

IN THE HIGH COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL DIVISION)CASE NO:

A833/01

DATE:

1-11-02

In the matter of:

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PETER MARTIN

Appellant

versus

THE STATE

Respondent

J U D G M E N T

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YEKISO, J: The appellant in this matter, together with his co-accused, one Gershwin Cloete, appeared as accused numbers 1 and 2 respectively in the Regional Court, Wynberg, on a charge of rape perpetrated on the complainant, one Felicia Windvogel, (who I shall hereafter refer to as "the complainant").

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The allegation against them was that on 29 June 1996 and at Eerste River, the appellant and his co-accused wrongfully and unlawfully had sexual intercourse with the complainant without her consent. They were both legally represented and pleaded not guilty to the charge of rape and in their plea explanation admitted having had sexual intercourse with the complainant but contended that the complainant had consented to such sexual intercourse. They were both convicted as charged on 1 February 2000. On 4 February 2000 the appellant was sentenced to 15 years' imprisonment, whilst Cloete was sentenced to nine years' imprisonment. Only the present appellant has noted an appeal.

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JUDGMENT

The appeal is against both conviction and sentence.

The evidence led in the court *a quo* could be summarised as follows. It was in the early evening of Saturday 29 June, 1996, when the appellant, Cloete (his co-accused), one Derek Koopman (to whom I shall refer as "Koopman") as well as the complainant had gone to a night club. The appellant had arranged with Koopman - who at that stage was his co-employee at Afrox, - to go to a night club that evening. Koopman was a friend and neighbour of the complainant. They had known each other for a period of about 12 years. They had virtually grown up together and their friendship was similar to that of a brother and a sister. Whilst with the appellant, Koopman in turn extended an invitation to the complainant to join them to the night club that evening. The appellant had remained in his motor vehicle whilst Koopman had gone to invite the complainant who later agreed to join their company.

In her evidence the complainant confirmed an arrangement which was made earlier in the week in terms of which the appellant, Koopman, the complainant and a friend of hers would have gone out to the night club that particular evening. However, it appears that this arrangement did not materialise as the complainant's friend had subsequently changed her mind. The three of them, that is the appellant, Koopman and the complainant were later joined by Cloete who was subsequently charged together with the appellant and had appeared as appellant's co-accused in the court *a quo*. Cloete incidentally lives in the same street where the complainant used to live at the time. She had

JUDGMENT

also known Cloete for a period of about 12 years.

The four of them then proceeded to a certain shebeen where they bought liquor, a bottle of Avocado brandy and a bottle of gin. From the shebeen they then proceeded to the night club. They had had a few drinks before going into the night club. The complainant admitted having had two to three shots of brandy before going into the club. A while after they had been in the club the appellant suggested that they all go and buy food at a nearby Kentucky outlet. The party then left the club. Instead of going to Kentucky as suggested earlier, the appellant instead drove through to Monwabisi Beach along False Bay, a distance of some 20 kilometres from the club they had been to. Except for a motor vehicle parked at a distance of some 20 metres from where they had parked, the parking area was otherwise deserted. Shortly after they had been to this parking area the appellant ordered Cloete and Koopman to get out of the car whilst he and the complainant remained in the car.

Thereafter, according to the complainant's evidence, the appellant disrobed her of her pair of trousers as well as her cycling pants she had at the time. He also undressed himself and thereafter had sexual intercourse with the complainant. The complainant claims to have resisted, screaming at the same time, but no help was forthcoming. She also claims that the appellant slapped her on her face on some occasions. Her attempts to unlock and open the nearby passenger door was constantly thwarted by the appellant. Once the appellant had had sexual intercourse with her, he called on Cloete also to have sexual intercourse with the complainant. She claims that Cloete also had sexual intercourse

JUDGMENT

with her, although penetration was slight. Although she protested that Cloete should not have sexual intercourse with her he ignored her protestation and just proceeded with the act of sexual intercourse.

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Once Cloete had had his turn, the appellant had further sexual intercourse with the complainant as, according to the appellant, he had not reached climax on the first occasion. The appellant claimed to have used a condom on both occasions he had sexual intercourse with the complainant. He had also given condoms to both Cloete and Koopman.

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Once the appellant had been through the second occasion they then returned to the night club.

The complainant had been crying all the way back to the night club. When they reached the night club, the appellant and Cloete went into the night club leaving the complainant and Koopman in the appellant's car. Koopman, according to the complainant's evidence, had offered her help from the stage they were still at the beach and also when the first opportunity arose to give her assistance. Shortly after the appellant and Cloete had been into the night club, Koopman accompanied the complainant to the nearby Melton Rose police station where she lodged a complaint of rape. The appellant and Cloete were arrested shortly afterwards.

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The appellant, in line with his plea explanation, contended in his evidence that the complainant had consented to sexual intercourse. However, his evidence with regards to when the complainant would have given such consent is full of contradictions. On the one hand the appellant claims that the complainant came up with the suggestion for

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JUDGMENT

sexual intercourse whilst dancing with the appellant. Not only did the complainant suggest sexual intercourse with the appellant, the complainant, according to the appellant's earlier evidence, would have consented to sexual intercourse with Cloete and Koopman as well. Later in his evidence under cross-examination, when the prosecutor suggested that the complainant did not give consent whilst they were dancing at the night club, the appellant replied in the negative:

"Sy het nie vir jou toestemming gegee by die dans om met haar seks te hê nie. --- Nee meneer."

Still later in his evidence under cross-examination, when asked what happened in the car, this is what the appellant had to say:

"In die kar nou? --- En toe, toe ek nou gevra of ek saam met haar kan seks hê, en toe sê sy, dis al right."

This clearly is in contrast to the portion of the record quoted earlier.

I am in agreement with Ms Tsheole, counsel for the State, that these blatant contradictions in the appellant's evidence are not indicative of consensual intercourse. There is a dispute as to whether the complainant did scream and ask for help when the appellant and Cloete had sex with her, the complainant and Koopman maintaining that the complainant did scream for help whilst the appellant and Cloete deny that the complainant ever resisted their sexual overture. The complainant admits having consumed intoxicating liquor but maintained that she was not intoxicated to an extent of not having been aware of the events around her. I am inclined to believe the complainant's version that

JUDGMENT

she resisted sexual intercourse with the appellant due regard had to the corroborative evidence by Koopman. The complainant's version, in my view, is the correct one.

Mr Vismer submits on behalf of the appellant that because the 5

complainant's inhibition had been lessened due to alcohol consumption that subsequent sexual intercourse with her cannot possibly be construed as being non-consensual sexual intercourse and that at the very most such conduct could be construed as seduction, and seduction not being a punishable offence, the appellant should not have been convicted of 10 the crime of rape.

For a proper determination of this aspect of the submissions on behalf of the appellant it is necessary to determine on basis of the evidence on record as to whether, in the first instance, there was 15 consent by the complainant to have sexual intercourse, not only with the appellant, but also with Cloete and Koopman, as the appellant had contended in his evidence. In the absence of such consent it is necessary also to determine whether, due to lessening of inhibitions as a result of consumption of intoxicating liquor, sexual intercourse with the complainant could be said to have been consensual. 20

I shall now deal with these issues in turn. In his evidence the appellant contends that the complainant not only consented to sexual intercourse with the appellant, but also consented to sexual intercourse with Cloete and Koopman. Cloete also claims to have danced with the complainant at the night club, that the complainant joined and danced 25

JUDGMENT

with him whilst he already was dancing on the floor, that they had kissed each other and the complainant rubbing his penis in the process. Apart from this, Cloete does not say in his evidence the complainant had agreed to have sexual intercourse with him, contrary to what the appellant had said in his evidence, that while the appellant was busy dancing with the complainant, she had informed the appellant that she had already consented to have sexual intercourse, not only with the appellant, but also with Cloete and Koopman. When the party left the night club afterwards the idea had been to go to and buy food at a nearby Kentucky outlet. No suggestion was made to the complainant that they go and enjoy themselves elsewhere.

It is also strange that at the beach, whilst everybody else had gone out of the vehicle to further enjoy themselves outside, the complainant had for the duration of their stay at the beach remained seated in the car and did not join the rest of the company, which continued to enjoy itself in the open area.

In my view the reason for this kind of conduct on the part of the complainant is not far to find. Her conduct, in my view, is consistent with what she stated in her evidence. When they left the night club it was not suggested to her that they were changing scene of enjoyment, the suggestion made was that they were going out to buy food at a nearby Kentucky outlet. She did not agree to leave the night club for a destination where resistance to ill-timed sexual overtures at dead of night would have been inconceivable. That she cried all the way from

JUDGMENT

the beach until they reached the night club, that she elected to remain in the car and not go into the night club on the second occasion and that she had gone to lodge a complaint with the police at the first available opportunity is inconsistent with the conduct of a person who had consented to sexual intercourse in the manner stated by the appellant and Cloete in their evidence. 5

If ever the complainant could not offer any resistance to sexual overtures by the appellant and as well as Cloete, this could more have been as a result of submission on her part rather than consent, due regard had to the circumstances surrounding the admitted sexual intercourse with her by both the appellant and Cloete. I am of the view that, due regard had to the totality of the evidence, particularly evidence by Koopman, there is substantial corroboration of the complainant's denial that she was a consenting party to such sexual intercourse. 10 15

The appellant, on the other hand, was a poor witness. His evidence is full of improbabilities. The appellant wants to give the impression that there was a love relationship between him and the complainant yet the appellant appears unmoved when, according to his evidence, which the complainant naturally denies, the complainant consents to sexual intercourse not only by the appellant but also by Cloete and Koopman. It is improbable that consent to sexual intercourse, that is an informed consent, would have been given under such circumstances. The magistrate was correct, in my view, in rejecting the appellant's evidence as being false. 20 25

JUDGMENT

The complainant, throughout her evidence, consistently claims to have been aware of the events around her, although she had consumed intoxicating liquor. Whilst I am mindful of the various submissions by Mr Vismer on behalf of the appellant, I am not persuaded under these circumstances that the complainant consented to sexual intercourse, as contended by the appellant. 5

Having arrived at this conclusion it is not necessary for me to deal with the aspect of the submission by Mr Vismer as to whether, because of perceived lessened inhibitions on the part of the complainant arising from alcohol consumption, that the conduct of the appellant could well be construed as seduction as against the crime of rape. I have carefully considered the submissions by Mr Vismer which are comprehensive indeed and we have listened to his argument. However, I regret to have to say, despite such submissions and argument, I am not persuaded that there is a basis to set the conviction aside. 10 15

It follows, in my view, that the appellant's appeal should be dismissed and that the conviction should stand.

With regards to sentence the magistrate took into account all the relevant factors in the determination of an appropriate sentence. He acknowledges in the first instance that the imposition of an appropriate sentence is the most difficult aspect in all criminal proceedings. He took into account the appellant's personal circumstances, particularly the fact that the appellant is a first offender, his marital status and all other factors incidental thereto. He took into account the interests of the society, the seriousness of the offence and the measure of mercy that 20 25

JUDGMENT

goes with it. With regards to the seriousness of the offence and without in any way over-emphasising it over the other balancing factors, he correctly and accurately cites the remarks by Mohamed, CJ in S v C, 1997(2) SACR 3 (SCA): "*we are determined to protect the quality, dignity and freedom of all women and we shall show no mercy to those who seek to invade those rights.*" With regards to the appellant's personal circumstances the magistrate took into account his age, the fact that he had to take severance package at work because of these proceedings, and the fact that he had to set up a family business in Bredasdorp in order to supplement the family income. He correctly, in my view, did not allow his judgment to be blurred by the appellant's personal circumstances and the measure of mercy that goes with it and went on to consider the interests of society, all the triad of factors, that is to say the appellant's personal circumstances, the interests of society, the seriousness of the offence coupled with the interest of the victim and the impact this offence had had on the complainant as a victim.

In my view, the magistrate properly balanced all the relevant factors in the determination of an appropriate sentence and did not in any way misdirect himself in this regard. With regards to the seriousness of the offence, once again without in any way over-emphasising this fact over other relevant factors, he took into account the prevalence of the crime within his area of jurisdiction and the cry of the community out there with regards to the kind of punishment that has to be meted out by the courts in offences of this nature. I am of the view that the magistrate adopted a balanced view of all the relevant factors in the

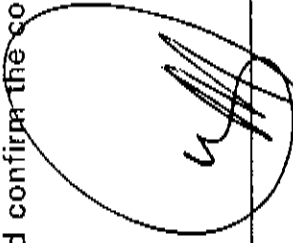
JUDGMENT

determination of an appropriate sentence and that his exercise of a discretion in this regard cannot be faulted at all. It therefore follows, in my view, the appellant's appeal against sentence should also be dismissed and the sentence imposed be confirmed.

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In the result I would dismiss the appellant's appeal as against both conviction and sentence and confirm the conviction and sentence.

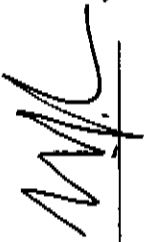
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YEKISO, J

LOUW, J. I agree. The appeal is dismissed. The conviction and sentence are confirmed.

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LOUW, J