

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 Division)

Date heard: **26/02/2007**
Date delivered: **02/03/2007**

Case number: **CA&R 78/2006**

In the matter between:

TOMA, VICTOR ADAM
Appellant

and

THE STATE
Respondent

*Coram: **Lacock J et Makhafola AJ***

JUDGMENT

LACOCK J:

- 1] The applicant was convicted in the Regional Court on a charge of indecent assault and was sentenced to payment of a fine of R5 000.00 or 12 months imprisonment, as well as a further 12 months imprisonment which was conditionally suspended for a period of 4 years.

He now appeals against the conviction only.

- 2] The relevant factual circumstances found by the Court *a quo* to have been proven beyond a reasonable doubt can be summarised thus:

[21] On Saturday afternoon, 19 February 2005, the complainant, Ms Julia Monone, arrived in Kimberley from Bloemhof, for an interview with the appellant. The latter was on the lookout for a person to be employed *inter alia* as a domestic worker.

The appellant met the complainant in the town centre of Kimberley, where he found her in the company of her sister-in-law, Ms Gracious Kgomo. Although Ms Kgomo wanted to accompany the complainant, the appellant refused her request and indicated to her that the complainant could spend the night at his house. The complainant and the appellant then left in his car and arrived at his house in Memorial Road, Kimberley, some time after 19:00.

[22] During the interview the appellant offered the complainant the job as a domestic worker at a monthly salary of R1 000.00, but added that he was prepared to increase this amount to R6 000.00 per month if the complainant was prepared to act as his sexual partner (to “sleep” with him). This the

complainant refused to do.

[23] After the interview the appellant invited the complainant to sit on a chair next to him in front of his computer. Here he first touched her breasts and then inserted his one hand into her trousers and touched her private parts over her panties.

- 3] The appellant denied that he indecently assaulted the complainant as alleged or at all.
- 4] The Regional Court Magistrate accepted the evidence of the State witnesses and rejected the version of the accused as not being reasonably possibly true. To my mind the magistrate was fully justified to have come to this finding.
- 5] Mr Van Heerden who represented the appellant in the court *a quo* and in this Court, relied firstly on a number of contradictions in the evidence of the complainant, as well as in that of her sister-in-law, Gracious, and the police officer, Mr Victor Gabonewe. He however, conceded, correctly so in my view, that these contradictions were not of a material nature. The record reveals that the complainant did not depart from her evidence in chief in any material respect, and her evidence was corroborated by Gracious and Gabonewe in all material respects.

6] The main thrust of Mr Van Heerden's argument was that the probabilities did not support the version of the state witnesses. In this regard it was submitted that, if the complainant was indecently assaulted by the appellant as described by herself, and if she was as afraid to spend the night in the house of the appellant as she testified, and if Gracious and inspector Gabonewe were honestly worried about the wellbeing of the complainant, it is improbable that the complainant would not have done more to either escape from the appellant's house during the night or to attract the attention of Gracious and Gabonewe for them to find the appellant's house, and that Gracious and Gabonewe would have abandoned their search for the complainant until the next morning.

[61] According to the evidence the complainant immediately reported the incidents to Gracious on the very first opportunity she had to speak to her on her cellular telephone in the absence of the appellant. She thereafter had several telephonic communications with Gracious who assured her that she contacted the police and that they were attempting to locate the appellant's house to fetch the complainant. Not one of these witnesses knew the appellant's address, except that the house was in Memorial Road, Kimberley.

[62] If one takes into account that the complainant came

form Bloemhof, was a complete stranger in Kimberley, was dependant on the appellant to return her to her family, that Gracious informed her that she (Gracious) has already alerted the police, that the police were unable to locate the appellant's house and that a police official has spoken to the appellant subsequent to the assault, the conduct of the complainant to have accepted her fate and not to have – as suggested by Mr Van Heerden – called the police herself or to escape through a window or to attract the attention of the search vehicle by switching a light on and off, does not strike me as improbable. If one adds hereto the evidence that the appellant at all times had a fire-arm in his possession or at least within reaching distance from him, and that the complainant was afraid that he might harm her, her conduct becomes all the more reasonable.

- 7] To my mind the probabilities strengthen the complainant's version.

[71] The complainant desperately wanted the employment offered by the appellant. Her evidence in this regard was not questioned. No reason at all presents itself why she would ruin this opportunity by laying a false complaint against the appellant.

Mr Van Heerden suggested that the complainant laid the charge in an effort to extort money from the appellant. It is common cause however, that, apart from the salary that was discussed, the first time that money matters were discussed between the parties, was during the next morning before the complainant left the appellant's house. By that time and several hours before that, the complainant had already informed Gracious, who in turn informed the police, that the appellant had indecently assaulted her.

[72] At the very first opportunity that the complainant could speak to Gracious in private, she informed her of the appellant's unacceptable conduct. I find it totally improbable that the complainant would have acted in this manner if she was not molested by the appellant in view of her eagerness to obtain employment.

8] The appellant clearly tailored his evidence on two material respects.

[81] When the complainant testified, it was put to her that the appellant did not offer her a monthly income of R6 000.00 per month, and the only income that was discussed was a salary of

R1 000.00 per month. In his own testimony the appellant however, revealed that he did discuss a possible income of up to R6 000.00 a month with the complainant, but averred that the additional amount would be paid to her as commission on the sales of a book he intended to publish.

[82] Again during cross examination of the complainant it was put to her that before she left the appellant's house the next morning, she came into his bedroom, sat next to him on his bed while he was still in bed, and tenderly put her hand on his chest. It was not put to her that she then touched his private parts with her elbow.

In his testimony however, the appellant averred that the complainant actually tempted him by deliberately touching his private parts with her elbow.

9] By reason of the aforesaid I am convinced that the Magistrate correctly rejected the appellant's version and accepted the evidence tendered on behalf of the State. I can find no reason to differ from the magistrate's conclusion that on all the evidence the guilt of the appellant was proved beyond a reasonable doubt.

In the result, the appeal is dismissed.

HJ Lacock
JUDGE

I concur.

K Makhafola
ACTING JUDGE

<u>For the appellant:</u> Adv CF Van Heerden (instructed by André Potgieter & Ass., Kimberley)
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For the respondent: Adv CG Jansen (Office of the DPP, Kimberley)