

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

Case Nr: CA & R 47/09
Case Heard: 31/08/2009
Date Delivered: 18/09/2009

In the matter:

HENDRIK LESALA

Appellant

versus

THE STATE

Respondent

Coram: Kgomo JP *et* Mjali AJ

JUDGMENT ON APPEAL

KGOMO JP:

[1] The appellant, a man of 31 years, was convicted in the Kimberley Regional Court of the rape of a 17 year school girl at Delpportshoop and was sentenced to 10 years imprisonment. He appeals against both his conviction and sentence.

[2] The appellant was a friend to the complainant's brother and frequented the complainant's parental home which she shared with her mother and her brother Jacob. His

initial visits were ostensibly paid to Jacob but Jacob subsequently became a pretext to gain access to complainant. The appellant would, with the full knowledge and apparent acquiescence of complainant's mother and Jacob, invite the complainant to accompany him on errands which in the main were meaningless or nonsensical like purchasing a packet of cigarettes whereas complainant was a non-smoker or buy a packet of dried potato chips which he could in any event have purchased and brought along with him. Jacob never accompanied them but complainant's friends occasionally did.

- [3] On the 1st August 2005, the date of the alleged rape, the appellant arrived at the complainant's home in a borrowed van. He outrightly requested the complainant to accompany him to the shops but it turned out that the intention was really for them to attend a braai/barbecue at the home of the appellant's police friend. The complainant, whether she was abash or for whatever reason, was unwilling to alight from the vehicle which was parked next to the front door of the braai house. As the vehicle had to be returned to its owner the appellant chose that its owner's driver drop them off at a beerhall or tavern. There is an immaterial dispute in the evidence of the pair on

whether liquor was bought or consumed at any of these places.

- [4] The complainant claims that she was raped in a piece of open veld behind a clinic. The appellant to the contrary maintains that he had consensual sexual intercourse with her where he resides. In the large scheme of things this dispute, which is not soluble on the evidence in favour of any of the disputants, is not a major factor.
- [5] After the sexual encounter, which happened relatively late at night, the appellant walked the complainant to her home whereat he knocked on the door. The complainant's mother let them in. Appellant told her something to the effect that he has brought her daughter home. In the presence of the three of them the complainant did not complain to or report the alleged rape to her mother nor did her mother say anything, at least nothing that displayed her displeasure.
- [6] There was a lull from the 1st August 2005 until a month later on the 2nd September 2005. On this latter day the complainant was morose and crying at her school where she was doing Grade 10. Her close friend and class mate, Marcelyn Van Schalkwyk, enquired what

was wrong. She goes on to say: "*Toe wou sy (the complainant) my nie eerste sê nie. Ek het haar gesoebat om my te sê, toe sê sy [sy] is die vorige aand ge-rape deur Hendrik (the appellant).*" Marcelyn told complainant to report the incident to her mother but complainant would have none of that and did not furnish any reason to Marcelyn for her reluctance. Marcelyn informed complainant that she was going to report the matter to her (Marcelyn's) aunt Ms Lena Lesala, which she did the same day (02/09/2005).

- [7] Lena Lesala urged Marcelyn to report what she had told her to complainant's mother but Marcelyn declined as complainant forbade her to. Lena Lesala nevertheless reported the alleged rape to complainant's mother only on the 5th September 2005. That was the first time the parent learned of her daughter's reported rape ordeal. She immediately summoned her daughter and Marcelyn home (to Delportshoop) from Barkley West where they were visiting relatives. Upon their return she wanted to know from her daughter "*hoekom het jy my nie gesê jy is ge-rape nie my kind? --- Toe sê sy vir my ma ek was bang om jou te sê.*" A charge was laid with police on the same day and the appellant was arrested two days later on the 7th September 2005.

[8] An incident of some significance occurred approximately a month before the alleged rape. Without the knowledge and consent of her mother or the knowledge of Jacob the complainant accompanied the appellant to a hamlet called Campbell between Delportshoop and Kimberley where they put up overnight at the appellant's relative's home. They shared a room. The dichotomy in their evidence is that appellant says they shared a bed and were intimate whereas complainant maintains that appellant slept on the couch and she slept on the floor. The following day they proceeded to a town called Douglas because the appellant suggested that he wanted to show complainant where her grandmother stays. Complainant in fact did not know where her grandmother stayed and did meet her.

[9] The complainant made a good impression on the Regional Magistrate who found her testimony to be reliable. He expressed himself in these terms (translated by me):

"As far as the complainant is concerned I was reasonably impressed with her as a witness. In my view there is nothing adverse in her demeanour that can be held against her. In the main she adhered to her account of the events. She did not dramatize her evidence nor did she exaggerate matters against the

accused. On the contrary when her evidence was called into question she cried, thus demonstrating that she was genuinely traumatised by the experience. No reasons were proffered why the complainant would implicate the accused falsely. This aspect by itself, it should be said, is not decisive. People sometimes do things for sinister reasons. However, when regard is had to the good relationship that existed between the accused and the complainant and their respective families it is inconceivable that complainant would the next moment bring a trumped up charge against the accused. The accused belatedly surmised that his predicament was caused by the fact that he impregnated complainant and that she committed an abortion as the reason for being falsely incriminated. But this aspect was never put to the complainant."

[10] I am not persuaded that the complainant was as good a witness as the Magistrate made her out to be. Sometimes the circumstances and probabilities militate against the trustworthiness of her evidence or parts thereof. In **S v Heslop** 2007(1) SACR 461(SCA) at 470e-g the court had this to say:

"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. In such a

case an appeal Court will more readily interfere with the findings of the trial court as to the weight to be attached to the witnesses' evidence and its ultimate conclusion based on such findings."

- [11] The Magistrate failed to detect that whereas the appellant and the complainant's brother, Jacob were initially close friends Jacob was gradually relegated to the background and was ultimately sidelined as appellant patiently forged a close relationship with the complainant as already shown hereinbefore. This excerpt from the complainant's mother's evidence-in-chief bears this out:

"Hoe gereeld het Hendrik by u huis gekom? --- Hy het begin saam met my seun geloop. Die oudste seun van my.

Wat is u seun se naam? --- Jakob Ratel.

En hy en Doreen – het hulle met tye saam gery? --- Toe raak Hendrik nou vir Doreen-goed gewoond daar by die huis.

Weet u of hulle al by tye saam iewers was? --- Meneer, ek was by `n partytjie gewees daardie naweek. Wat ek by die huis kom toe hoor ek Hendrik het vir Doreen by die huis kom haal, hulle is Douglas toe. Toe weet ek nie."

- [12] Even though it cannot be said that complainant's mother encouraged or approved of the closer bond that

was developing between the appellant and her daughter she could not have missed the substitution of her siblings in the life of the appellant. She should have nibbed the questionable association in the bud. When the incident in question took place the complainant was 17 years old and the appellant 31. The disparity in age screamed at her that they were not of the same peer group. The fact that complainant's mother says she regarded the appellant as her son does not explain the relegation of Jacob to the level of a spectator. The relationship may have started out as platonic but from the evidence before us it cannot be said with any measure of probability that the perceived platonic relationship did not progress beyond that.

- [13] The Magistrate was either unmindful of the relationship described above or he attached insufficient weight to the evidence that establish that situation. For instance he uses the disparity in ages of the protagonists incorrectly. He remarked as follows:

"Die beskuldigde [is] 'n persoon wat glad nie in die protuurgroep val van klaagster nie. Hy is 'n volwasse persoon. Hy het alreeds kinders by twee ander vrouens. Dit is seker nie onmoonlik dat hy met die klaagster sou loop nie, maar dit is basis nie die normale portuurgroep wat 'n mens met die beskuldigde sou assosieer nie."

- [14] He concluded later that therefore they could not have been lovers. The Magistrate seems to have overlooked the fact that appellant, complainant and Marcelyn are *ad idem* that the pair were frequently in each other's company. On other occasions complainant's (girl) friends joined them in their jolly rides. It must be added that all state witnesses contradict the appellant that there was a love relationship between him and complainant. The point to be made here really is that the Magistrate was remiss to intimate or suggest that the age disparity is a pointer against the existence of a love relationship. Love relationships between couples with disparate ages are legend.
- [15] The complainant says that before and during the course of the alleged rape she objected against the appellant imposing himself on her, she thrashed about, screamed several times and even bit the appellant on the shoulder in an effort to stave off being violated. He warned her if she screams again "*dan gaan ek sien wat gaan hy doen.*" The appellant did not sustain any injury as a result of being bitten.
- [16] The ordeal that complainant says she went through is incongruent with what her mother observed when she came home. She says the appellant knocked on the

door and announced himself. The door was closed but unlocked and she allowed him in. Appellant then said he had brought the complainant home. *"Toe sê ek hom nêe, orraait. Toe lê en slaap ek."* Complainant says she did not report because she feared being scolded. In other words she did not fear being harmed by the appellant if she reported him.

- [17] In her evidence-in-chief complainant says nothing about crying or her mother shouting at her. However, under cross-examination (conducted in English) the picture changes somewhat. She says:

"And that is when he informed your mother that he brought you home and you went straight to the room and he stood there and had a little chat with your mother --- Nêe, wat my ma my vra van waar af kom ek, het hy geantwoord. Hy het nie gesê van waar af kom ons nie, maar hy het gesê hy het vir my huis toe gebring en hy het buitekant die deur gestaan wat hy saam met my ma gepraat het. En my ma het vir my geskel en aan gegaan, toe is dit wat hy gesê het hy het vir my huis toe gebring.

So your mother shouted? --- Ja, my ma het my geskel omdat ek so laat huis toe gegaan het.

Did you say anything or try to explain to your mother why you were late?

--- Nee, ek het gehuil maar toe sê hy vir my ek moet stil bly en ek het net in gegaan en ek het niks vir my ma gesê nie.

When your mother was shouting, you cried? --- Ja, ek het gehuil."

(My emphasis).

- [18] The Magistrate says it may have faded from the mother's memory that her daughter cried when the matter surfaced and was reported to the police on the 5th September 2005, a month after the nocturnal knock on the door. I cannot envision how the mother could have forgotten such a distressing situation. If complainant cried she certainly would have asked both parties on the spot to explain themselves. Complainant says she did not report the alleged rape because her mother would have scolded her. Her mother did that in any event, in accordance with her version under cross-examination, as emphasised above. I am inclined to hold that the mother's version must prevail because when the complainant was summoned from Douglas by her mother on the 5th September 2005 and asked why she did not report the rape incident to her the complainant said she feared being scolded. It is therefore to be doubted that complainant cried or was scolded by her mother that evening. In this regard the Magistrate erred as well.

[19] The Magistrate has set a lot of store by the complainant's attempt to commit suicide. Why she did so is not entirely clear from the record because the cause was not fully ventilated. The prosecutor enquired from her whether anything dramatic involving her life took place after the sexual encounter with the appellant. She said she attempted ending her life by swallowing an unspecified heap of tablets ("hoop pille") in January, apparently of 2006. It could be speculated that the attempted suicide had to do with the alleged rape. However, it remains mere conjecture. Complainant says she, unwisely in my view, refused counseling. It is not known whether, if adduced, the psychological evidence would have assisted to establish a link. This *ex post facto* reconstruction is unhelpful. The Magistrate should have seen the evidence in that light.

[20] As regards the dispute in the evidence of complainant and appellant on where the sexual encounter took place, whether in the open veld or at the appellant's home, I find no probability either way. Appellant's witnesses testified about an unidentified woman that they saw in his company entering his residence. It does not mean that that woman was the complainant. What it does suggest is that the appellant is not averse to taking a woman to his home, if regard is also had to

his rendezvous with complainant at Campbell. I am not convinced that the complainant would have balked at accompanying him to his home as she seems to have won his trust but she certainly won his friendship.

- [21] The Magistrate is correct that the complainant could be criticized for having taken a month to report the incident. He is also correct when he remarked:

"Aan die ander kant is dit hoegenaamd nie vreemd wanneer gekyk word na die gewone sake wat voor die Hof dien nie. Dit is dikwels so dat 'n Klaagster getraumatiseer is deur 'n voorval en dat sy dit dan later onder druk van 'n maatjie soos hierdie geval, van Schalkwyk, uit kom met dit wat gebeur het."

In **Monageng v State** [2008] JOL 22596 (SCA), unreported, **Maya JA** had this to say at paras 23 and 24:

"[23] Much was made by the appellant's counsel of the complainant's apparent ability to act normally after the rape and her delay in reporting it. It has been firmly established in a number of studies on the impact of violence, including rape, against women that victims display individualized emotional responses to the assault. Some of the immediate effects are frozen fright or cognitive dissociation, shock, numbness and disbelief. It is

therefore not unusual for a victim to present a façade of normality.

[24] It is further widely accepted that there are many factors which may inhibit a rape victim from disclosing the assault immediately. Children who have been sexually abused, especially by a family member, often do not disclose their abuse and those who ultimately do may wait for long periods and even until adulthood for fear of retribution, feelings of complicity, embarrassment, guilt, shame and other social and familial consequences of disclosure. Significantly, the newly passed Criminal Law (Sexual Offences and Related Matters Amendment Act 32 of 2007) provides, in s59, that:

'in criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.' Raising a hue and cry and collapsing in a trembling and sobbing heap is not the benchmark for determining whether or not a woman has been raped. There was thus nothing unusual about the complainant's behaviour and her explanation for not immediately reporting the appellant is plausible."

- [22] Every case must be treated on its own merits. In this matter the complainant, then 17 years old, informed Marcelyn that she was raped by appellant the previous day ("die vorige dag"). Marcelyn was certain and emphatic about this. That is why Marcelyn got confused when she established during the trial that the incident actually took place on the 1st August 2005 and reckoned that complainant made the report to her on 2nd August 2005. A month prior is far removed from a day before. The complainant could not have made a mistake. She may have tried to save face, but this still amounts to embroidery.
- [23] The Magistrate was correct in finding that the appellant lied in certain respects. One such instance is that the complainant was carrying his child and aborted it. Complainant says she had her monthly menstrual cycle when the sexual encounter took place on the 1st August 2005 and once more when she was examined by a doctor one month later (on 05/09/2005) when the charge was laid. On the facts of life, even though no medical evidence was presented, this would be a Ripley's Believe It or Not phenomenon if complainant was pregnant.
- [24] A second aspect on which appellant lied blatantly is his vulgarity to the effect that complainant's mother once

caught them in the sexual act at her house and merely commented that “die teef is mondig” (the bitch has come of age). However, a court cannot convict an accused merely because he or she is disposed to be mendacious. See: **S v Steynberg** 1983(3) SA 140(A) and **S v Mtsweni** 1985(1) SA 590(A) at 593I – 594D. The correct approach has been authoritatively set out in **S v Chabalala** 2003(1) SACR 134 (SCA) at 139I – 140A in these terms:

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence."

See also **S v Van Aswegen** 2001(2) SACR 97 (SCA) at 101a-c (para8).

- [25] This case is a costly reminder that parents must not entrust the safety of their children with adults under dubious circumstances. The appellant may not have raped the complainant but he certainly exploited her sexually. The words of **Beyers JA** in the seduction case of **Bull v Taylor** 1965(4) SA 29 (A) at 35A-B come to mind :

*"A man who has sexual relations with a virtuous young school-girl can surely not be heard to say that he has not led her astray. That the respondent in the present case did indeed lead the appellant astray is evidenced by the latter's subsequent behaviour. After the first act of intercourse she used occasionally to stop at his home on her way to school, there to have further intercourse with him. It could in these circumstances be said of her, as it was of the plaintiff in **de Stadler v Cramer**, 1922 CPD 16 at p. 19, that she 'has thus gone still further along the wrong path into which he has led her'."*

- [26] As **Slomiwitz AJ** said in **S v Kubeka** 1982(1) SA 534 (W) at 538G that we "subscribe to the view that in the search for the truth it is better that the guilty [accused] should go free than that an innocent [one] should be punished." On that basis the appellant is given the benefit of the doubt and must walk.

[27] **The appeal succeeds. The appellant's conviction and sentence are set aside.**

**F DIALE KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION**

I concur:

**G N Z MJALI
ACTING JUDGE
NORTHERN CAPE DIVISION**

**For Appellant :
On Behalf of:**

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THE LEGAL AID BOARD

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