

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
(REPUBLIC OF SOUTH AFRICA)

Case No: AR210/2011

In the matter between:

BRENT LYLE LEHMAN

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

HARTZENBERG, A.J.:

[1.] The Appellant, aged 44 at the relevant time was convicted on 18 May 2007 in the Regional Court, at Kokstad, of indecent assault. He was sentenced on the same date to a fine of R 4 000 or in default of payment of the fine to 2 years' imprisonment, which sentence was wholly suspended for a period of 5 years, on condition that the Appellant, during the period of suspension was not convicted of indecent assault. In addition, he was ordered to pay compensation to the complainant in the amount of R 5 000.

[2.] The Appellant, with the requisite leave, appeals against his conviction. He does so on a number of grounds, all of which are directed essentially at factual findings made by the learned Regional Magistrate.

[3.] The factual background to the appeal is briefly as follows: The Appellant was the Manager of the Town Talk Furniture Store in Matatiele at the time. The complainant applied for and was appointed to the position of Sales Advisor in the store and commenced working on 9 March 2005. The charge relates to events which took place in the room where the complainant resided, on 9 April 2005. The room occupied by the complainant is situated in a building where there are a number of such rooms which were being let out to a number of different persons. The complainant's version of the events was to the effect that the Appellant, with some force and threats pushed her onto her bed and attempted to have sexual intercourse with her. The Appellant was however disturbed by a knock on the door. The person knocking was a debt collector employed by Barnett's Furnishers, one Thabo, who was known to both the complainant and the Appellant. Once this happened, the Appellant left. The complainant was taken by Thabo to one Maliphapang, a neighbour and colleague of the complainant. One gathers from the evidence of the Appellant that this is the person, Katherine Kiba, to whom the Appellant referred in his evidence. The complainant, on the same day laid a charge with the Police. Her statement, however, was only recorded by Detective Inspector Sonia Lamarque and signed by her on 22 April 2005. The Appellant's version of what transpired in the room, is very different. According to him, it was the complainant who invited him into her room. She closed the door behind her and stood in front of the door. She touched his hand, from which he inferred that she was making sexual advances to him. He too said that Thabo arrived and knocked on the door. According to him, the complainant

invited Thabo in. The complainant was fully dressed, as was he. In addition to this, the Appellant alleges that the complainant was completely composed, and spoke in a normal tone.

- [4.] The evidence focused mainly on the events which took place on 25 March 2005, and those which took place on 9 April 2005. With regard to the events which took place on 25 March 2005, the evidence shows the following: 25 March 2005, was Good Friday. The Appellant fetched the complainant from her place of residence. They drove into a rural area and delivered a kitchen set to a customer. The evidence of the complainant, which was corroborated by that of her then boyfriend, one Maluleki Gidi, was to the effect that on this occasion, the Appellant came to the complainant's room. He knocked on the window calling for the complainant and said words to the effect that the complainant must wear a "G-string". The complainant accompanied the Appellant and, on her version, during the journey, the Appellant made various sexual advances to her by *inter alia* inserting his hand into her pants, touching her breasts, and making lewd and sexually loaded remarks to her. The Appellant's version of the events on this occasion, on the other hand, was that he had pre-arranged with the complainant that the particular delivery to the customer would take place on that day. Indeed, it was the complainant who asked that the delivery be effected then, since the customer had specially requested it, in view of the fact that the customer's husband would be returning home for the Easter weekend. According to the Appellant, nothing untoward happened on this occasion. He explained that the

discourse between him and the complainant was cordial, but at the same time congenial. According to him, they stopped at a small shop in a rural area where he gave money to the complainant to buy them each a coldrink. The complainant brought some sandwiches and fruit juice with her. She ate the sandwiches along the way. They stopped to enable the complainant to pick a bunch of cosmos flowers. He allowed the complainant to drive the vehicle, for a short distance, until he realised that her driving skills were inadequate. The complainant took a photograph of the Appellant with a mobile telephone, with him holding the cosmos flowers. The complainant, it is common cause, never laid a criminal charge against the Appellant arising from these events. In re-examination, the complainant, however, stated that she lodged a grievance, through a trade union representative, arising from this particular incident. She further stated that she heard that the Appellant had been suspended. This particular assertion was purely hearsay, and I do not take it into account for any purpose.

- [5.] Regrettably, the prosecution did not lead the evidence of either Thabo or Maliphapang. Neither did the prosecution lead the evidence of the Policeman or Policewoman with whom the complainant first laid the charge on 9 April 2005.
- [6.] Counsel for the Appellant, with some justification, criticised the way in which the case was presented by the prosecution. She also highlighted a number of aspects of the complainant's evidence which, it was contended, detracted from

the cogency and reliability of the complainant's evidence. In this regard, counsel, in particular, pointed to certain inconsistencies between the complainant's evidence and the statement she made to the Police. She also contended that an adverse inference should be drawn against the prosecution for not calling Thabo and Maliphapang.

[7.] In my view, despite certain imperfections in the evidence of the complainant, the prosecution had discharged the onus of proof, establishing the Appellant's guilt beyond reasonable doubt. I say so for the reasons which follow.

[8.] First, I do not find that any adverse inference should be drawn from the prosecution's failure to call either Thabo or Maliphapang. It is not clear on the evidence whether these persons had furnished statements to the Police. I accept that they were available to be called as witnesses. It is however noteworthy that the prosecutor stated during the trial that Thabo was available to be called by the defence. The failure by the prosecutor to call these witnesses or either of them, may be due to a number of factors, including ineptitude or inexperience on the part of the investigating officer and/or the prosecutor. In my view, it would be inappropriate, in these circumstances, to draw any adverse inference against the prosecution from the fact that neither of these witnesses was called. The position is that the complainant, on the very same day when the relevant incident took place, did report the matter to the Police. In fact it was the Appellant's own

evidence, that he was also approached during that same afternoon by the Police in connection with the incident.

[9.] Second, such inconsistencies as there were between the complainant's evidence and the contents of her police statement, are not of such a nature, in my view, as to justify the rejection of her evidence either in its entirety, or in respect of the material aspects which underpin the Appellant's conviction. It is well recognised that statements of this nature suffer from imperfections, often not caused by or in any way attributable to the witness who deposes to the statement. The causes of such imperfections are multiple and may include:

- The fact that statements of this kind are not intended to be a comprehensive account of the evidence which a witness will give in Court. The primary purpose of the statement, is that of obtaining sufficient information which would enable the prosecuting authorities to determine whether the institution of a prosecution is justified.
- The statement is usually recorded in the language of the Police officer recording the statement, which may be different to the home language of the witness. This was so it appears, the position in this matter. The complainant stated that she provided a statement in Isi Xhosa, which had to be translated or interpreted.

- Statements of this kind often use terminology with which the deponent is not familiar.¹

[10.] In this case the complainant was subjected to searching and thorough cross-examination. With regard to some of the inconsistencies between the complainant's evidence and her Police statement, I make the following observations: In relation to the complainant's evidence as to what transpired between her and the Appellant in the bedroom, it is clear to me that details of these events may well be inadequately and even incorrectly recorded in her Police statement. It should also be borne in mind that the complainant started giving her evidence on 14 September 2006, that is to say some 17 months after the relevant events. Her cross-examination was interrupted and her evidence was only finally concluded, on 16 March 2007. Events such as those described by the complainant, one may safely accept, would induce fear and excitement which may well result in diminished recollection of precise details of the events and, particularly the sequence of events. The criticism that the complainant said in her Police statement that when there was a knock on the door she gave a "shout", after which the person knocking opened it, whereas in her evidence she stated that she gave an instruction that the person should enter, is, in my view, not justified. The import of the complainant's evidence is that she made it known to the person knocking that he should enter. The further criticism that the

¹ S v BRUINERS EN 'N ANDER, 1998(2) SACR 432 (SE) at 437 h
S v MAFALADISO EN ANDERE, 2003(1) SACR 583 (SCA) at 593 e – 594 h
S v GOVENDER, 2006(1) SACR 322 (E) at 324 j – 326 h

complainant in her Police statement said that she closed the door behind her after the Appellant had entered, whereas in her evidence, she stated that it was the Appellant who closed the door, in my view, is not material. Again, what was material, is that the door was closed, and the complainant and the Appellant, were alone in the complainant's bedroom. The fact that the complainant did not in her evidence in chief state that the Appellant on 9 April 2005 said to her that he wanted to make love to her, whereas she did state in her Police statement that he did make such statement to her, in my view, is not material. It appears that the complainant was not specifically asked, when she was examined in chief, whether the Appellant had on 9 April 2005, said that he wanted to make love to her. This is the kind of detail, which even a perfectly honest and candid witness may forget.

[11.] In my view, the learned Regional Magistrate's finding that the Appellant did indecently assault the complainant on 9 April 2005, is correct. My reasons are the following: First, the Magistrate, correctly in my view, held that the Appellant was sexually attracted to the complainant. It is significant that on both occasions when the complainant alleges the Appellant behaved inappropriately towards her, the initiative, for being alone with the complainant came from the Appellant. On the first occasion, namely Good Friday 25 March 2005, being a public holiday, it seems that the Appellant arranged a somewhat extra-ordinary delivery of a kitchen set to a customer. On the second occasion, the Appellant, after he had given the complainant a lift home, and had dropped her off, returned to the

complainant's place of residence. I find the Appellant's explanation as to why he returned to the complainant's place of residence, unconvincing. It also appears, even on the Appellant's own version, that he, being in a position of authority, behaved in a manner which was unusually familiar towards the complainant. Second, I find that the evidence of the complainant that, on 25 March 2005, the Appellant told her to wear a "G-string", as corroborated by the evidence of Gidi, clearly illustrates that the Appellant had, even before departing to effect the delivery of the kitchen set, made a suggestion to the complainant that he found her sexually attractive. The further conduct of the Appellant on 25 March 2005, as testified to by the complainant, is consistent with the Appellant's earlier statement before departing that the complainant should wear a "G-string". It is noteworthy that when both the complainant and Gidi were cross-examined, it was not put to them that their evidence with regard to the "G-string", was false, but merely that they had misheard the Appellant. Third, the Appellant, on his own version, stated that it was inappropriate when, on his own version, the complainant held his hand, in the complainant's bedroom, with the door closed. If, the Appellant indeed believed that what was taking place between him and the complainant, inside her bedroom, was inappropriate, he was singularly inactive in doing anything about it. Fourth, the conduct of the complainant, in immediately, once the Appellant left, taking steps to lay a charge, in my view, is entirely consistent with the complainant's state of mind and attitude that the Appellant had behaved inappropriately and indeed wrongfully towards her on 9 April 2005. Fifth, the conspiracy theory put forward by the Appellant as to why the

complainant would falsely implicate him, in my view, is speculative at best, for the Appellant. The complainant had by then been employed for about a month at Town Talk. It is hardly likely that she, where she depended upon her employment, would become embroiled in such conspiracy with Kathrine Kiba, who previously had a dispute with the Appellant, more so in spearheading a campaign to get rid of the Appellant, within such a short period of time. Even on the Appellant's own version, by the time of the relevant events, the dispute with Kathrine Kiba, had been determined and she had been reinstated. Sixth, it should be borne in mind that a trial Court's conclusions, in the absence of misdirections, are to be presumed to be correct. A reasonable doubt as to such conclusions will not suffice. If an appeal Court is merely left in doubt, it will uphold the trial Court's conclusions.² Counsel for the Appellant further asked that the appeal be upheld and that the conviction and sentence of the Appellant be set aside and further that an order be made that the trial Court hear the evidence of Thabo. Such request, in my view is not well founded. Both the prosecution and the defence had ample opportunity to call Thabo at the trial. The request was in any event belatedly made. For this to have had any substance, it was necessary for the Appellant to institute a formal application to lead further evidence on appeal. There is no such application before the Court.

[12.] For these reasons, I would therefore propose that the appeal be dismissed.

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R v DHLUMAYO AND ANOTHER, 1948(2) SA 677 (A) at 706
S v MLUMBI EN 'N ANDER, 1991(1) SACR 235 (A) at 247 g

HARTZENBERG, A.J.

I agree and it is so ordered.

VAN ZÿL, J.

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COUNSEL FOR THE STATE: Adv W. Smit, instructed by the Director of
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