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Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: CA&R 35\05

Date heard: 2006\02\16

Date delivered: 2006\02\17

In the appeal of:

JOHN FOURIE

APPELLANT

versus

THE STATE

RESPONDENT

Coram: MAJIEDT J *et* TLALETSI J

JUDGEMENT ON APPEAL

MAJIEDT J:

1. The appellant appeals against his conviction of rape as well as the sentence of 10 years imprisonment imposed therefor.

2. The appellant, who was legally represented at his trial, outlined his defence at the commencement of the hearing to the effect that he had been involved in a sexual relationship with the complainant, but that he denied having raped her on the day in question.
3. The complainant testified that she and the appellant had previously worked together at a farm butchery. She denied the existence of any intimate relationship between them. She testified further that the appellant and his friend had been present at her house on the evening in question. They were drinking beer which they had brought there. Also present were her neighbours, one Stiga and his wife. The appellant offered her some of their liquor, but she declined same. After the neighbours had left and after the appellant and his friend had finished their liquor, she requested them to leave. They refused to do so. The appellant used her toilet and thereafter they left. Later that night she was awakened by a person lying on top of her and strangling her. This person clamped her mouth shut with his one hand, removed her panties with the other and then proceeded to have sexual intercourse with her against her will. Later, when this person left, she grabbed his shirt and when he looked back, she saw that it was the appellant. He left through the toilet window which was open. The complainant inferred that the appellant had deliberately left the toilet window open earlier, so that he could gain access to her house later that night. According to the complainant, she reported to Emily

Pieterse, her uncle's wife, about the rape. She was later examined by a doctor.

4. Emily Pieterse confirmed that the complainant had arrived at her house late that evening. The complainant had a towel or shawl around her shoulders. The complainant made a report to her – she was however not certain whether the complainant had said that the appellant (whom she referred to by name, viz “Nana”) had attempted to rape her or had in fact raped her. The complainant was clearly shocked and she spoke rapidly.
5. The medical certificate (J88) was handed in – no injuries were found by the doctor. The clinical examination also did not yield any results as to whether or not the complainant had in fact been raped.
6. The appellant then testified. He confirmed that he and his friend Tswang had been at the complainant's house. According to him the complainant spoke to him about “love” and about their relationship. He denied having returned to the complainant's house later and having raped her. He initially alleged that the complainant was fabricating the rape allegation, since she was upset with him because he had refused her demand that he should leave his present girlfriend and move in with her. This version was never put to the complainant. Later on in his evidence the

appellant raised an alibi defence, namely that after having left the complainant's house earlier, he had been with Tswang when he got a lift to his cousin Joel, where he had then spent the night. This latter version was also never put to the complainant.

7. The magistrate found the complainant to be a truthful witness and also found her to be a reliable identification witness. The magistrate correctly found that identification was the main issue for adjudication. I can find no fault with the magistrate's assessment of the complainant as a witness. She was extensively cross-examined and did not contradict herself on material aspects. She was confronted with ostensible contradictions in her witness statement, but the statement was never handed in. The magistrate approached her evidence with caution, considering that she is a single witness. He also tested her identification evidence against the guidelines laid down in leading cases such as **S v Mthetwa 1972(3) SA 766 (A)** at 768 A-C; **S v Zitha 1993(1) SACR 718 (A)** at 720 i – 721 a. That is not to say that the complainant was a flawless witness – she was understandably quite shocked, traumatised and confused during the event which has undoubtedly affected her powers of observation to some extent. Her version does, however, follow logically and is far more plausible than that propounded by the appellant. Moreover, she is corroborated in important respects by Emily Pieterse.

8. While Emily Pieterse was uncertain as to whether the complainant had reported that she had been raped by appellant or whether he had merely attempted to do so, she was quite clear about the fact that the complainant was in a considerable state of shock. She also confirmed, at least in part, how the complainant was dressed. The most important part of her corroborative evidence is that she confirms that the complainant had made mention that the appellant had done something to her (i.e. either rape or attempted rape).
9. The Magistrate in my view correctly accepted Emily Pieterse's evidence as first report witness. There is nothing on the record to controvert that finding.
10. The appellant advanced two different versions as defence, as I have alluded to herein. He was at a complete loss to explain why neither of these two versions had been put to the complainant by his attorney, who had been quite meticulous and thorough in his cross-examination. The appellant's versions are in my view utterly improbable and stands to be rejected as false beyond reasonable doubt as the Magistrate has correctly done.
11. On a conspectus of all the evidence I am satisfied that the magistrate has correctly found that the State has proved its case beyond reasonable doubt. The appeal against conviction must consequently fail.

12. With regard to sentence, the Magistrate found that there are no substantial and compelling circumstances justifying a departure from the minimum sentence of 10 years imprisonment prescribed in Act 105 of 1997. Aggravating features in the appellant's misdeed include:
- a) The complainant was accosted and defiled in the sanctity of her own home and, worse still, in the presence of her three year old child;
 - b) the offence was carefully planned and was premeditated – the appellant had deviously left the toilet window open prior to his departure so that he can gain access to the complainant's residence';
 - c) the appellant has not shown an iota of remorse and had maintained his clearly untruthful contradictory defences throughout.
13. Based on the test laid down in **S v Malgas 2001(1) SACR 469 (SCA)** at 481 h – 482 b, the Magistrate has correctly assessed all the relevant sentencing factors and has correctly come to the conclusion that the minimum sentence should be imposed.
14. Rape remains a scourge in our society and the circumstances in which the present rape was committed demands a severe sentence, as prescribed in Act 105 of 1997. The appeal against sentence is also devoid of merit in my view.

**15. THE APPEAL IS DISMISSED. THE APPELLANT'S
CONVICTION AND SENTENCE IS CONFIRMED.**

**SA MAJIEDT
JUDGE**

I agree:

**PL TLALETSI
JUDGE**

FOR THE APPELLANT : ADV AT MODUPE
FOR THE RESPONDENT : ADV CG JANSEN

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