

Reportable**IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]**

CASE NO: A84/2007

In the matter between:

TIMOTHY LOTTER

Appellant

and**THE STATE**

Respondent

JUDGMENT DELIVERED ON 29th NOVEMBER 2007

HJ ERASMUS, J:

[1] The appellant appeared before the Cape Town Regional Court on 19th November 2003 on a charge of rape, allegedly committed during August 2000. On 8th November 2006 the appellant was found guilty and on 12th December 2006 he was sentenced to ten years imprisonment.

[2] The appellant appeals to the Court against both the conviction and the sentence.

[3] The facts can, in broad outline, be briefly stated. The complainant, who was at school and 16 years old at the time of the alleged offence, worked part-time in a steak house in Milnerton. The appellant was one of the managers at the steak house.

[4] It is common cause that the appellant from time to time took members of the staff home after work when the restaurant closed. It would appear that the restaurant usually closed late at night if not in the early hours of the morning.

[5] On one such occasion, in August 2000, he once again took the complainant and other members of staff home. The complainant says that he had his dogs (she referred to “puppies”) with him in the car. After dropping the other members of staff off, the appellant said that he first wanted to walk his dogs on the beach. At the beach, the complainant says, she got out of the car and smoked a cigarette while the appellant let the dogs run loose. The appellant tried to hug and kiss the complainant, but, she said, she rebuffed him.

[6] The appellant then said that he would take the complainant home, but that he first wanted to drop the dogs at his house. At the house she said that she would wait in the car but he insisted that she accompany him inside. He showed her the house and she sat down on a bed and waited for the appellant to take her home.

[7] The appellant then started forcing his attention upon her, put his hand up the back of her top, tried to kiss her, pushed her down on the bed

and then removed her pants and had intercourse with her. The complainant said that she did not resist him physically, but that she made it very clear that she did not want to have sexual intercourse with him. She said that when “she realized that it was going to happen, whether I liked it or not, and obviously thinking of consequences, I asked him then if he is going to, I would prefer him to use a condom, which he then put on”. The rape alleged by the complainant was not, therefore, accompanied by violence or threat. It was a matter of the appellant urging his attention on the complainant with such persistence that in the end she capitulated.

[8] The complainant said that she was still a virgin before that night.

[9] The appellant then took her home. She did not tell her mother (who was very ill at the time) of what had happened. She told her best friend about it, two days after the event. Her family only gained knowledge of what had happened several months later when they became concerned about changes in her behaviour.

[10] The matter was reported to the Police and proceedings against the appellant were set in motion.

[11] The appellant denies al knowledge of the events as described by the complainant in her evidence.

[12] It would be convenient at the outset to briefly set out the approach to be adopted in evaluating and weighing the evidence adduced by the

State and by the defence.

[13] The decided cases dealing with this aspect are legion. The proper test to be applied in such case was stated by Nugent J (as he then was) in *S v Van der Meyden* 1999(1) SACR 447 (W) at 449h-450b. The following passage from his judgment is cited with approval in *S v Van Aswegen* 2001(2) SACR 97 (SCA) at 101a-e and in *S v Trainor* 2003(1) SACR 35 (SCA) at 40i-41a):

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 simply be ignored.

After citing the passage, Navsa JA in *S v Trainor*, *supra* continues (at 41b-c):

A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be

found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong.

[14] There are certain considerations which apply specifically to the evaluation of certain particular parts of the evidence. These considerations must, obviously, not be lost sight of in a conspectus of all the evidence.

[15] The first such consideration is adverted to by the trial magistrate in her judgment:

If the Court then proceeds and evaluates the evidence, the Court is obviously in the best position with regards (*sic*) to evaluating the evidence that was put before the Court because the Court can actually see the witnesses as they testified.

The learned magistrate points out that when a matter is taken on appeal or review, the Court of appeal or review only has a typed version of the evidence before it. She continues –

However, if you see somebody and you see them talking it is a lot

easier to make a credibility finding and to put the words and evidence in perspective.

[16] While there can be no denial of the advantages of the trial Court which hears the *viva voce* evidence of a witness, a Court of appeal is not bound by the evaluation of such evidence by the trial Court. In this regard, Nugent JA said in *Marx v S* [2005] 4 All SA 267 (SCA) at 326b (par [283]):

I do not think we ought simply to defer to the trial court's findings notwithstanding the care with which they were arrived at. This Court has cautioned on more than one occasion, most recently in *Medscheme Holdings (Pty) Ltd v Bhamjee* [[2005] 4 All SA 16 (SCA)], against according undue weight to the advantages that are said to be enjoyed by a trial court, and has said that the demeanour of a witness is no substitute for evaluating the content of the evidence, taking into account the wider probabilities.

As it was put in *Protea Assurance Ltd v Casey* 1970 (2) SA 643 (A) at 648E, “over-emphasis of the advantages which the trial Court enjoyed is to be avoided, lest the appellant's right of appeal becomes illusory”.

[17] The learned magistrate says that the evidence of the complainant has “single witness qualities” but that she was not a single witness. She nevertheless holds that she has to be “very, very careful” with the complainant's evidence. The complainant is, in fact, the only State witness who was present when the alleged rape took place. The evidence

of the complainant's mother fills in some of the background. The evidence of Ms Dean relates to the report made to her and is corroborative of nothing more than that the complainant made a report to her. The evidence of the complainant's sister is in the main hearsay and is not corroborative of the evidence of the complainant on any of the essential issues.

[18] The learned magistrate concludes, after considering her evidence and the criticism thereof, that she was "very favourably impressed by her demeanour" and that the criticism of her evidence was not such as to "in any way damage her credibility".

[19] The two principal criticisms leveled against the evidence of the complainant, both at the trial and on appeal before this Court, are that her evidence is vague in material respects, and that the complainant's statement to the Police contradicted her evidence in Court. I need not deal with the criticism that the complainant did not cry out for help, and that she did not attempt to run away. The magistrate rightly rejected the criticism of the complainant on this score.

[20] In regard to vagueness, the magistrate says that this "is five years later that the complainant is testifying and surely one would not remember all insignificant detail". The vagueness, however, cuts both ways. On the one hand, it cannot be held against the witness if after five years a certain degree of vagueness pervades her evidence. On the other hand, that very vagueness might affect the value (reliability) of her evidence, or parts thereof.

[21] As regards the contradictions between the complainant's evidence and her statement to the Police, I am in agreement with the findings of the magistrate that, considering the nature of the alleged contradictions and the circumstances under which the statement was made, the contradictions are not such as to impact in a negative way on the evaluation of her evidence (see in this regard the remarks of Olivier JA in *S v Mafaladiso en Andere* 2003(1) SACR 583 (SCA) at 594d-f).

[22] There are other features of the evidence, which were not canvassed at the trial nor raised on appeal before us, which in my view must be considered in the evaluation of the complainant's evidence.

[23] Due to the fact that the alleged rape was reported to the Police months after the event, no medical evidence was placed before the Court. The absence of medical evidence inevitably leaves a gap in the State case. Thus there is no independent corroboration, which there could have been had the complainant been examined by a doctor shortly after the event, of the complainant's evidence that she was a virgin at the time and that she bled profusely after the event (the complainant said she discarded her underwear which was "full of blood").

[24] The delay in laying a charge had a further effect on the case. If a charge had been promptly laid, it would have been possible, upon a proper investigation and presentation to Court of the matter, to adduce the evidence of the other employees who were given a lift by the appellant on the night in question. By their evidence it could have been shown, if such

had indeed been the case, that the complainant was one of the employees in the car, and that she was left alone in the car with the appellant after the others had been dropped off. In this way evidence corroborating that of the complainant could have been placed before the Court.

[25] In the evidence of the State witnesses, and particularly in that of the complainant's mother and sister, reference is made to behavioural changes in the complainant. The prosecutor in her questions did her best to link these changes to the alleged rape, and so did the complainant's sister. From the evidence of the mother, it is clear that changes in the behaviour of the complainant were evident before the alleged rape. The mother was upset because the complainant had started smoking (she was caught smoking at school): that she started smoking before the alleged rape is apparent from the complainant's own evidence that while the appellant walked the dogs on the beach, she smoked a cigarette. It is clear that she started working as a waitress against her mother's wishes. She did not want to go to church with the family any more. The mother, who speaks of "rebelliousness" on the part of the complainant, said that the change in the behaviour of the complainant may have been due to, what I may term, teenage *Sturm und Drang*. In this regard, it is of importance to note that the complainant's parents belong to a strict religious order which cultivates "conservative" values: discipline, church-going, no partying and the like.

[26] The mother was clearly concerned about her daughter's work at the steak house: the late hours and (reading between the lines) the exposure of the child to conduct and values of which she disapproved. If the

appellant is to be believed, the complainant attended parties at his home with other occupants of the house when he was at work. This is conduct of which the mother would not have approved. At some stage there was a breakdown of relations between the complainant and her mother, and for a short while the complainant left the house and moved in with her friend Lizelle Dean.

[27] The complainant's friend, Lizelle Dean, testified that a day or two after the alleged rape (there was initially some confusion in the mind of Ms Dean about dates) complainant made a report to her.

[28] The complainant said that she reported to Ms Dean rather than to her mother because her mother was at the time ill with cancer and was receiving chemotherapy. The breakdown in relations between mother and daughter, and the fact that her rebelliousness and her work at the steak house (of which her mother disapproved) had led to an unfortunate sexual experience, cannot, in my view, be discounted as reasons for the complainant withholding information from her mother of the events of the night in question.

[29] Ms Dean said that though she could see that the complainant was upset, she did not at first tell her what was wrong. The next day, two days after the event, she told Ms Dean "that she wasn't a virgin anymore". On the face of it, this seems a rather oblique way of reporting a rape; it rather seems like a young girl telling her best friend of her first sexual experience. In response to a question in cross-examination whether the complainant had at any stage told her that she was raped, Ms Dean said

that she did use the word “rape”. When asked when that was, she said:

Just after I said what do you mean? Then she said to me – when she said to me, well not exactly like it, I said so what are you saying, so she said no well, it was forced.

She added when further questioned:

She said that he done it with her saying no.

[30] Ms Dean further said that the complainant never complained about the conduct of the appellant towards her at work. In contrast, the complainant’s sister, Mrs Haigon, testified that the complainant “constantly” told her about the way the appellant treated the waitresses, and that she referred to him as “a pig”.

[31] Mrs Haigon said that her mother asked her to speak to the complainant because she (mother) was concerned about the complainant’s behaviour and that the complainant “wants to do away with herself”. When asked what the complainant told her, Mrs Haigon said:

Yes at that time yes, that she had been assaulted.

While it is not clear what Mrs Haigon meant by the word “assaulted”, there is nothing in the evidence of the complainant that there had been an assault on her in the sense of an intentional application for force, either directly or indirectly, to her person. Mrs Haigon said that the complainant

did not go into any detail about what had happened:

I did ascertain from her that it happened at his home and that she had been begging him to please take her home and that he wouldn't stop badgering her basically and that it had happened at his place.

[32] In regard to the evidence of the appellant, the learned magistrate in her judgment says:

He also gave a chronological version insofar as it was possible for him because he could not limit his version to one particular night because according to him it did not happen and during cross-examination he did not divert in any way from his version in chief.

If the Court looks at his version in a framework and superficially, he is basically saying that he is being accused of something he did not do. The motive thereof he is not privy to or the motive therefore he isn't privy to but he says that are two possibilities.

Apart from the foregoing, the learned magistrate does not comment further on her impressions of the appellant's demeanour.

[33] When asked in examination in chief why the complainant would "make up a story" against him, the appellant said:

Most probably – I've got no idea but at the point of time I had – well I have fired her twice.

The topic was pursued in cross-examination, and when he was asked

what would be the motive for the complainant to come and lie to the Court, the appellant referred to problems with his partners and allegations made against him, and continued:

At that point of time I'm not sure what their motives was or would have been or what transpired.

When asked "why would she come and lie" he said:

Ma'am I'm not sure I cannot answer you directly on that, like I said I'm not sure what her motives was and I haven't seen him [her?] for years and I would also like to move on with my life and basically so I cannot answer that – why would she want to lie about it. It's probably to save embarrassment or her step that she's taken or commit follow through or whatever, I'm not sure.

[34] The learned magistrate approached the question of the appellant's explanation of possible motive on the part of the complainant as follows:

Now it is trite law and as Mr Mia argued, it is not for the accused to in any way prove his innocence or give reasons as to why a false charge may be lodged against him but if that person, an accused do offer possible motives, then obviously those motives that he offers has to be evaluated to the probability or improbability thereof and it can at the end of the day impact on the credibility of the accused if it is found to be totally farfetched or fabricated.

[35] After considering the motives the appellant offered, the magistrate concludes that none of them makes "any sense at all". The magistrate then concludes:

So if I look at the picture as a whole the State's version, the accused version, the probabilities and the improbabilities, I am of the opinion that the accused version does not present a reasonable possibility and I reject it insofar it contradicts that of the State.

[36] The magistrate misdirected herself in considering the evidence when she laid emphasis upon the fact that the appellant's explanation of the complainant's motive in laying a false charge against him is unacceptable. In *S v Lesito* 1996 (2) SACR 682 (O) the accused said that the dagga found in his house had been planted there by the Police. He explicitly said that he did not see the Police planting the dagga, but that he inferred the planting of the dagga from other facts. In this regard the Court stated (at 687h-i):

Sou hy pertinent beweer het dat hy so iets sou gesien het en sou die hof kon bevind dat daardie bewering vals was, dan sou die afleiding dat die res van sy getuienis ook vals was, waarskynlik geregverdig gewees het. Waar slegs bewys word dat 'n afleiding wat 'n persoon maak verkeerd is, is daar nie dieselfde ruimte om al sy getuienis as vals te verwerp nie.

In *Rex v Roga* 1935 TPD 101 the magistrate said in his judgment:

The defence put up by accused no 2 was just a total denial, but she gave no explanation as to why the traps should have implicated her if she had nothing whatsoever to do with supplying the liquor.

In regard to this statement, Tindall J said (at 102) that the magistrate was not entitled to expect the appellant to give an explanation why the traps should have implicated her if she had nothing to do with the supplying of the liquor. The learned Judge adds that –

... it is not right to draw any inference adverse to the appellant's credibility from the fact that she was not able to offer any reason why the traps should have implicated her if she had nothing whatsoever to do with supplying the liquor.

[37] In *S v Lesito supra* (at 687j-688a) it is emphasised that –

Daar moet ook daarteen gewaak word om sondermeer op 'n beskuldigde 'n las te plaas om 'n verduideliking te verstrek waarom 'n getuie namens die Staat sou lieg. Waarom juis moet 'n beskuldigde weet om welke rede 'n getuie leuenagtige getuienis teen hom lewer? Hy mag dink dat dit om 'n bepaalde rede is, terwyl die getuie om 'n geheel en al ander rede 'n grief teen 'n beskuldigde koester.

See also the remarks of Dowling J in *R v Mtembu* 1956 (4) SA 334 (T) at 335H-336B.

[38] The appellant in this case was repeatedly asked why the complainant would lay false charges against him, and on every occasion he said that he does not know but then tried to give tentative, speculative explanations. The questions were not only inappropriate, but the conclusion that because the explanations he offered do not “make any

sense at all”, the rest of his evidence is false, is not justified. In the circumstances of this case, the magistrate was not entitled to draw any inference adverse to the appellant’s credibility from the fact that he had offered explanations as to the complainant’s possible motives which she found unacceptable. In the circumstances this Court is entitled to reach its own conclusions on matters of fact and credibility. In this regard, I need refer only to the oft-quoted leading case; namely, *Rex v Dhlumayo and Another* 1948 (2) 677 (A).

[39] A conspectus of the totality of the evidence before the Court reveals a case built upon the evidence of a single witness whose credibility was highly rated by the trial magistrate. Yet there are features, as pointed out above, which cast a shadow of doubt and uncertainty over the cogency of the whole. Add to this the simple denial by the accused of involvement in the events of the evening in question, a denial that in the end emerges unscathed, then it cannot be said that on the evidence before the Court, the guilt of the accused has been established beyond reasonable doubt. In the ultimate result, one is left with the uncomfortable feeling that the full story of the events of the evening, whatever that may be, has not been placed before the Court.

[40] In the result, I would uphold the appeal and set aside the conviction and the sentence.

HJ ERASMUS,J

I agree. The appeal is upheld and the conviction and sentence are set

aside.

VAN REENEN, J