



Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

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

CASE NO: **CA&R 80/2015**
DATE HEARD: **22/02/2016**
DATE DELIVERED: **26/02/2016**

In the matter between:

PETRO, J

Appellant

and

THE STATE

Respondent

Coram: Olivier J *et* Erasmus AJ

JUDGMENT

Olivier J

- [1.] The appellant was charged with rape¹ in the Regional Court, Keimoes. He pleaded not guilty. His plea explanation was that the complainant had approached him where he was drinking near the house of her father. They agreed that he would let the complainant have some of his wine in exchange for intercourse at a later stage. The two of them, together with the complainant's young daughter, at a later stage went to a building which apparently served as a communal outside shower, to have intercourse there. When they got there the room was dirty and the appellant left the complainant there and went to fetch a blanket. He returned, spread the blanket on the floor and had consensual intercourse with the complainant. During the intercourse the complainant's father entered the room and said "*Sharon, Here wat maak jy*". Complainant then pushed him away from her and dressed. She walked away and he followed her. As they approached the house of one Dokkers the complainant started to shout and alleged that he had raped her. The appellant was angry because of the false allegation of rape and they argued, and in that process he hit complainant on her mouth. The complainant then made a report to Ms L. V. W.. The police were summoned. The appellant waited there until they arrived and he gave them his full co-operation.
- [2.] The complainant testified and denied having consented to sex in exchange for wine, or at all. Her evidence was that she was drunk when she arrived at the place of Dokkers. She was offered wine by the appellant. At some stage thereafter the appellant forced her from there, with her child, to a nearby shower. According to the complainant she did not scream while they were on their way from Dokkers' place to the shower, because the music at Dokkers was so loud that nobody would have heard. In the shower there was a blanket. The appellant forced her into the shower and onto the floor and undressed her. Over a period of approximately two hours the appellant raped her, while

¹ In contravention of the provisions of section 3 of the **Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**

constantly strangling her and repeatedly hitting her in the face with fists. The complainant cried and pleaded with the appellant, and the child also cried. During that process her father entered the shower. According to her he said something, but she could not say what. She then managed to get away and left with her child. She went to Dokkers place and told the people, presumably Ms V. W., that she had been raped. The next day her face was swollen, her eyes blue and she had marks on her neck as a result of the strangulation.

- [3.] Ms V. W.'s evidence was that she had arrived at the place of Dokkers early that evening. At some stage thereafter the complainant arrived. She was crying and reported that she had been raped by the appellant. Her face was swollen and scratched, her eyes were blue and swollen and there were scratches on her neck. The complainant was dressed, but was not wearing a panty. Ms V. W. then summoned the police.

- [4.] Lastly, as far as the case for the prosecution is concerned, a medical report (J88) by Dr Coetzee was handed in as an exhibit, on the basis that the contents thereof were admitted as correct. According to the report the examination was conducted at 22:15 on the day of the incident. It was noted that the complainant had a swollen upper lip, with a bleeding laceration of 0.5cm. As far as the gynaecological examination is concerned, the findings that were noted were that there was *"bleeding, abrasions and superficial lacerations on/around the urethra + left labia"* and the conclusion that was noted was that there were *"Definite signs of recent/forceful penetration"*.

- [5.] The appellant testified in his own defence, and the complainant's father, Mr K. P., was also called on his behalf.

- [6.] In his evidence the appellant basically persisted with the version in his plea explanation. He testified that his mother and one Elvis were also present when he and the complainant left and walked to the shower. According to the

appellant the complainant was drunk, but knew what was happening. According to the appellant the complainant's father appeared to be under the influence of alcohol when he entered the shower. The appellant testified that he had accidentally injured the complainant's lip during the argument that developed when the complainant accused him of rape. The appellant speculated that the complainant might have accused him of rape in an attempt to explain for the fact that she had been caught in the act of having intercourse with a relative, and because of being embarrassed about that. The evidence was that the appellant was the grandson of the complainant's aunt.

- [7.] Mr K. P. denied having entered the shower and insisted that he knew nothing at all about the incident between the appellant and the complainant. According to him he had indeed walked past the shower. He testified that he heard no screaming or crying from the shower at the time, and he admitted that he would have heard sounds like that when he passed the shower. Mr Petro also admitted that he was drunk at the time.
- [8.] The Regional Magistrate then called Dr Coetzee as a witness. Dr Coetzee, at least in his initial evidence, persisted in the findings and conclusion noted in the medical report. He testified that those findings were inconsistent with consensual intercourse. I will revert to the doctor's evidence in due course.
- [9.] The Regional Magistrate found that Ms V. W. had been an honest and trustworthy witness and that there had been no material contradictions in her evidence. It was found that Ms V. W.'s evidence that the complainant arrived at Dokkers' place with the injury on lip confirmed that the appellant had indeed assaulted the complainant during the incident when the intercourse took place. Reference was furthermore made to the evidence of Dr Coetzee that lubrication would usually be present during consensual intercourse, which would prevent injuries. The Regional Magistrate furthermore surmised that Mr K. P. may have gone to the shower because of the complainant's screams.

- [10.] The appellant was convicted and sentenced to 8 years imprisonment. Leave to appeal against his conviction was granted on petition.
- [11.] Although a court of appeal will not readily interfere with the factual and credibility findings of a trial court, it will do so where such findings are clearly incorrect².
- [12.] In an attempt to explain why she had not screamed for help when the appellant dragged her to the shower, the complainant testified that there had been loud music at Dokkers' place and that nobody would have heard her screams. This evidence was contradicted by Ms V. W., who testified that no music had been playing there. The Regional Magistrate made no reference at all to this contradiction and made no effort to call either the appellant's mother or Elvis on the crucial aspect of how it happened that the appellant and the complainant went to the shower.
- [13.] The Regional Magistrate made no reference at all to the apparent improbability of a blanket conveniently lying spread open in a communal shower that was, on the appellant's undisputed evidence, dirty and not used during that time of the year.
- [14.] In his medical report Dr Coetzee noted that, other than the injury to the complainant's lip, there were "*no other external injuries*". In his later evidence Dr Coetzee made it very clear that the complainant's version of the manner in which she had been assaulted during intercourse could not be true, having regard to the absence of injuries that one would have expected in the event of such a severe and prolonged assault. The same would obviously apply to the evidence of Ms V. W. about the injuries she had allegedly observed when the complainant arrived at Dokkers' place. In fact, on her evidence there would have been scratch marks on the complainant's face, which Dr Coetzee would

² **S v M** 2006 (1) SASV 135 (SCA) para [40]; **Karim v S** [2012] 2 All SA 125 (SCA) para [65]

undoubtedly have observed during his examination. This means that the evidence of the complainant and of Ms V. W. regarding the nature of the assault perpetrated on the complainant and the injuries sustained by her was false. On the face of it the Regional Magistrate never considered this issue³ and it is not clear how the Regional Magistrate could, in the circumstances and on the evidence of Ms V. W., have found that the injury to the complainant's lip had been sustained during intercourse.

[15.] The appellant's version was that the injury to the complainant's lip had not been caused during intercourse. Although it may be argued that he contradicted his version in this regard, as set out in his plea explanation, by later testifying that he had accidentally caused the injury, he remained consistent in the version that the injury to the complainant's lip had not been sustained during intercourse. In my view the evidence of the complainant and of Ms V. W. could not, in the circumstances, be said to have refuted the reasonable possibility of the injury to the complainant's lip having been sustained at some stage after the intercourse, time during an altercation between the appellant and the complainant about her allegation of rape.

[16.] In the judgment the Regional Magistrate made reference to only the doctor's evidence-in-chief, and the findings in the medical report. No reference at all was made to the evidence of Dr Coetzee in cross-examination.

16.1 In cross-examination Dr Coetzee testified that *"Usually when ... it is not consensual, you would sustain injuries in the fossa navicularis (sic) or in the perineum"*. Dr Coetzee's evidence-in-chief was, however, that the perineum was intact. He made no mention at all of any injury to the fossa navicularis. In fact, he testified that, apart from the injuries noted in the medical report, all other gynaecological observations

³ "It is cause for concern to find laudatory epithets applied by a trial court to witnesses when the record shows that their performance, judged by the written word, was obviously far from satisfactory" : **S v Heslop** 2007 (1) SACR 461 (SCA) para [13]

were normal. This means that the injuries which would on Dr Coetzee's own evidence normally have been typical of non-consensual intercourse were not found.

- 16.2 In maintaining that the injuries that he had found were nevertheless indicative of non-consensual intercourse, Dr Coetzee made reference to the fact that lubrication, which would prevent such injuries, would "*usually*" be present during consensual intercourse. When Dr Coetzee was confronted, in cross-examination, with a scenario where the intercourse would have been preceded by a business transaction, and no foreplay, Dr Coetzee initially conceded that that could explain the absence of lubrication, but he immediately thereafter reverted to his initial opinion that the penetration had occurred forcefully.

In my view the possibility that intercourse may have taken place as described by the appellant, and not forcefully (in the sense of a violent attack and an absence of any form of consent) was not excluded by the evidence of Dr Coetzee. In my view the court was not bound by the fact that the contents of the medical report had been admitted, more particularly not as far as the noted *conclusion*⁴ of forceful penetration was concerned⁵.

- [17.] In my view there can be little doubt that Mr K. P. was not truthful in his denial that he had entered the shower. His evidence that he had heard no screams or crying in the shower, and that he would have heard screams and crying when he walked past the shower, was however never discredited.

- [18.] As regards the fact that the complainant reported to Ms V. W. that she had been raped, it is clear from the evidence that the complainant and Ms V. W.

⁴ In the sense of an inference drawn or an opinion expressed, as opposed to a recorded fact.

⁵ Compare **Rance v Union Mercantile Co Ltd** 1922 AD 312 at 315; **Fourie v Sentrasure Bpk**1997 (4) SA 950 (NC) at 970

knew one another well. The complainant knew that her father had just seen her having intercourse with a family member, and would have known that an explanation was going to be necessary. This would also explain why she did not, immediately upon leaving the shower, scream for help.

[19.] The Regional Magistrate also apparently paid no attention to the undisputed evidence that the complainant had been very drunk at the time, or to the fact that, according to the medical report, the complainant had been suffering from hallucinations. In this regard it is significant that the complainant was not able to explain, in her evidence, how she had managed to get away from the appellant and why she did not know what her father had said. The appellant's evidence that the complainant had simply pushed him away from her and left, was therefore not really disputed. This would be extremely difficult to reconcile with a scenario where the complainant had been overpowered by a violent attacker and was being strangled and assaulted by him, while being pinned to the ground. On the complainant's version she would of course also in the process have had the time and the opportunity to get dressed before she left the shower for Dokkers' place, which is also difficult to reconcile with the behaviour expected from an extremely violent attacker such as the one described by her.

[20.] The complainant's evidence to the effect that the appellant had completely undressed her before the intercourse and the evidence that she had left behind her panty when she left the shower, was irreconcilable with the version in her statement to the police, to the effect that her pants and panty had not been completely removed by the appellant.

[21.] According to Ms V. W. she initially did not believe the complainant when she reported having been raped. She testified that she thought that the complainant may be crying because she was glad to see her father. There was no evidence that the complainant's father was there when the complainant

made the report. How Ms V. W. could furthermore have remained under this impression until she saw that the complainant was not wearing a panty, despite the complainant's immediate report of having been raped and at least her bleeding lip, is a mystery. This appears to be an improbability in the version of Ms V. W. which was not considered by the Regional Magistrate.

[22.] In the circumstances I am of the view that this court should not defer to the trial court's credibility findings. On the evidence the reasonable possibility of consensual intercourse was not rebutted.

[23.] It follows that I am of the view that the appeal should succeed and the following order is therefore made;

THE CONVICTION AND SENTENCE ARE SET ASIDE.

**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

I agree.

**S L ERASMUS
ACTING JUDGE
NORTHERN CAPE DIVISION**

**For the Appellant: Mr A Van Tonder
Legal Aid South Africa**

For the Respondent: Adv J J Rosenberg
Office of the Director of Public Prosecutions