



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **CA&R 90/2017**
DATE HEARD: **29 JANUARY 2018**
REASONS: **29 JANUARY 2018**

In the matter between:

JOSHUA DE WET

Appellant

and

THE STATE

Respondent

Coram: Olivier J et Erasmus AJ

REASONS

Olivier J:

- [1.] The appellant, Mr Joshua De Wet, stood trial in the Regional Court in Port Nolloth on charges of rape, on the basis of vaginal penetration with a finger (count 1) and attempted rape, on the basis of attempted vaginal penetration with his penis (count 2)¹. The case for the prosecution was that both offences had been committed at the home of the complainant, during the early evening, and basically on the same occasion.

¹ As envisaged in the **Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007** ("the Act").

- [2.] The appellant pleaded not guilty to both counts. In his plea explanation in respect of count 1 he stated that he had pushed his hand into the complainant's pants while sitting on her lap on a bench in the lounge, and while they were cuddling and kissing, that he had then touched her vagina, but had never inserted his finger. During the incident the complainant remarked that the appellant was married and that what he was doing amounted to rape, but according to the appellant she had said that in a joking manner. According to the appellant the complainant had never resisted, and in effect had impliedly consented.
- [3.] In respect of count 2 the appellant stated that he and the complainant had, after the incident in the lounge, gone to a bedroom, while still kissing and cuddling, where the complainant lay down on a bed. He stated that he had then removed both of their pants, and that she had in fact assisted him by lifting her buttocks, so that he could pull her pants off. The appellant stated that he had at that stage been aroused to such an extent that he ejaculated onto the complainant's panty, before he could penetrate her.
- [4.] The appellant was convicted on both counts. On count 1 it was found that the complainant had resisted, but had been overpowered by the appellant, who had then inserted his finger into her vagina. On count 2 it was found that the appellant had in fact forced the complainant to the particular bedroom, had forcefully removed her clothing and had then ejaculated prematurely. It was found that these actions had amounted to an attempt to rape the complainant.
- [5.] The appellant was sentenced to 10 years imprisonment on count 1 and 5 years imprisonment on count 2, and it was ordered that the sentence on count 2 be served concurrently with the sentence on count 1.
- [6.] The appellant's application for leave to appeal against the convictions and sentences was dismissed, but he was granted such leave on petition. After having heard argument, and in the light of the fact that the appellant was already

serving the sentences at that stage, we deemed it fit to make the following order, and what follows are the reasons therefore :

THE APPEAL SUCCEEDS AND BOTH THE CONVICTIONS AND SENTENCES ARE SET ASIDE.

[7.] The following facts were common cause:

- 7.1 In October 2009 an intimate incident took place between the appellant and the complainant on a rugby field in Alexander Bay.
- 7.2 Over the years thereafter they regularly saw one another in passing, and always greeted one another in a friendly manner.
- 7.3 The appellant would on such occasions often make reference to the incident on the rugby field, by asking the complainant when they were going to play rugby again.
- 7.4 The appellant would also always, apparently jokingly, call the complainant his mother-in-law's daughter, and he would also call her mother his mother-in-law.
- 7.5 During 2011 the appellant got married, but he kept on greeting the complainant and her mother like before.
- 7.6 On 10 March 2014 the appellant visited the house of the complainant. It appears that he had in some way been involved in the voting process, and he asked the complainant whether she had registered as a voter.
- 7.7 At some stage they were both on the couch in the sitting room or lounge, where the complainant had been sitting.

7.8 The complainant wore tracksuit pants and a panty.

7.9 The appellant put his hand inside the complainant's pants, and apparently also inside the panty. That is when, on her version, he inserted his finger into her vagina and, on the appellant's version, he only touched the complainant's vagina.

7.10 There was a sound at the door through which the appellant had entered the house, as if somebody was knocking on it. The appellant then got up and locked the door.

7.11 The appellant and the complainant then moved to a bedroom.

7.12 That is where the appellant, intending to have sexual intercourse with the complainant by penetrating her vaginally with his penis, removed their clothing, but then ejaculated prematurely.

[8.] As far as count 1 is concerned, the insertion of his finger into the complainant's vagina without her consent would have constituted rape, as envisaged in the Act. Without consent, the mere touching of her vagina would in any event have constituted indecent assault, which would have been a competent verdict on count 1. As far as count 2 is concerned, the State's case was that the appellant's actions would, without the consent of the complainant, have constituted an attempt to rape, again as envisaged in the Act. The issues, as far as count 1 was concerned, were therefore penetration and consent and, as far as count 2 was concerned, consent.

[9.] It is trite that a court of appeal should not readily interfere with the factual findings of a trial court². However, it will, and in fact should, be done where such

² Compare **Kebana v S** [2010] 1 All SA 310 (SCA) para [12]

findings are clearly wrong³; all the more so where such findings are premised on the recorded evidence, rather than on demeanour⁴.

- [10.] The complainant's evidence was that she and the appellant had in October 2009 attended a dance at the rugby field and had ended up kissing.
- [11.] She went on to testify that, on the day of the present incident, the appellant knocked, then entered the house without having been invited to do so and closed the door behind him. She had been alone at home, and according to the complainant her daughter had been out at that stage.
- [12.] According to the complainant the appellant, after having enquired about her registration as a voter, in some way ended up on top of her, where she was sitting on the couch. He again wanted to know when they were going to the rugby field again. He tried to get his hand inside her pants, repeatedly, but according to her she managed to prevent this by pulling his hand away every time. During that process she said to him that he was a married man and asked him whether he realised that what he was doing amounted to rape. According to the complainant the appellant, while she was still struggling and resisting, managed to get his hand inside her pants and inserted his finger into her vagina.
- [13.] That is when the appellant got up, peaked through a window and then locked the door.
- [14.] According to the complainant the appellant then forced her to the bedroom. She resisted, but he held her by her arms. In the bedroom he threw her onto the bed, held her down and removed his pants and then hers. The appellant then ejaculated before he could penetrate her vagina with his penis.
- [15.] The complainant testified that the appellant then left the room. She got up from the bed, pulled up her pants and panty, and straightened the bedding. When the

³ Compare **S v M** 2006 (1) SACR 135 (SCA) para [40]

⁴ Compare **S v Crossberg** 2008 (2) SACR 317 (SCA) para [149]

appellant came back to the room, she closed the door of the room to prevent him from entering, and he then walked away.

- [16.] The complainant went on to say that she then went to the toilet, where she noticed the semen of the appellant on her panty and wiped it off.
- [17.] According to the complainant her daughter arrived at some stage, but it is not clear exactly when. The complainant then sent a so-called Whatsapp message to Mr Gregory Cloete, and made a report to him. It later appeared that the report was in fact contained in a series of such messages.
- [18.] Mr Cloete arrived and took the complainant to the house of her aunt, Mrs Lizzy Balley, to whom she then also made a report.
- [19.] The complainant testified that she was then taken to the police station by one Lucinda Nel. She did not, however, at that stage lay a complaint, according to her because she was too emotional.
- [20.] At a later stage she spoke to her father, and then also to her mother.
- [21.] The next morning her mother took her to Sister Meissenheimer in Springbok for a medical examination. That afternoon the complainant opened a criminal case against the appellant.
- [22.] Mr Cloete and Mrs Balley testified about the complainant's reports to them. I will revert to their evidence in this regard at a later stage.
- [23.] Sister Meissenheimer was not called as a witness, but her report (J88) was entered into evidence.
- [24.] After an unsuccessful application for his discharge in terms of section 174 of the **Criminal Procedure Act**⁵ the appellant's case was closed without having presented any evidence.

⁵ 51 of 1977

[25.] The complainant was a single witness as far as the issues of penetration and consent were concerned. Her evidence therefore needed to be approached with caution and, where not substantially satisfactory, would have had to be corroborated by other evidence⁶. The question is whether it can be said that the complainant's evidence was substantially satisfactory regarding the issues in dispute, and that it excluded the reasonable possibility of the version of the appellant being true.

[26.] The Regional Magistrate referred to various aspects which were considered to be probabilities favouring the case of the prosecution.

26.1 The Regional Magistrate found that the fact of premature ejaculation was "*inconsistent*" with the appellant's version that events in the bedroom had taken place with the complainant's consent. It is not altogether clear why the Regional Magistrate came to this conclusion. Would the premature ejaculation really have been more consistent with the version of violence, where the appellant had been struggling to get the complainant to the bedroom, to get her onto the bed and to undress her?

26.2 The Regional Magistrate also found that the fact that the appellant had stood up immediately after ejaculating was inconsistent with a scenario of consent, and consistent with the complainant's version of having prevented the appellant to penetrate her⁷. Again, it is not clear why this would be so. What else would the Regional Magistrate have expected the appellant to have done on his version? Whether or not the intercourse was going to be consensual, it would certainly not have been strange for the appellant, having realised that he had already ejaculated, to get up and leave.

⁶ Compare **S v Mahlangu and Another** 2011 (2) SACR 164 (SCA) at 171b to d

⁷ A version to which I will revert in due course.

- 26.3 The Regional Magistrate found the version of the appellant that he believed the complainant's remark, about him being married and being busy with rape, to have been made jokingly, to be "*ridiculous in the extreme*". Once again, it is not clear why the Regional Magistrate came to this conclusion. The appellant had even made reference to the complainant's facial expression at the time when she made the remarks. In fact, why would the complainant, in circumstances where she was being subjected, on her version, to a forceful indecent assault, deem it relevant to confront the attacker with the fact that he was married? Why would that have been relevant, and why would she have thought that it would have stopped him. Surely a violent attack like that would have constituted rape, regardless of the marital status of the attacker.
- 26.4 The Regional Magistrate found the short duration of the events in the house to be inconsistent with the version of the appellant that they had kissed and cuddled on the couch, that he had then closed the door and that they had then gone to the bedroom. The Regional Magistrate found it unlikely that "*such consensual and sexual encounters*" could have taken place in such a short space of time. It was found that a short duration of time was more consistent with the version that the appellant had been forcing himself onto the complainant. Why would the cuddling and kissing version have taken longer than the incident described by the complainant? The Regional Magistrate seems to have lost sight of the fact that everything, whether consensual or not, was cut short by the appellant's premature ejaculation.
- 26.5 The Regional Magistrate found, as regards the events in October 2009, that whatever relationship there might after that have existed between the appellant and the complainant, that relationship had been "*punctuated*" when the appellant got married in 2011, and the Regional

Magistrate found that this made it unlikely that the complainant would have consented in the way described by the appellant. It is an unfortunate fact of life that married people sometimes commit adultery, and sometimes unmarried people are involved in that. I think judicial notice can be taken of this.

26.7 The fact that the complainant did open a criminal case against the appellant is not in our view, in the particular circumstances of this case, a decisive consideration, or one which “*could significantly affect the probabilities one way or another*”⁸. It must be seen against the background that the complainant had chosen not to lay a complaint when she had been taken to the police station the previous day. It appears that she only decided to do so after having spoken to her parents.

[27.] The Regional Magistrate found that Cloete’s evidence “*corroborated*” what the complainant had testified regarding the fact that the complainant had told the appellant that he was busy with rape, the wrestling in the sitting room, the fact that the door had been locked by the appellant, the fact that the appellant had pushed her down, the fact that the appellant had taken her pants off and the fact that the appellant had ejaculated on her.

27.1 With the exception of the aspects of the wrestling and the pushing down, all the other aspects in respect of which the Regional Magistrate found Cloete to have corroborated the complainant’s evidence, were actually not in dispute⁹.

27.2 As far as the remaining two aspects are concerned it is trite law that a report about a sexual incident generally cannot serve as corroboration,

⁸ Compare **Erasmus v Camdeboo Munisipaliteit** 2011 JDR 1477 (ECG) para [22]

⁹ Compare **S v Gentle** 2005 (1) SACR 420 (SCA) at 430 -431; **S v Scott-Crossley** 2008 (1) SACR 223 (SCA) para [8]

but will only be admissible as to the consistency of the allegation that there had been no consent¹⁰.

[28.] In his plea explanation the appellant expressly stated that he did not know why the complainant had laid the charges, but that he suspected that it may have been because he was married, because he had not been able to complete the intercourse and had made a mess on the complainant or because the complainant could possibly have been concerned that the events in the house could become known, and that it would then be said of her that she got involved with married men.

28.1 The Regional Magistrate found these possibilities to be "*ludicrous in the extreme*".

28.2 It would appear, with respect, that the Regional Magistrate lost sight of the fact that the appellant had expressly stated that he did not actually know what could have motivated the complainant to lay false charges against him. He was merely speculating.

28.3 Furthermore the Regional Magistrate apparently never considered why the complainant had not, when she was taken to the police station the very same day, opened a case. Her explanation that she was too emotional to do so, is difficult to believe, because she had at that stage already discussed the events in some detail with Cloete, and thereafter also with Mrs Balley.

28.4 Insofar as the Regional Magistrate's rejection of the possible motives raised by the appellant may have contributed to the rejection of the

¹⁰ Compare **S v Hammond** 2004 (2) SACR 303 (SCA)

version of the appellant as a whole, that would have been wrong in law. An accused person has no duty to explain why a complaint was laid¹¹.

[29.] In our view there were various unsatisfactory aspects in the evidence of the complainant, some of which the Regional Magistrate did not refer to.

[30.] The appellant's version, as contained in his plea explanation, was that he and the complainant had known each other for many years and that they once had sexual intercourse at the rugby field.

30.1 All the complainant was initially prepared to admit regarding the incident at the dance was that she and the appellant had kissed. In her police statement she also simply said that they had kissed on the rugby field, and added that it had been nothing serious¹². When the complainant and Cloete discussed the incident on the rugby field, after she had laid these charges against the appellant, she told Cloete only about a kiss¹³. When it was put to her that the appellant's version, in his plea explanation, was that they in fact had sexual intercourse on that occasion, she simply denied this.

30.2 In cross-examination the version of the complainant changed drastically, to a scenario where they had in fact wanted to have sex, where both of their pants had been pulled down and where they had in fact been attempting to achieve penetration, but had failed because of the fact that they had been standing.

[31.] The complainant's initial evidence was, as far as the incident in the lounge is concerned and as already said, that the appellant had repeatedly attempted to

¹¹ Compare **S v Lotter** 2008 (2) SACR 595 (C) para [38]; **Van der Watt v S** [2010] 3 All SA 434 (SCA) para [16] and **S v Raghobar** 2013 (1) SACR 398 (SCA) para [19]

¹² "maar dit was nie iets ernstig nie"

¹³ "'n soentjie"

get his hand into her pants, but that she had pulled away his hand every time¹⁴. Shortly after that, however, she corrected herself, claiming to have forgotten to say that the appellant had eventually succeeded in getting his hand into her pants and that he had then inserted his finger into her vagina. The Regional Magistrate apparently viewed the fact that the complainant had corrected herself in this way as a sign of honesty. How is it possible that the complainant could initially have forgotten such a vital piece of information? In fact, her initial evidence was in effect that each and every one of the appellant's attempts to even get his hand inside her pants had been unsuccessful, until he eventually had to get up to go to the door. Her initial version therefore in effect excluded any suggestion that the appellant had even succeeded to get his hand into her pants.

[32.] The Regional Magistrate furthermore clearly regarded the fact that the complainant had also mentioned penetration with a finger in her police statement as corroboration for her evidence in this regard. It is trite law that evidence of a similar statement is inadmissible under circumstances like these¹⁵. Also this part of the police statement was never canvassed in evidence as far as we could discern, and it therefore appears as if the Regional Magistrate had at some stage on his own read the whole statement and had then relied on contents thereof that he regarded as "*similar*" to what the complainant had testified in court, but which had never been canvassed in evidence.

[33.] In her evidence-in-chief the complainant denied that the appellant had at any stage been sitting on her lap, as stated by him. In cross-examination the complainant testified that, at the stage when the appellant asked her about the rugby field, he had already been on top of her for a while¹⁶, which would suggest that the appellant had in some way or another been on top of the complainant when they were talking about the rugby field. To Balley the complainant

¹⁴ "*elke keer het ek sy hand weggeruk*"

¹⁵ Compare **R v M** 1959 (1) SA 434 (A) at 437 – 438F

¹⁶ "*was hy al lankal bo-op my*"

reported that the appellant had in fact jumped onto her¹⁷. This was, however, never part of the complainant's evidence and would in fact be very difficult to reconcile with her version.

- [34.] When the complainant was examined by Sister Meissenheimer the next morning, she apparently told her that the appellant had forced her to have sex with him. The report contains no indication that the complainant had told Meissenheimer that the appellant had inserted his finger. Also, a report that the appellant had *"forced her to have sex with him"* would in our view suggest some form of coercion, rather than a violent subjection to one-sided sexual intercourse.
- [35.] According to Balley the complainant had told her that the appellant put his hand into her panty, but Balley made no mention of the complainant adding that the appellant had at any stage inserted his finger into her vagina. According to Balley the complainant told her that this happened in the bedroom, while the complainant's evidence was of course that it had happened in the lounge.
- [36.] It is clear from both the statement and the evidence of Balley that the complainant had also told her, or at the very least led her to believe, that actual sexual intercourse had in fact taken place.
- [37.] The complainant's report to Cloete consisted of a series of so-called Whatsapp-messages. The first message was only to the effect that the appellant had pinned her down. The exact contents of the subsequent messages were never disclosed by Cloete, but the only relevant additional information that appears to have been contained in them was that the door was locked, and that the appellant's semen had landed on the complainant. The Whatsapp report/s to Cloete were clearly silent on any form of penetration, let alone by specifically a finger.
- [38.] At no stage did the complainant shout for help; not even when the appellant got up from the couch after having allegedly already succeeded in penetrating her with his finger and when it sounded like somebody was knocking at the door.

¹⁷ *"hy het haar toe bespring"*

She did also not do so after having observed the appellant locking the door, and by that time the appellant's intentions must have been painfully clear to her. It appeared that the complainant had neighbours on both sides of her house, and also opposite the street, and she conceded that people could have been walking past her house in the street at that stage. She tendered various different explanations for not having called for help, not one of which was really satisfactory; *inter alia* that she was not the type of person who would scream.

- [39.] As already mentioned the complainant's initial version was that the appellant had thrown her down onto the bed¹⁸. This is also what she had apparently told Balley. In cross-examination, however, she changed her version and said that she had not been thrown down, but had only been pinned down on the bed; which would obviously beg the question how she landed up on the bed in the first place. Her police statement also made no mention of having been thrown onto the bed; only that they had wrestled until they were on the bed.
- [40.] Initially the complainant said that the appellant had indeed attempted to have intercourse with her, but could not succeed because she struggled too much. Later she testified that the appellant had ejaculated before he had even attempted to penetrate her vagina. At a later stage the complainant reverted to the version that the appellant had indeed attempted to penetrate, but that she had prevented it by closing her legs.
- [41.] In fact, on the complainant's initial version the appellant had not even pulled down her panty, which would correspond with his plea explanation that he had ejaculated onto her panty. The complainant's evidence that she wiped the panty (not herself) when she noticed the semen on it, would also fit in with the semen having landed on the panty. It would also correspond with Cloete's evidence that the complainant had reported to him that the appellant had ejaculated onto her panty. It was only at a later stage that the complainant testified that her panty had been pulled down, and was hanging around her ankles near the floor, when

¹⁸ "my op die bed gegooi"

the appellant ejaculated directly onto her vaginal area, and that she seemed to suggest that the semen landed up on her panty when she pulled it up after the incident. This version is, however, difficult to reconcile with the complainant's evidence that she wiped "*it*"¹⁹, in other words the panty and not herself, when she noticed the semen.

- [42.] The complainant straightened the bed when the appellant got up and went out of the room. This is also what she told Cloete. We found this difficult to reconcile with the actions of somebody who had just been subjected to a violent sexual attack. It is equally difficult to reconcile with a person who was so traumatized by the events in that house that she was too emotional to lay a complaint when she was at the police station later that very same day.
- [43.] The complainant initially testified that the appellant had simply walked away after the incident, but when she was confronted with the fact that she had told Balley that the appellant had run away, she had no hesitation to adapt her version and to say that the appellant had jogged home when leaving the house. On her initial version she would, however, also not have observed the appellant on the outside of the house, but she adapted version to one according to which she had followed the appellant when he left the house, locked the door and then peaked through the window, observing him jogging off. It is also not clear when, on this new version, it was that the complainant had gone to the bathroom then.
- [44.] The new evidence that she had locked the door at that stage is difficult to reconcile with Cloete's evidence that, when he arrived in response to the Whatsapp-messages, he found the complainant sitting in a chair in the lounge.
- [45.] Having regard to the degree of violence that must on the complainant's version have been applied, it could be argued to be strange that not as much as a single bruise was left. No mention was apparently made to Meissenheimer of such violence.

¹⁹ "*dit*"

- [46.] In our respectful view the Regional Magistrate was wrong to find, on the basis of the complainant's evidence, that she had not consented to what had taken place in both the lounge and the bedroom. Her evidence was, in our view, far from satisfactory on the issue of consent, and there was nothing to corroborate it.
- [47.] The same applies to the issue of penetration, as far as count 1 is concerned. In the absence of any independent corroborating evidence the evidence of the complainant alone was not nearly sufficient to exclude the reasonable possibility that no penetration had taken place.
- [48.] The fact that the appellant did not testify could not in these circumstances in our view have strengthened the case for the prosecution.
- [49.] It follows that we were of the view that the convictions should be set aside, which makes it unnecessary to deal with the appeal against the sentences.



C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I concur.



S L ERASMUS
ACTING JUDGE
NORTHERN CAPE DIVISION

For the Appellant:

Adv D Filand
(Instructed by Towell & Groenwaldt Attorneys)

For the Respondent:

Adv J S Mabaso
(On behalf of The Office of the Director of Public Prosecutions)