

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

CASE NO. 136/2012

In the matter between:

CARL DENVER HOUSTEN

Appellant

and

THE STATE

Respondent

JUDGMENT

GORVEN J

[1] The appellant was charged with one count of rape as defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The rape was alleged to have taken place at gunpoint on 11 September 2009 at the flat of the complainant, a 31-year-old woman, in Newlands East. The appellant pleaded not guilty but was convicted and sentenced to eight years' imprisonment. The appeal is against conviction only, with the leave of the learned regional magistrate.

[2] The state relied on two witnesses and a medical report. The first witness was the complainant and the second was her boyfriend of the time, Mr McKenzie. The medical report was handed in by consent and the contents were

admitted in terms of section 220 of the Criminal Procedure Act 51 of 1977. I will revert to this below.

[3] The complainant testified that she was at her flat with Mr McKenzie during the evening of the day in question. At approximately 22h45, he went to purchase beer. Shortly afterwards, she heard a knock on the door and, when she opened it, saw the appellant. There was a security gate between the appellant and her. The appellant, calling her by name, asked where her boyfriend was. She told him that he had gone to purchase beers. He then told her to open the gate in a soft voice. After she opened the gate, he pointed a firearm at the back of her head and told her that if she screamed, he would shoot her and her boyfriend. He gestured that she should enter the bedroom and followed her. He then said 'Do me a favour and take your panty and everything off'. She then lay on the bed at his instruction and he raped her. He then indicated that he wanted anal intercourse and when she refused he said 'Oh, you don't do it? Okay, never mind.' She said that the firearm was pointed at her head during the encounter. He then told her to shut up and never tell her boyfriend or anyone, dressed and left. She remained in the bedroom crying on the bed. After a few minutes her boyfriend returned, saw her crying and asked what was wrong. When she did not tell him, he smacked her on her legs and asked again. She then said to him that she was missing her twin brother, who had died some years before that. They then went into the kitchen and the boyfriend drank alcohol but the complainant did not partake. She said that they partied. She also said that she just sat and cried. She told her boyfriend what had happened after five days. He then phoned the police and went to see them that day. They sent her to the doctor that same day.

[4] Mr McKenzie gave evidence that he left the flat to purchase beer at approximately 22h45. On his return, he asked the complainant to open the door and gate for him which she did. She was, at the time, in the kitchen and was

crying. In response to his enquiry, she told him that she was missing her deceased twin. Before he left to purchase the beers, they had been drinking together in the flat and she had had about two glasses of alcohol and he had had about one beer. Five days after the incident, she told him, out of the blue, that she had been raped by the appellant, mentioning him by name. He testified that he had seen the appellant at approximately 21h00 on the evening in question just outside the flats. This changed under cross-examination to his having seen the appellant at that time at a friend's house which was a tavern.

[5] The report of the medical examination of the complainant is dated 25 September 2009, 14 days after the incident. The report states that no extra-genital injury was noted. It states that the findings are consistent with genital penetration. It also records that the complainant informed the medical practitioner that she had had consensual intercourse three days before the examination.

[6] The appellant was the only witness called in defence. In both his bail application and at the outset of the trial when explaining his plea he raised an alibi defence. He denied having visited the complainant on the evening in question. He had last been to her residence about five or six years before for her late brother's funeral. He denied having raped the complainant. He stated that he knew the complainant well and had been very friendly with her deceased brother. He had seen her and Mr McKenzie during the afternoon at the tavern consuming alcohol on the day in question. He had left the tavern at approximately 19h00 and had gone home to watch a documentary with his family on the September 11 tragedy since it was the anniversary of that event. The documentary ran from 21h00 to 22h00 and he thereafter went to bed. When he left the tavern the complainant and Mr McKenzie were still there. There had previously been no problems between himself and the complainant except that he had refused to buy her a beer on a few occasions, the last one being approximately two weeks prior

to the incident. He knew that the complainant had been shot in the head approximately ten years earlier and that, since that time, her thought processing had been a bit slow.

[7] The crime of rape is a serious scourge on our society. It is, in essence, a crime of violence involving the assertion of power over women by the rapist. It has rightly received annual focus at this time of year in the 16 Days of Activism for No Violence Against Women and Children. The founding values of our constitution include human dignity, the achievement of equality and non-sexism.¹ The Bill of Rights enshrines every person's 'inherent dignity and the right to have their dignity respected and protected'.² The crime of rape clearly negates that right in a most fundamental way.

[8] The previous approach of our courts to evidence by rape complainants, was to invoke a cautionary rule when assessing that evidence. Holmes JA articulated in *S v Snyman*³ in the following way:

'Unlike an accomplice in a criminal trial, a complainant in a sexual case is not *ex hypothesi* a criminal. Nevertheless in respect of both of them there exists an inherent danger in relying on their testimony. First, various motives may induce them to substitute the accused for the culprit. Second, from their participation in events which actually happened, each has a deceptive facility for convincing testimony, the only fiction being the deft substitution of the accused for the real culprit. Hence in sexual cases there has grown up a cautionary rule of practice (similar to that in accomplice cases) which requires-

- (a) the recognition by the Court of the inherent danger aforesaid; and
- (b) the existence of some safeguard reducing the risk of wrong conviction, such as corroboration of the complainant in a respect implicating the accused, or the absence of gainsaying evidence from him, or his mendacity as a witness....'

¹ Section 1 of the Constitution of the Republic of South Africa, 1996.

² Section 10 of the Constitution.

³ 1968 (2) SA 582 (A) at 585 C-H.

Amongst other things this approach clearly negated the right to equality mentioned above. It is thanks to the values in our Constitution that this approach has been decisively rejected in *S v Jackson*⁴ in trenchant terms:

‘In my view the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.’

And, in dealing with the equally irrational belief that complainants cynically cry rape more readily than those who make false claims in other offences, Olivier JA said this:

‘Few things may be more difficult and humiliating for a woman than to cry rape: she is often, within certain communities, considered to have lost her credibility; she may be seen as unchaste and unworthy of respect; her community may turn their back on her; she has to undergo the most harrowing cross-examination in court, where the intimate details of the crime are traversed *ad nauseam*; she (but not the accused) may be required to reveal her previous sexual history; she may disqualify herself in the marriage market, and many husbands turn their backs on a “soiled” wife.’⁵

To this I would respectfully add that in sexual assault cases a double cautionary rule was often invoked; that applying to single witnesses and the one now rejected. This was because such cases overwhelmingly rely on a single witness because the brazenness of the perpetrator does not often extend to committing the offence in the presence of any other witnesses. This made it exceptionally difficult for the state to obtain a conviction. It is believed that rape survivors often chose not to press charges as a result of these impediments, to their detriment and that of justice in society.

⁴ 1998 (1) SACR 470 (SCA) at 476e-f.

⁵ *Jackson* at 475e-g.

[9] Having said this, there is an unacceptable tendency in certain sectors of our society to assume that, if someone is charged with the crime of rape, that person must be guilty. This is probably at least partly as a result of the impediments mentioned above and is, to that extent, understandable. It finds expression in comments within the media and in public demonstrations outside courts in support of convictions in rape cases. If a person accused of rape is acquitted, the response of such people is that an injustice has been perpetrated and that rapists should not be allowed to go free. This attitude is inimical to the proper functioning of the criminal justice process. It substitutes the decision of the court of public opinion for that of a court of law. It is designed to place pressure on a court of law to convict a person when the evidence may not support such a conviction. If a conviction does not follow the court is criticised for siding with rapists against rape victims.

[10] At the heart of the criminal justice system is the presumption of the innocence of an accused person until convicted in a court of law. This presumption, accepted in almost all jurisdictions in the world, has been enshrined in S 35(3) of the Constitution.⁶ This has been clearly embraced and explained by the Constitutional Court in the following terms:

‘The purpose of the presumption of innocence is to minimise the risk that innocent persons may be convicted and imprisoned. It does so by imposing on the prosecution the burden of proving the essential elements of the offence charged beyond a reasonable doubt, thereby reducing to an acceptable level the risk of error in a court's overall assessment of evidence tendered in the course of a trial.’⁷

⁶ This section reads as follows: ‘Every accused person has a right to a fair trial, which includes the right...to be presumed innocent....’

⁷ *S v Manamela & another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) para 26 (references omitted).

As Olivier JA said in *Jackson*,⁸ the burden is on the State to prove the guilt of an accused beyond reasonable doubt. This was spelt out more recently in ringing terms:

‘In open and democratic societies that have adversarial criminal justice systems similar to ours, the centrality of this right to a just criminal process has been strongly emphasised. The requirement that the State must prove guilt beyond a reasonable doubt has been called the golden thread running through the criminal law and a prime instrument for reducing the risk of convictions based on factual error. The very first judgment of this Court affirmed the significance of the principle of not convicting a person if a reasonable doubt as to his or her guilt existed.’⁹

This sometimes has the unfortunate consequence that accused persons who may well be guilty are acquitted on the basis that a reasonable doubt exists as to their guilt. But courts cannot succumb to beliefs of the general public which has not evaluated admissible evidence in a court of law because the outcome may be criticised. With that in mind, I turn to the evidence in this matter.

[11] The complainant was a single witness as to the occurrence of the incident in question. It is so that an appeal court seldom will interfere with findings of fact unless there have been misdirections on the part of the trial court. This is not an inflexible approach, As was said in *R v Dhlumayo & Another*:¹⁰

‘10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

11. The appellate Court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.’¹¹

⁸ See fn 4.

⁹ *S v Baloyi (Minister of Justice & another intervening* 2000 (2) SA 425 (CC) para 15 (references omitted).

¹⁰ 1948 (2) SA 677 (A) at 706

¹¹ In *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) para 78-80, the Constitutional Court upheld the approach in that matter and the dictum in *S v Kelly* 1980 (3) SA 301 (A) at 308B-D which questioned the sacred cow of credibility findings by trial courts in

[12] In the present matter it is my view that the learned Magistrate misdirected himself in his findings of fact. First, his judgment was premised on a finding that it was proved that a rape had taken place on the evening in question. His evaluation of the evidence took place on that basis. Apart from the evidence of the complainant, however, there is absolutely no evidence that this was the case. The report, whose contents were admitted as true, did not even go so far as to say that his findings were consistent with rape. He said that his findings were 'consistent with genital penetration'. But he also recorded that, three days prior to his examination which took place 14 days after the incident, the complainant had engaged in consensual sexual intercourse. In these circumstances, it would be extremely surprising if his findings were not consistent with 'genital penetration'. The doctor was not called to give evidence. There is a worrying tendency not to call expert medical witnesses to testify. The state satisfies itself with handing in reports with or without an admission that the contents are accurate. This is often so in circumstances where the findings and reasons for the findings could make the difference between an acquittal and a conviction.

[13] It is necessary to recapitulate briefly the approach of courts to medical evidence. First, this usually involves giving opinion evidence. For such evidence to be admissible, the person giving it must be an expert in the field. This is because it is only such an expert who can give the court information to which it does not have access.¹² In addition, the expert witness must not only give her or

the following terms: 'In any event, as counsel conceded in a homely metaphor, demeanour is, at best, a tricky horse to ride. There is no doubt that demeanour - "that vague and indefinable factor in estimating a witness's credibility" (per Horwitz AJ in *R v Lekaota* 1947 (4) SA 258 (O) at 263) - can be most misleading. The hallmark of a truthful witness is not always a confident and courteous manner or an appearance of frankness and candour. As was stated by Wessels JA in *Estate Kaluza v Braeuer* 1926 AD 243 at 266 more than half a century ago in this Court:

"A crafty witness may simulate an honest demeanour and the Judge had often but little before him to enable him to penetrate the armour of a witness who tells a plausible story."

On the other hand an honest witness may be shy or nervous by nature, and in the witness-box show such hesitation and discomfort as to lead the court into concluding, wrongly, that he is not a truthful person.'

¹² *Ruto Flour Mills (Pty) Ltd v Adelson (1)* 1958 (4) SA 235 (T) at 237B.

his opinion, but must give reasons why this opinion has been arrived at for it to be admissible and of any use. The following was said of this need:

‘As I see it, an expert's opinion represents his reasoned conclusion based on certain facts on data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.’¹³

The process of reasoning may be a matter of ordinary logic but may also involve the application of scientific principles. The evidence would, if a person was not an expert, be inadmissible because it is the sole preserve of a court of law to arrive at a decision on the facts. The opinion of a person is, therefore, generally not relevant or of inadequate relevance. Experts are allowed to give opinion evidence because they can both arrive at facts in their field which are material to the matter in dispute and explain the significance of the facts.

[14] When medical reports are handed in without the expert witness being called, the significance of factual findings and the reasons for them might not form part of the report and most certainly cannot be interrogated by way of cross-examination or clarifying questions by the court. In the present matter, no reasons were given in the report for the finding in question. It may be that, if the doctor in question had been called to testify, he could have given evidence distinguishing features of genital penetration by way of consensual sexual intercourse from genital penetration by way of rape and have explained which of the two was, in his opinion, more likely to have taken place and why he formed that opinion. The medical report handed in studiously avoids any finding that it was consistent with rape, even though it was reported to the doctor that this had taken place. I am of the view that the report is of no assistance. If the doctor had been called, it may

¹³ *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 371F-H.

have led to a basis for the finding by the magistrate that a rape had taken place. As it is, the finding of the magistrate that the appellant could not dispute that the complainant had been raped has no basis in the medical evidence and amounts to a misdirection.

[15] In the second place, the magistrate misdirected himself in ignoring serious contradictions in the evidence of the complainant. I will list only a few. She initially testified that the appellant produced a firearm only once the gate to the flat had been opened. This was contradicted at a later stage when she said that he had banged the firearm on the gate and pointed at her before he entered. She initially stated that she did not consume alcohol after Mr McKenzie returned to the flat, saying that she had only cried while he drank. Under cross examination she said the following: 'I said we were drinking that when Illy brought the beer I didn't drink. But maybe after that I said "You know what, let me have a glass."' She initially indicated that the appellant gestured to her to go to the bedroom before the rape took place. She was specifically asked whether or not the appellant told her to do so and she emphatically denied this. At a later stage she testified that the appellant had told her to go to the bedroom. She initially testified that the appellant had ejaculated but later indicated that she did not know whether or not this had happened. She first denied that she had been at the tavern that afternoon but later conceded that she had been there, as the appellant later testified. She first said that the appellant had visited her flat many times after the death of her brother but later conceded that the last visit had been around the time of his funeral as was the evidence of the appellant.

[16] The third misdirection was that the magistrate failed to consider the contradictions between the evidence of the complainant and that of other evidence relied on by the state. She testified that, after he had purchased the beers, Mr McKenzie located her in the bedroom where she was crying. In order

to find her there, he must have gained access to the flat himself. He said that she allowed him into the flat and was crying in the kitchen at the time. Her evidence that, after laying a charge with the police five days after the incident, she went immediately to the district surgeon is contradicted by the date of the examination which says that the visit took place fourteen days after the incident. A further concern is the fact that the complainant not only took five days to report the incident but only presented herself for medical examination a further nine days later. No explanation for this conduct was sought or proffered.

[17] Contradictions are not necessarily an indication that no reliance can be placed on the evidence of a witness or witnesses. However, these are material contradictions. It can hardly be imagined that the complainant would not remember whether a firearm was banged on the gate and produced prior to her opening the gate or whether it was only produced after she had opened the gate. She did not claim that she could not remember whether the appellant had gestured to her to enter the bedroom or had instructed her to do so, emphatically denying the latter. It seems difficult to believe that she could not recall whether or not she had consumed alcohol after the incident. Her emphatic denial and subsequent testimony that she had a glass or two cannot both be correct. This is also true of her testimony as to whether she visited the tavern that afternoon.

[18] In contrast, the appellant had raised a detailed alibi defence as early as his bail application. He was not shaken in cross-examination. There was nothing inherently improbable in his defence. The magistrate ought to have found that his evidence was reasonably possibly true and given him the benefit of the doubt.

[19] In the light of the above, it is my view that the magistrate erred in finding that the state had proved beyond reasonable doubt that the appellant raped the complainant. The state case simply did not pass muster.

In the result, the appeal is upheld and the conviction and sentence of the appellant are set aside.

I agree:

KOEN J

Date of hearing:	29 November 2012
Date of judgment:	7 December 2012
For the appellant:	JE Howse, instructed by Prathima Jairajh & Company
For the respondent:	V Alamchand