couldn't release her? --- Yes because I didn't know in what way I must help her.

What was Anna doing? --- She was seated.

Okay so now he bent her over the wall what was the next thing that he did? --- Then may be he would have raped her at that stage but I don't know whether he finished there or something but the struggling went on and he took her to the bed.

Okay when you say he raped her there or he don't have finished but what was he doing there? What did you see, did you see Elizabeth over the wall and what did you see him doing? --- I then saw that he was busy raping her.

Did he have sexual intercourse with her? --- At that stage Your Worship he had but may he I don't know how to call it he wasn't satisfied.

Court: Okay then you were in the bedroom or they were in the bedroom what happened then? --- Your Worship and there they again struggled Your Worship the man he want to stop Your Worship and I saw it can't go on like this it must now stop.

Okay proceed. --- Your Worship and I later on threw my weight on Elizabeth I threw myself on Elizabeth by that time the accused had a knife I don't know where he got it whether he got it in the house or he came with I don't know.

Ms Fouche: Where was the accused when you threw yourself on Elizabeth? --- She was there Your Worship I try to get my weight in and I then threw myself on her.

Yes and then? --- Your Worship then may be because of my drunkenness or what he just took me and throw me away so and I then saw that no I must just stop here because the accused would have injured me or Elizabeth.

Court: Yes and then? --- Your worship and then I saw the sharp object and because I was drunk he was drunk he cannot he can easily stab me.

Yes and what happened then? --- May be they finished themselves there Your Worship I was relaxed and they, he and Elizabeth then left.

Have you ever seen him having sex with the complainant? --- Your Worship I just saw the struggling Your Worship you know it is not a quiet thing Your Worship."

That last question by the prosecutor is significant: She was obviously still feeling uncertain as to what the witness's answers amounted to. Under cross-examination Fanie testified that the house has only one room and the kitchen is an open plan kitchen "you can see into the kitchen" and he could see everything that happened "because it was an open building". He said he only saw the knife "when accused had already dragged the complainant on to the bed, he did not see appellant threaten complainant with the knife. Defence counsel then specifically asked the following questions which he answered as follows:

"Now you testified here that when the accused person had sexual intercourse with the complaint at the door he had bent her over the wall the low wall that was there. Were they facing towards you or looking away from you at that stage? --- Your Worship the complainant tried to cover herself. There was a stage that they were facing us and other times then they were standing with their backs towards us.

I am specifically talking about the time that the accused had her bent over the wall and he according to you had sexual intercourse with her, which side were they facing to you at that stage? --- They were standing with their backs towards us Your Worship."(My emphasis).

These also raises the doubt as to what it was that he saw appellant doing to complainant.

Now Fanie's evidence in chief was summed up by defence counsel and the trial regional magistrate as follows:

“Defence Counsel: You also stated that things were so busy and confused at that stage that you cannot say for sure that you saw the accused person having intercourse with the complainant Elizabeth?

Fanie: Your worship I did see that he indeed had sexual intercourse.

COURT: No he wanted to have?

Fanie: He did have.”

This evidence which I have repeated verbatim speaks for itself. In brief it leaves one wondering what exactly did Fanie see. It remains to say that apart from this he did not confirm complainant’s story about escaping into the toilet or bathroom, he did not confirm complainant’s story about appellant going into the kitchen to fetch the knife. In my opinion the truth was not told by these two state witnesses. I note in particular the fact that complainant stands out as uncertain as to:

- (a) Where and when she was undressed;
- (b) Where and when appellant undressed himself;
- (c) Where and when appellant got the knife; and
- (d) How or in what posture she was raped, and where.

The fact that Fanie’s evidence shows the same uncertainties and that he does not confirm various episodes in complaint’s evidence in chief, also leaves one wondering whether the truth was told. The trial court, in my opinion, should have appreciated this. It should have had real doubt in that regard had it exercised caution in

approaching the evidence as a whole, particularly where either of their evidence does not corroborate the other.

In my opinion these uncertainties would explain the following:

1. Why complainant had all her clothes removed so easily;
2. Why complainant gave such a confused and contradictory stories (the three versions already referred to);
3. Why Fanie and Anna apparently just watched while the so-called struggling was taking place;
4. The possibility that the story of the knife and the threat therewith was a make weight story.
5. Why Frans left in a huff as it were and did not raise a finger to prevent appellant pulling complainant back into the house after he had demanded she should leave with him;
6. Why complainant told the story under cross-examination that appellant had called her back and only took her into the house by the hand after she reached the doorway;
7. Why the complainant's story about how appellant came to be in possession of a knife is contradictory in itself; (at first she does not know where appellant got the knife from yet she later says she saw him go into the kitchen and come out with the knife).

8. Why complainant's story as to in which part of the house she was undressed differ even in her evidence in chief: and
9. Why Frans and Fanie testified about events complainant did not mention namely.
 - i. That Frans knocked at the door after complainant was taken back into the house by appellant and that complainant responded.
 - ii. That according to Fanie complainant shouted for help when appellant started undressing her.

Much as Anna de Klerk could be said to corroborate complainant's story, again her version of events differs from that of complainant, and Fanie on at least one material respect, namely that, according to her, appellant had sex with complainant twice or thrice. Her statement to the police also differed from her evidence.

[15] The appellant gave evidence in which he denied that he raped the complainant. In the course of his evidence he related he had been to complainant's residence previously at her invitation and found Fanie and Anna there. That visit was confirmed by these witnesses and the complainant herself despite her description of him in her statement to the police as "the unknown man". Beside that he used to meet her at drinking places. He alleges that Frans and complainant had a quarrel during the drinking at Anna's daughter's house which quarrel ended with Frans assaulting complainant. It will be recalled that Frans and Fanie talked of a

quarrel between the two of them but, significantly, gave two different reasons why they quarrelled. It will also be remembered that Fanie chased Frans away. It is probable that the real reason for the guard which led Fanie to chase Frans out of the house was more serious and other than what either of them was prepared to submit. In this regard Frans' explanation of the reason for the quarrel raises the probability that appellant's story why Frans was chased away by Fanie is reasonably possibly true.

Anna de Klerk's evidence in chief strikes me as suspiciously similar to Fanie. That evidence however, like Fanie's was completely shaken under cross-examination where she ended up admitting that "It was so confessed we were so drunk".

[16] The judgment by my brother Strydom AJA also analyses the evidence. Though it noted the discrepancy between complainant's evidence in chief, and her evidence under cross-examination and the statement complainant made to the police, it finds that Fanie and Anna, the two eyewitnesses, corroborated the evidence of the complainant "in material respect" I strongly disagree. It is so that the judgment points out areas where the evidence of the two eyewitnesses, in particular that of Fanie, does not support the evidence of the complainant as indicative that Fanie and Anna told the truth. One such area is the evidence by the complainant under cross-examination where she tells the story that after Frans left appellant pulled her back into the house and the four of them sat on a bench in the sitting room part of the house and continued drinking before appellant started trying to have sexual

intercourse with her. The judgment seems to dismiss that evidence and it would appear the only basis for rejecting that evidence by the complainant is that it is not corroborated by Fanie or Anna. My problem with that approach to that particular aspect of complainant's evidence is that it completely ignores the background to the said evidence. I have in detail recorded complainant's evidence in chief and under cross-examination in order to highlight the salient points in each and to bring into focus the multiplicity of the contradictions in the State's evidence. I therefore now turn to comment on these discrepancies and contradictions and to highlight the points I feel should not be ignored in evaluating the State's evidence in this matter.

[17] The first point that should not be ignored or glossed over in this case is that the main witness for the State is the complainant herself and the first step in deciding whether the State can be said to have proved its case beyond reasonable doubt is whether the story told by the complainant is credible beyond reasonable doubt. Secondly of course, whether there is corroboration of that story in some material respect. When the complainant in this case gives a story that is confused and contradictory in various important aspects of it, and when certain important events that form part of that story differ or do not tally as to their sequence and in all material respects, one must examine the story carefully to see what the conflicting versions or sequence of events indicate and care must be taken to say what is corroborated. In my opinion it is not sufficient to simply say that the story is corroborated in some material respects when there are material aspects of the story as a whole that are contradicted or are not confirmed by the other witnesses. The case in point in this

regard is the areas where, as the judgment found, Fanie does not confirm what complainant under cross-examination and in chief said happened or how those events happened.

For example the complainant contradicts herself in respect as to at what stage and in what location in the house she was undressed. Nor is she consistent as to when Anna and Fanie tried to assist her. The question then is what did Fanie or Anna corroborate, especially when Fanie denied that the complainant went into the toilet (from where she said appellant pulled her to the door where he then had sexual intercourse with her) and where he was not questioned on the discrepancy in her, two versions as to whether she was undressed at the bed or at the door. Thirdly, the significance of the prosecutor not re-examining the complainant in the face of her conflicting and confusing evidence should not be lost sight of as if the cross-examination made no dent on her credibility, which it obviously did.

[18] What I consider most unacceptable in my brother's judgment is the omission to evaluate the evidence by complainant that when she went out with Frans, her boyfriend, the appellant came out and called her and, that when she came nearby and was in the doorway he then pulled her inside. If that is read with the evidence that she was dragged back into the house and the evidence of Frans, her boyfriend, that accused said he was going to have sex with her, as he dragged her back into the house, and the fact that she did not resist appellant's brazen action, it seems to strongly support the inference of a willingness on her part to positively and freely

respond to appellant's advances. This inference is strengthened by the apparent ease with which she allowed herself to be undressed in the presence of others and her confused and contradictory narrative of events surrounding the commission of the alleged rape. This inference would seem to negate the claim that she was struggling against appellant all the time. Complainant's contradictory stories include her story about the knife, her evidence under cross-examination, her evidence about escaping into the toilet or bathroom and her statement to the police.

[19] In the overall evaluation of the complainant's evidence my brother's judgment postulates a number of excuses why it concludes that complainant's evidence should be accepted despite its proven weaknesses. Among these excuses it lists the fact that complainant might merely have been confused when she testified under cross-examination that after she was taken back into the house they sat down and had more drink; before appellants alleged molestation of her started. It necessarily posits the question to be answered in regard to that story as to whether complainant was telling a deliberate lie or whether she was confused and did so in error. With respect I think it is erroneous to look at that evidence that way. That evidence starts with complainant telling the court that appellant called her back into the house when she was already outside with Fransand that only when she was in the doorway, apparently in response to the call, did appellant grasp her hand and pulled her back into the house. Whether she was lying or was merely confused, I submit for the prosecutor to seek to clarify; she did not. I believe the Court is not entitled to seek to explain away such a discrepancy. Seeing that complainant was under cross-examination the opportunity was again afforded her to recollect, as when the

prosecutor had earlier urged her “to think now clearly as back it happened because it is very important at which stage what happened” The other excuse given is that complainant’s evidence must be evaluated against the fact that she was under the influence of liquor, that she was a victim of an attack on her and that the scene was a moving one. Some of that granted but the essential question is whether the evidence adduced by the State proved that the complainant was a victim of sexual attack in the first place, and until that was done beyond reasonable doubt it is wrong to assume that as a fact. Lastly, I do not see how the fact that Anna and Fanie denied parts of complainant’s evidence under cross-examination proves or suggests that she was confused when she gave that evidence. On the contrary it could be held to prove that complainant lied in her evidence in chief that immediately she was pulled back into the house appellant “started with” her. The motive for her earlier evidence in chief would obviously be to strengthen her story of unconsensual sex, whereas one can’t find any motive for her to lie against herself by thus casting doubt on her earlier evidence.

[20] It remains to be noted that in addressing the merits Mr Hinda, appearing *amicus curiae* in the Court *a quo*, fully dealt with the areas of criticism of the State’s evidence more or less in the same manner I have done and it is surprising that the Court *a quo* avoided dealing with the prospect of success by stating, wrongly in my opinion, that:

“Prospects of success on appeal only become a consideration if the reason for the delay is acceptable. If the reason for the delay is not acceptable, it matters not that the prospects on appeal are reasonable, except in the rare case where there has been a complete failure of justice; or the verdict of the lower court is so repugnant and perverse that the Court on appeal cannot, in all conscience, allow it to stand.” (My underlining) see page 245 of the record.

State’s counsel in the Court *a quo* conceded that there are inconsistencies here and there in the State’s evidence but argued that such inconsistencies were “immaterial”. I totally disagree.

[21] To explain away complainant inconsistent and contradictory evidence on the basis that she was under attack or to say the scene was a moving one as my brother Strydom AJA does in his judgment contrary to, the demonstrable contradictions and palpable falsehoods in complainant’s evidence and the unsatisfactory features of the State’s evidence as a whole seems, in my opinion, to amount to propounding a principle that the complainant must be given the benefit of the doubt contrary to the well-established principle that the benefit of a doubt must be given to the accused. My brother Strydom AJA’s judgment merely seeks to excuse the discrepancies and contradictions in the evidence of the State. I do not agree that my evaluation of the evidence “is a clinical dissection of the evidence of witnesses without having regard to the circumstances about which the witnesses have testified”. The contrary is true if one reads my note properly and attentively.”

[22] Lastly, and in conclusion, I submit that taking the state as proving the case against the appellant where there is no corroboration of the same or where the so called corroboration is itself questionable is erroneous. Complainant's evidence should be read as that of a single witness and urge that it be approached as such. In this regard I repeat what Diemont JA said in *S v Sauls and Others* 1981 (3) SA 172 (AD) at 180 E-G:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness (see the remarks of Rumpff JA in *S v Webber* 1971 (3) SA 754 (A) at 758). 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... 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."

The criticism of complainant's evidence in this case, or that of the other State witnesses, is not slender.

[23] In the result, I submit that the appeal should be allowed, and I so order.

MTAMBANENGWE AJA

On behalf of the appellant:

In person

Counsel on behalf of respondent:

Mr. J.T. Kuutondokwa

Instructed by:

Prosecutor-General