

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 58/09
Heard on: 09-11-2009
Delivered: 20-11-2009**

In the matter between:

CHRISTOPHER HOOGSTANDER

Appellant

and

THE STATE

Respondent

CORAM: KGOMO JP et MJALI AJ

JUDGMENT ON APPEAL

MJALI AJ:

1. Arising out of an incident which occurred under the first Transvaal Road Bridge ("the bridge"), Kimberley, in the morning of 11 December 2005, the appellant and his co-accused ("companion") were prosecuted in the regional court, Kimberley, on two counts of robbery, assault and attempted rape. He was convicted on one count of robbery as well as attempted rape and was sentenced to 5 years imprisonment for robbery and 3 years for attempted rape. He now appeals against both his conviction and the sentence.

2. The complainants, Hester Salmon and Hans Siro, were lovers and walking from a tavern where they had spent the night consuming alcohol. They stopped and had a chat under the bridge when the appellant and his companion appeared. The appellant was armed with a beer bottle whilst the companion was armed with a screw driver.
3. The co-accused demanded money from Hans and when he showed him his empty wallet he threw it down and chased Hans for a while and then returned to where Hester and the appellant were. Hans also turned and followed him. Meanwhile the appellant who remained behind with Hester had instructed her to undress and turn around so that he can have sexual intercourse with her. When she refused the appellant threatened to assault her with the beer bottle and forcefully lifted her skirt whilst pulling her panty to the knees. She held tight onto her skirt. In the process the appellant noticed a cellphone in her skirt's pocket. They grappled over it and the appellant eventually took possession of it and fled with the cellphone. She went after him demanding that he return it.
4. When he noticed that Hans had followed him, the co-accused again chased him and as he was running Hans screamed for help and shouted that some people were raping his girlfriend. The police who were informed telephonically by a passerby about a rape that was in progress at the bridge immediately rushed to the scene. On their arrival they found a traumatized and crying Hester who immediately pointed out the appellant and his co-accused who were promptly arrested.
5. Mr Van Tonder, for the appellant, launched a wide-ranging attack on the evidence and the findings of the Regional Magistrate. First in relation to the evidence of the complainants, Van Tonder argued that the state

witnesses contradicted each other in material aspects and as such could not be relied on. Secondly he contended that because Hans and Hester had spent the whole night prior to this incident consuming alcohol their evidence was untrustworthy as they were under the influence at the crucial time. Thirdly, that Hester Salmon was a single witness in so far as the removal of her panty by the appellant was concerned. For this reason her evidence should have been approached with more caution. Lastly, he contended that at most the appellant could have been convicted of indecent assault and theft instead of attempted rape and robbery as the evidence does not establish an intention to rape as well as robbery.

6. There are of course a number of contradictions between the versions of the witnesses. In considering their effect one must bear in mind that contradictions per se do not necessarily lead to the rejection of the evidence of a witness. Not every error made by the a witness affects his credibility and a court has to make an evaluation, taking into account the contradictions, their number and importance, as well as their bearing on other parts of the witness's evidence: **S v Mkohle 1990 (1) SACR 95 (A) at 98 f-g; S v Jochems 1991 (1) SACR 208 (A) at 211 g-i**. Bearing that in mind, I turn to deal with the contradictions.
7. Hester testified that when their attackers approached them they enquired if they did not see anyone going past. Hans testified that when the two greeted them and the appellant asked how much money he had on him he replied that he used his money at Oriental Tavern. Hans testified that he ran away because the appellant said they were going to finish him off as he was wasting their time. Hester testified that the appellant ordered Hans to go so that they can have sexual intercourse

with her. According to Hester whilst Hans was being chased by the co-accused, the appellant ordered her to remove her panty. According to Hans he was present when the appellant told Hester that he wanted to have sexual intercourse with her. Hans testified that the appellant returned the cellphone to Hester in the presence of the police and that the co-accused had the screwdriver in his possession during the arrest. On the other hand Inspector Gherhadus Esterhuizen's testimony is that the two had nothing in their possession when he arrested them. Esterhuizen testified that Hester reported to him that the appellant gave the cellphone back to her when he (Esterhuizen) appeared under the bridge.

8. In my view, there is nothing in these discrepancies which should have caused the magistrate to reject the state's evidence in its entirety. The events unfolded quickly and would have caused the witnesses considerable stress. In the light of the fluid and mobile nature of the incident and the fact that the witnesses observed the events from different positions, it is not surprising that there may be contradictions. These discrepancies, which are not materially, on the contrary may point away from any possibility that they had colluded to give false evidence against the appellant. Some of these alleged discrepancies are merely perceived. For example Van Tonder contended that Hans mentioned that the appellant threw his wallet on the ground when he discovered that it did not contain any money whereas Hester makes no mention of this fact. The evidence illustrates clearly that the complainants could not always be together. When Hans was chased twice and raised the alarm the two were separated. See **S v Safatsa and Others 1988(1) SA 868 at 890 G** at which point the Court states:

“The fallacy in the argument for the accused is that it presupposes that either or both of the witnesses must be untruthful or unreliable simply because their observations did not coincide. Such an approach to the evidence is unsound.”

In **S v Van Aardt 2009(1) SACR 648 (SCA) at 657b-d** the Court observed:

“Secondly, it is not sufficiently appreciated by the defence that the witnesses were not always in each other’s presence as the events unfolded and they therefore occupied different vantage points. For example the tractor driver was mixing the animal feed elsewhere; one of the milkers milked one of the cows that could not walk outside the shed, others were milking the cows in the shed; another heard the commotion in Koert’s house when he went to fetch a pair of pliers at the appellant’s residence; another watched a different stage of the assault when he went to feed the calves and yet another when he kraaled the cattle.

It follows that the witnesses could not necessarily corroborate each other on all points. They merely recounted what they observed at a particular stage. What is essential is that there is no suggestion that they were not present on the farm and observed some assault. In fact the evidence emanating from the appellant as well suggests that he interacted with his workers in the ordinary course of them performing their duties.”

9. A further attack on the evidence of the state is that Hester’s version contradicts that of Esterhuizen. According to Hester when the police arrived at the scene the appellant and his companion were walking. They were arrested by the police together with Hans. According to Esterhuizen when he arrived at the scene Hester said to him “daar haardloop hulle”. He saw the appellant and the other man running at a distance of approximately 15 -20 metres from him. At no stage did he see Hans Siro. I hasten to say that given the fact that it is common

cause between the defence and the state that Hans Siro was at the scene, the fact that Esterhuizen did not see Hans can only be ascribed to a mistake on his part.

10 I turn now to the issue of the drunkenness of the witnesses. Although it was put to them during cross-examination that they were drunk, it is clear from the record that they were only mildly under the influence of liquor and fully appreciated what was taking place. Their evidence must not be viewed in isolation. In order to decide upon the guilt of the appellant, it is necessary to have regard to a conspectus of all the evidence. As was said by Nugent J in **S v Van Der Meyden 1999 (2) SA 79 (W) at 81F–82D**:

“Evidence which incriminates the accused, and evidence which exculpates him, cannot both be true – there is not even a possibility that might be true – one is possibly true only if there is an equivalent possibility that the other is untrue. There will be cases where the state evidence is so convincing and conclusive as to exclude the reasonable possibility that the accused might be innocent, no matter that his evidence might suggest the contrary when viewed in isolation...”

The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind,

however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may be simply ignored.

Part of this dictum is quoted with approval in **S v Van Aswegen 2001(2) SACR 97 (SCA)** at 101b-e. See also **S v Chabalala 2003 SACR 134 (SCA)** at 139 I – 140 b.

11. The complainant's evidence is corroborated to a large extent by Esterhuizen as well as the defence evidence. Esterhuizen rushed to the scene because of a report of a rape that was taking place at the first Transvaal Bridge. When he arrived at the scene he found a traumatised Hester crying. Hester immediately pointed out the appellant and his companion. The two were arrested not far from the scene. It is the defence version that the appellant and the companion were at the scene at the relevant times and that there was a confrontation between Hans and the companion albeit for different reason. The testimony of the state witnesses that the attackers were armed with a beer bottle was not disputed and that one of them had a screw driver was admitted by the defence. Having considered the totality of the evidence I am of the view that the evidence on all material aspects was substantially common cause.
12. In my view, the testimony of Esterhuizen and the defence in relation to the incident affords a sufficient safeguard to the reliability of the testimony of Hester and Hans notwithstanding their alcohol

consumption. As is apparent from his judgment, the magistrate was impressed with the manner in which the state witnesses testified. He was obviously unimpressed with the quality of the evidence of the appellant when he stated: *“Bygevolg is ek nie tevrede dat hulle weergawes enigsins die waarheid is nie en verwerp ek dit”*.

13. A trial court has advantages which a court of appeal does not enjoy, especially in regard to the evaluation of the credibility and demeanour of the witnesses. Accordingly, appeal courts are slow to disturb factual findings made by courts of first instance and, absent the Magistrate having been shown to have misdirected himself, his conclusions are presumed to be correct and must stand unless they are shown to have been wrong. See **R v Dhlumayo and another 1948 (2) SA 677 (A) at 706**. I have not been persuaded that the Magistrate misdirected himself or that he reached the incorrect conclusion.

14. I turn now to the issue of Hester being a single witness with regard to attempted rape. It is a well-established judicial practice that the evidence of a single witness should be approached with caution. His or her merits as a witness must be weighed against factors which militate against his or her credibility. See in this regard **S v Webber 1971 (3) SA 754 (A) at 758G–H**. The correct approach to the application of this so-called “cautionary rule” was set out by Diemont JA in **S v Sauls and others 1981 (3) SA 172 (A) at 180E–G** as follows:

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the

remarks of Rumpff JA in S v Webber . . .). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in R v Mokoena 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean ‘that the appeal must succeed if any criticism, however slender, of the witnesses’ evidence were well-founded’ (per Schreiner JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.”

15. On a proper analysis of the Magistrate’s judgment in this case the conclusion can safely be reached that he was alive to the applicability of the cautionary rule and that he approached Hester’s evidence with the necessary caution, having stated the following:

“Vir sekere aspekte van haar getuienis is Hester, ‘n enkele getuie en sal die hof haar getuienis in daardie lig beoordeel en dan vir vedere aspekte is daar stawing vir haar weergawe te vinde”,

The magistrate proceeded to weigh the merits and demerits in her evidence and was satisfied that there was sufficient corroboration for her version. She made a good impression on the court and gave her evidence in a satisfactory manner. As stated earlier, the trial court is in a better position to make these determinations

16. I come now to the contention by Van Tonder that at most the appellant should have been convicted of indecent assault and theft instead of attempted rape and the robbery of a cellphone. The evidence establishes that the appellant voiced his intention to have sexual intercourse with Hester. This is the reason why he ordered her to turn around and remove her panty. When she refused he threatened to hit her with the beer bottle and forcefully lifted her skirt and pulled her panty to her knees. In my view the expressed intention accompanied by the threats of assault and the active act of undressing go beyond the act of indecent assault and constitutes attempted rape which was halted by Ms Salmon's resistance.
17. On the question of robbery of the cellphone there is cogent evidence that there was resistance from Hester as they grappled over the cellphone which the appellant eventually succeeded to take from her. Because of the resistance and the amount of force that was exerted to get the phone from her this matter is distinguishable from the grab-and-run cases. Appellant only returned the instrument because his co-accused told him to and because these assailants were aware that they were surrounded by the police. It seems clear to me therefore that the Magistrate was perfectly correct in convicting the appellant as he did on this count and the appeal against his conviction must fail.
18. Turning to the question of sentence. Van Tonder argued that the Magistrate misdirected himself in finding that the minimum sentence of 15 years imprisonment was applicable in this matter. He

contended further that the appellant was convicted of robbery and not robbery with aggravating circumstances. In terms of section 51(2)(c) (ii) of Act 105 of 1997 a minimum sentence of 7 years imprisonment was applicable. This is a fact that was conceded by Mr. Mashuga for the state. However for an appeal court to interfere the misdirection must be material. As was said by Maya JA in **Ntaka V S (2008) 3 All SA 170 (SCA) at 173 para 13**

“That said, however, it must be borne in mind that an error committed by a court in determining or applying the facts for assessing the appropriate sentence does not necessarily spell the end of the enquiry. A mere misdirection is not by itself sufficient to entitle the appeal court to interfere; it must be of such a nature, degree or seriousness that it shows directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably such as to vitiate its decision on sentence. Assuming, without deciding, that the misdirections are not of a vitiating nature when proper regard is had to all the relevant factors, it must nonetheless be considered whether the sentence was appropriate in the circumstances of the case”.

19. Whether the Magistrate was right or wrong in holding that the prescribed sentence of 15 years is applicable, has no bearing on the outcome because what has to be decided is whether the misdirection vitiated his decision on sentence. Together with the other relevant factors before passing sentence, the magistrate had to consider the fact that the appellant has numerous previous convictions. He had his

first brush with the law as early as 17 May 1994 when he was convicted of Housebreaking and sentenced to 5 strokes with a light cane. In November 1994 he was sentenced to 7 strokes with a light cane for theft. On 16 February 1995 he was again sentenced to 7 strokes with a light cane for theft. On 10 November 1995 the imposition of sentence for theft was postponed for 3 years. On 7 February 1996 he was convicted on two counts of robbery which were taken together for the purposes of sentence and was referred to a reformatory school. In September 1996 he was sentenced to 30 months imprisonment for theft. On 28 May 1999 he was sentenced to 8 years imprisonment for housebreaking with intent to steal and theft. On 17 June 2005 he was released on parole supervision until 27 November 2008. Within months of his release on parole he committed the present offences.

20. With the long list of previous convictions that the appellant has, all relevant to the charge of robbery for which he has been convicted, it cannot be said in my view that the sentence of 5 years imprisonment is inappropriate. This is so particularly when one considers the fact that the Magistrate found in his favour that there were substantial and compelling circumstances to justify the departure from the prescribed minimum sentence of 7 years imprisonment. I am satisfied that the Magistrate did not exercise his discretion improperly. If he erred, it was on the side of leniency.
21. The appellant's record of previous convictions shows that he has a propensity for committing crimes involving dishonesty. He must be warned that he risks being declared a habitual criminal in terms of

section 286 of the Criminal Procedure Act 51 of 1977 or worse. There is no merit in the appeal against sentence.

In the result I make the following order.

- 1. The appeal is dismissed.**
- 2. The conviction and sentence are confirmed.**
- 3. The appellant is warned that he risks being declared a habitual criminal in terms of section 286 of the Criminal Procedure Act 51 of 1977.**

**G. N. Z. MJALI
ACTING JUDGE
NORTHERN CAPE HIGH COURT**

I concur

**F.DIALE KGOMO
JUDGE PRESIDENT
NORTHERN CAPE HIGH COURT.**

On behalf of the Appellant	Adv A Van Tonder
Instructed by	Kimberley Justice Centre
On behalf of the Respondent	Adv Mashuga
Instructed by	Director Public Prosecutions

