IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of:

DAVID JOHN NEL ..... Appellant

versus

THE STATE..... Respondent

CORAM: Corbett, Viljoen et Nestadt, JJA

DATE OF APPEAL: 11 September 1987

DATE OF JUDGMENT : 1987-09- 30

J U D G M E N T

CORBETT JA:

In May 1984 appellant in this matter was convic-ted of rape in the Natal Regional Court (sitting in Durban) and sentenced to five years' imprisonment. The conviction related to an incident which took place in the early hours

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of Saturday, 25 February 1984. The appellant appealed to the Natal Provincial Division ("the NPD") against both his conviction and the sentence imposed. His appeal was heard on 21 March 1985. The Court dismissed the appeal. On 21 October 1985 appellant made application to the NPD (i) for leave to make application to the Appellate Division for the setting aside of appellant's conviction and sentence and the remittal of the case to the trial court for the hearing of fresh evidence; (ii) for leave to appeal to the Appellate Division against conviction and sentence; and (iii) for condonation of the lateness of the applica-tion for leave to appeal (I refer in this regard to the amended order prayed by the appellant). The Court, fol-lowing the procedure indicated in S v Turner 1975 (3) SA 285 (N), granted the application as prayed. It is in terms of this order that the matter now comes before us.

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At the hearing in this Court appellant's counsel conceded that on the evidence placed before the Regional Court there was no valid ground for interfering with the conviction. He, therefore, confined his argument to the question of remittal for the hearing of fresh evidence and the question of sentence. I shall deal first with the remittal issue, but before doing so it is necessary to survey the evidence adduced before the Regional Magistrate and his reasons for convicting the appellant.

The complainant in the case is a Miss S.O., whose age at the time of the trial was 25 years. She then worked as a sales representative for a photographic company. She had never been married, but had a son born out of wedlock, aged seven years. She lived in the Berea, in Durban. Her version of what happened, as given in evidence at the trial, is the following.

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On the evening of Friday, 24 February 1984, she went out with appellant at his invitation. The complain-ant was spending the weekend with her parents, who lived at Cowies Hill, and the appellant came there in his "bakkie" to fetch her at about 20h30. At that stage they had known one another for approximately eight months. He was not her "boy friend" — she in fact had another "boy friend" at the time — but they moved in the same social circles and often met on social occasions in the company of common acquaintances. On the evening in question complainant and appellant first went to the Imperial Hotel in Pinetown for a drink. They stayed there for about an hour and a half, but because none of their friends were there they left and went on to the Rugby Hotel, where they found some of their friends and again had a drink. They stayed there until about midnight. They then decided to go on to a night club in Durban. The appellant thereafter discovered

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that his vehicle was low on petrol and they consequently went to the premises where appellant worked (he was in the busi-ness of repairing motor cars, panel-beating, etc) at number 64, Railway Road, Seaview in order to put in some petrol.

Upon arrival at the premises in Seaview the appellant stopped in a yard in which a vehicle, described by the complainant as a white "Kombi" was parked. (It would appear from appellant's own evidence that the premises belonged to a friend of his, who permitted appellant to main-tain a workshop in the yard behind the house.) The appel-lant alighted, while complainant stayed in the "bakkie". Complainant noticed appellant go to a shed, where she presumed the petrol was kept. Shortly thereafter appellant went to the Kombi, opened the middle door (which gives access to the back portion) and sab on the floor with his legs dangling outside. He commenced smoking a dagga cigarette. The complainant remained sitting in the

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"bakkie" for some time, but then, feeling cold and irritated, went over to the Kombi, entered it and sat at the back on what appeared to be a mattress, waiting for the appellant to finish his dagga cigarette. She waited for about ten minutes and in the course of waiting rested her head in her hands, closed her eyes and relaxed. The appellant then suddenly assaulted her. He pushed her down onto the mattress and forcibly held her down. He pulled up her skirt, "ripped off" her stockings and tried to touch her private parts. The complainant screamed and struggled. She managed to escape from the Kombi and ran to the house. The lights of the house were on and the back door was open. When the complainant reached the back door she found a lady standing there. This lady, it transpired, was a Mrs Michelle Schoe-man, sister-in-law of the proprietor of the house. The complainant, thinking that Mrs Schoeman was the owner of the house, asked Mrs Schoeman whether she could use the

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telephone to speak to the police "because the appellant was trying to rape her". Mrs Sehoeman replied that it was not her house and that she would go to ask her sister-in-law. The complainant waited in the kitchen near the telephone. The appellant then came into the house and asked the com-plainant "what she was trying to prove". Complainant replied that she had no intention of having a sexual relationship with him and felt that the police need to be told about it. Ap-pellant then "brutally grabbed" her round the waist and pul-led her from the kitchen and down the back steps. The complainant screamed and shouted and asked Mrs Schoeman for help. Mrs Schoeman did not, however, attempt to intervene and appellant took complainant to the "bakkie", pushed her in on the passenger side and went round to the driver's seat. The complainant had an aerosol "Defence-U" spray attached to her key-ring. She took this in her hand and as appellant entered the cab she sprayed the

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contents into his eyes. It deterred him for a few seconds and she made a move to get out of the vehicle, but he pushed her in again and hurled abuse at her. He grabbed the aerosol can from her and tried to spray her eyes, but without success. With her still crying and screaming, appellant drove off at high speed. He reached the N3 freeway and turned into it, proceeding in the direction of Durban. At a certain point appellant stopped the vehicle at the side of the road and came round to the passenger side of the vehicle. The complainant hold onto the steering wheel to prevent him pulling her out of the car. She screamed and asked him please to take her home and "not to be silly and try and rape her". Appellant then said that he had always had "this wild desire" to have sexual intercourse with her. He took a blanket from the "bakkie" and laid it down in some tall grass near the edge of the freeway. He pulled the complainant from the vehicle, led her to the blanket and threw her down. He pulled her

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panties off and had intercourse with her. At a certain point the appellant also attempted to have "anal sex" with the complainant, but she managed to turn over and kick him of her. She then jumped up and ran across the freeway and stood in the other carriage-way, ie that in which traffic proceeded away from Durban in the direction of the airport. Almost immediately a motor car approached and stopped. In it were two men, a Mr Minnaar and his son. Complainant explained to them that she had been raped and pleaded with them to take her with them, away from the appellant who was "still in the grass beginning to stand

up". Minnaar agreed and let her into the motor car.

Complainant's evidence then proceeds:

"The gentlemen then drove to the next glide-off, I think it goes to Mobeni or something like that, and they stopped there and the gentleman who was driving the car put his arm out to me and held my hand very tightly and in Afrikaans told me that they were going to pray for me and we stopped there for five
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minutes and they prayed for me and I was absolutely hysterical. We then drove to the nearest police station which was the charge office at Louis Botha Airport."

At Louis Botha airport the police told the com-plainant that the charge would have to be laid at the Pine-town police station because the alleged crime was committed in "their area"; but said that they would telephone her parents so that they could fetch her. The complainant waited until her father came to the airport. She told him what had happened. They went home and complainant changed into some warmer clothing. Her mother then took her to the Pinetown police station, where complainant laid a charge and made a statement. A detective took her to the scene of the crime and there she pointed out the spot where it had all happened. By this time it was about 08h00 on 25 February 1984. They found complainant's stockings about 100 metres up the road from the place where the rape occurred. At 10h55 on the same day complainant was examined

by the district surgeon. The complainant estimates that the rape occurred at about 02h30.

The other witnesses called by the State were Mr Minnaar, Mrs Schoeman and the district surgeon, Dr Noche. Minnaar, it appeared, was a lecturer in electronics and mathematics at the Technikon in Pretoria. He also had a BA degree, for which he had taken psychology as a major sub-ject. At the Technikokon he was a leader of the Students Christian Association. In evidence he stated that as he was driving along the N3 highway at about 02h30 on 25 Februa-rie 1984 he suddenly saw, in the light of his headlamps, a young lady standing in the middle of the freeway, ob-viously intent on causing him to stop. He stopped and she came over to the motor car. She asked them please to help her as she had just been raped. She wanted to be taken to the police station to lay a charge. They picked her up and took her to Louis Botha airport. He confirmed

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having prayed with the complainant by the side of the road.

He stated:

"I said I don't know much about these things but from wbat I've heard and read, the trauma with the actual court case can sometimes be more severe that the actual deed. And she must carefully consider it and I actually suggested that we pray about it. Yes?-- And I do particularly remember that when we prayed I offered her my hand and she really sort of took hold of it as a person that is emotionally very disturbed."

When complainant first approached them he gained the im-pression

that she was obviously "very upset", "very, very hurt and very

upset. Very unhappy".

Mrs Schoeman described in evidence her perception of what happcned

at 64 Railway Road on the night of 24/25 February 1984. They had

just finished watching video films and her sister-in-law was

putting the baby to sleep. The witness was in the kitchen. She then

heard screaming outside. She went to the back door, but saw nothing

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put it down to the next door neighbours fighting. She went back inside. A few minutes later she had another look. She then heard a female shout "Please help me get out of here. I don't want to be here". She saw a female open the door of a white vehicle parked in the yard, climb out and come running towards her. This female was the complainant. The complainant asked if she could use the telephone. Mrs Schoeman replied that she would ask her sister-in-law. Thereafter she decided not to disturb her sister-in-law and was going to tell the complainant to go ahead when she saw the appellant (whom she knew, he being a friend of her husband's) holding the complainant round the waist and carrying her out of the back door. The complainant was shouting and struggling to get away from him. That was all she saw. Under cross-cxamination by the attorney for the defence, Mrs Schoeman stated that she did not recall the complainant saying that she wanted to

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use the telephone because the appellant was trying to rape her.

The district surgeon, Dr Noche, described the medical examination of the complainant which he conducted on 25 February 1984. He knew that the complainant was the alleged victim of a rape. He confirmed and handed in the written report compiled by him at the time. During the examinabion he found a small bruise on her right arm, a bruise on her left thumb and a scratch on the front part of her left leg. There were no recent genibal injuries, but the witness stated that one would not expect to find such injuries in a woman who had had a child.

The appellant gave evidence in his defence.

He was at the time 25 years of age and unmarried. Ho confirmed that he had known thc complainant for approxi-mately a year. He deposed to a much closer and more inti-mate relationship between them than had been described by

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the complainant in her evidence. He etated, for instance, that one night after a party the complainant came home with him and that they had sexuai intercourse there. He also described an occasion whcn the complainant came to his flat early one morning, while he was sleeping with his "girl-friend", got into bed with them and started making sexual advances to him. I might mention in passing that the first of these two episodes was put to the complainant in cross-examination. She vehemently denied it. The other was not put to her. The appeilant stated further that on the first of these two occasions he was "very drunk" and that consequently he was unable to achieve a full erec-tion. The complainant mocked him about this later.

Turning to the night of 24/25 February, the appellant stated that he and the complainant went out together at her invitation. His account of the visits to the Imperial Hotel and the Rugby Hotel tallies more

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or less with the complainant's, save that, according to him, they had substantially more to drink at each of these venues than the complainant had been prepared to admit and that between the Imperial Hotel and the Rugby Hotel they shared a dagga cigarette. The complainant became more and more inebriated as the evening wore on. She mock-ed him in front of others about what was termed his "sexual prowess", or rather the lack thereof, and towards the end of the evening, at the Rugby Hotel, she poured a mug of beer down his back. He decided then that it was time to take her home (to Cowies Hill). They set off in his "bakkie", but at a certain point she "yanked" his steering-wheel so that he was in effect guided onto the freeway to Durban. He then decided to go to his workshop at Seaview to put in additional petrol.

At 64 Railway Road he decided, before getting the petrol, to smoke a dagga cigarette. While he was

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sitting in the doorway of the Kombi, the complainant entered thc vehicle and went to lie on a bed which was fitted into the rcar portion of the Kombi. She refused "something to smoke". Having finished his cigarette, the appellant took of f his clothes, closed the door of the Kombi and climbed into the bed. He just "lay back" on the bed. The com-plainant then "went claustrophobic" and started to scream "Let me out of here, I don't want to be here". He tried to pacify her, but without success. He opened the door and she jumped out. He heard hcr creating a "scene" at fhe house. He pulled on his trousers, rushed into the house, grabbed the complainant and took her out. He put her into the "bakkie". As he turned to go to get thc petrol the complainant sprayed him with tho anti-assault spray. He wrested it from her grasp and sprayed her in retaliation. He then drove off without having filled up with petrol. He proceeded along the N3 highway, heading for Cowies Hill.

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While they were driving along the complainant slipped off her stockings (at the Imperial Hotel she had shown him that there was a small hole in the one stocking) and threw them out of the window. He stopped his vehicle about 400-500 metres further on and reversed back to look for the stockings. As he put it, he wanted to get her home "lock, stock and barrel". He did not succeed in finding the stockings. By that stage tho complainant had quietened down. He stopped the vehicle and alighted. He took out a rug and laid it down next to the freeway and sat down upon it. The complainant shouted from the bakkie "Let's go home". He told her that if she wanted to go home, she could drive herself and he would retrieve the vehicle later. After sitting on the rug for about fifteen minutes he went back to the bakkie and found the complainant slumped over the steering-wheel. He then picked her up - she came quite willingly - and carried her to the rug. She lay

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there, as he put, "spread-eagled". He stood there mastur-bating in order to achieve an erection. The complainant said that if he had intercourse with her she would "have him up" for rape. There followed a conversation of a coarse nature and, thereafter, while appellant was still standing there the complainant got up and ran across the freeway. A car stopped. He shouked to her, but there was no reply. She appeared to have driven off in the car. Later that morning he telephoned her home and as a result of that call the detectives came to see him.

Two other defence witnesses were called: a Mr Nigel Holmes and appellant's brother, Mr Mark Nel. They both deposed, with a certain amount of circumstantial detail, to an intimate relationship between complainant and the appellant.

The Magistrate accepted the evidence of the com-plainant and rejected that of the appellant. He indicated

in his judgment that he was conscious of the need for special caution in a case involving a sexual assault when the Statc relies on the evidence of a single witncss. His comments upon the complainant were as follows:

"The first and lasting impression of her is that she is an attractive, well-groomed and intelligent woman who must be in demand by the majority of men in her age group. She gave her evidence ex-tremely well. Without much guidance from the prosecutor she gave an intelligent, coherent and detailed account of the whole incident from beginning to end. Under cross-examination she remained calm and frankly admitted that she has an ille-gitimate child and that she has smoked dagga before. She did not contradict her-self on any important issue and she has been corroborated in material respects by Mrs Schoeman in respect of the incident at the house, before the alleged rape, and by Mr Minnaar in respect of the events thereafter. The circumstantial evidence relating to the screaming, the missing stockings and panties, her injuries and the incident with Mr Minnaar, supports her evidence and places a large question mark over that of the accused.

To sum up, the Court's impression was that she was a most impressive witness."

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He referred also to Dr Noche's confirmation that she had had the bruises testified to by her, He emphasized that there was no sign that the complainant had exaggerated or was biased against the appellant; and that there was no apparent motive for her to falsely accuse the appellant. The evidence of Minnaar and Schoeman had not been seriously challenged by the defence and was accepted without hesi-

tation.

Of the appellant the Magistrate had the following

to say:

"The accused, on the other hand, was an arrogant, aggressive, cheeky and argumentative witness. He was also extremely talkative and on occasions evasive. It soon became apparent that he was anticipating questions and that he had an answer ready for most of them. He must have realised that there were several serious incriminating features in the State's case and he was nob averse to inventing evi-dence in order to try and find innocent ex-planations for it. Some of those explanations were, to put it mildly, ridiculous."

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He then proceeded to give a number of examples of improbabie explanations and statements.

As to the two defence witnesses the Magistrate said that they —

".... left the distinct impression that they were biased in favour of the accused".

He accordingly found that the charge of rape had been established and convicted the appeliant. I shall deal later with the Magistrate's reasons for imposing the sentence of five years' imprisonment.

On appeal to the NPD appellant's counsel stated that he did not rely upon the appellant's evidence or upon the defence evidence, but argued that on the complain-ant's own evidence there was a reasonable possibility that there had not been penetration. This argument was rejected by the Court, which held that the State had proved beyond reasonable doubt that there was penetration.

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Against this background I now turn to the application to lead further evidence. The original application was f or leave to lead the evidence of Dr Reuben Maller, Barbara Fisher, Joanne Nel, Sharon Badenheuer, Helga Bromfield and Brian Nel; and for leave to recall the com-plainant for further cross-examination; and with leave to the State to call such further evidence as might be con-sidered necessary after the cross-examination of the com-plainant. Affidavits by the persons listed were annexed to the application. The State filed affidavits in oppo-sition to the application and this resulted in the appli-cation gaining momentum by the addition of four more pros-pective witnesses. Broadly-speaking the evidence which it is sought to adduce from these witnesses falls into three categories:

1)evidence of the complainant's character, personality and lifestyle and of the relationship between the parties prior to 24 February 1984;

2)evidence relating to a spermatozoa test that was done and showed a negative result;

/ (3) evidence.....

(3) evidence of the post-trial conduct of the complainant, which suggests that no rape took place.

The power of this Court, under circumstances such as these, to remit a case to the court of first instance for further hearing, with instructions as regards the taking of further evidence, is governed by sec 22 of the Supreme Court Act 59 of 1959, as amended. It is a power which the Court exercises only in exceptional cases for —

"It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty."

(per HOLMES JA in S v De Jager 1965 (2) SA 612 (A) at p 613 B). The possibility of the fabrication of testimony after conviction is an everpresent danger in such matters (see R v Van Heerden and Another 1956 (1) SA 366 (A), at p 372 H - 373A; S v Nkala 1964 (1) SA 493 (A), at p 497 H; S v Zondi 1968 (2) SA 653 (A), at p 655 F). For these

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reasons this Court has in a long series of decisions laid down certain basic requirements which must be satistied before an application for the re-opening of a case and itg remittal for the hearing of further evidence can succeed. These were summarized by HOLMES JA in De Jager's case supra (at p 613 C-D) as follows:

"(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a prima facie likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial."

In an appropriate case this Court has the power to relax strict compliance with the requisite of a "reasonably sufficient explanation" (see (a) above), but it is only.

in rare instances that this power will be exercised (S v Njaba 1966 (3) SA 140 (A), at p 143 H).

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A study of the reported decisions of this Court on the subject over the past 40 years shows that in the vast majority of cases relief has been refused: and that where relief has been granted the evidence in question has related to a single critical issue in the case (as to which see eg R v Carr 1949 (2) SA 693 (A); R v Jantjies 1958 (2) SA 273 (A); S v Nkala, supra; and S v Njaba, supra. In contrast to this, in the present case the application appears to contemplate a re-canvassing of the entire case. As counsel for the appellant conceded in argument, he was really asking fdr a fresh trial de novo before a different magistrate. It seems to me that this factor can only serve to multiply the dangers and disadvantages to the proper administration of justice which have been referred to.in the cases.

In applying the aforegoing principles to the present case, I shall consider the three categories of

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evidence separately. I commence with category (1).

I do not propose to set out the further evidence, as revealed by the affidavits, in any detail. I think LhaL its general thrust was correctly summarized in his heads of argument by counsel for the State when he said that the evidence was claimed by the appellant to

show that —

(i) the complainant is a girl of loose morals, with a heightened sex drive when under the influence of liquor or drugs, inclined to tease men, given to drug abuse, given to playing pranks and constantly seeking the limelight;

(ii) the appellant is impotent when under the influence of liquor and/or drugs, is not sexually demanding and is of a sympathetic and gentle nature; and

(iii) prior to the incident the complainant and the appellant had a sexual relation-ship.

/ Counsel.....

Counsel for the State subjected the relevant affidavits to a detailed critical analysis in subsban-tiation of his submission that many of the allegations (denied on affidavit by the complainant) were of doubt-ful veracity and that in many instances the witnesses

concerned were not unbiassed. While there is much substance in these submissions, I do not find it necessary to decide whether this evidence passes the test of "prima facie likelihood of truth" for in my view it does not pass the other two tests.

Firstly, there is in my view no reasonably suf-ficient explanation, based on allegations which may be true, as to why the evidence was not led at the trial. The evi-dence was available. About that there is no dispute, for the witnesses concerned were all friends or relatives of the appellant. For the failure to call all or any of these witnesses the appellant blames the attorney, Mr K M V Smith, who represented him at his trial. Apart

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from accusing his attorney of having presented "so completely inadequate" a defence that it "caused him material prejudice and led to a miscarriage of justice", appellant also alleged that he gave his attorney Lhe names of "about seventeen witneases" who were able to testify to the matters listed under (i), (ii) and (iii) above, but that Mr. Smith failed to subpoena, or even consult with, any of them.

Another complaint against Mr Smith, as stated in appellant'saffidavit, is the following:

"On the day on which I was to testify, I was so nervous that I smoked dagga (which I was doing habitually at that time), a fact which is in my respectful submission clear from the manner in which I gave my evidence. This shouid have been apparent to Mr Smith, who would have known, where the learned Magistrate could not have, my behaviour and personality when not under the influence of dagga."

And a third complaint is:

"After my conviction and sentence, Mr Smith informed me, and my mother and aunt, that I could not appeal, as I had
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been sentenced. Only later during that week did he discover his mistake, and note an appeal."

The State filed an affidavit by Mr Smith. In it he denied that appellant had given him the names of seventeen witnesses; stated that he could not understand why appellant alleged that he should have known that applicant was under the influence of dagga at the time of giving evidence; and denied that he ever informed the appellant that he could not appeal.

In general, I do not think that an applicant in a case such as this can rely upon the alleged shortcomings of his legal representative as an explanation as to why the evidence was not led at the trial (cf S v Swanepoel 1983 (1) SA 434 (A), at p 447 F). But in any event I find the appellant's evidence (on affidavit) in this respect to be most unconvincing. Although he speaks of seventeen witnesses at the time of the trial, the expanded applica-tion for leave to lead further evidence refers to only

five witnesses in this category. The bizarre allega tion that/he gave evidence while under the influence of dagga (no doubt in order to expiain his poor showing in the witness box) seems most improbable, because it is difficult to believe (a) that a person in his position
would have behaved so irresponsibly and (b) that, if he did, no-one in or around the court that day would have perceived his condition. And I find it equally improbable that any attorney could have told him that he was not entitled to appeal. Consequently, I hold that there

is not a reasonably sufficient explanation, based on allegations which may be true, why the evidencé was not led at the trial.

Secondly, I cannot see that the evidence in question can materially affect thc outcome of the trial. As appears from my summary of the evidence given at the trial, the crucial issues relate to what happened at

64 Railway.....

64 Railway Road and beside the N3 freeway. Apart from this and apart from certain matters of detail, the re-spective versions of the complainant and the appellant do not differ radically. At 64 Railway Road, however, complainant alleges that the appellant made sexual advances (she regarded it as an attempt to rape her), whereas he de-nies that anything of the sort happened. And beside the N3 freeway complainant alleges that the appellant did rape her, whereas he says that, though he wished to have inter-course and though she appeared to be willing, nothing in fact happened. The undisputed evidence of what happened at these two locations (as confirmed by Mrs Schoeman and Minnaar) is strongly corroborative of complainant's version. Why else should complainant have screamed and shouted for help in the Kombi, and run to the house in order to tele-phone? And what explanation has the appellant for having removed complainant so forcibly from the house and bundled

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her into the "bakkie"? And for her having used the anti-assault spray on him? The suggestion that the com-plainant was overtaken by a fit of claustrophobia seems to be utterly fanciful and certainly does not adequately explain what happened. It is true that Mrs Schoeman does not confirm that complainant told her of the attempted rape and that she wanted to telephone the police. But this con-flict is of minor importance. Mrs Schoeman was not an en-tirely independent witness: the appellant was a friend of her husband's. Alternatively, in the confusion she may not have taken this in. On the other hand, the complain-ant may be mistaken about what she told Mrs Schoeman. What is significant, however, is that complainant wanted to use the telephone and it seems likely that this was in order to telephone the police. Who else, one may ask, at that time of night?

Furthermore,.....

Furthermore, one may also aak why complainant should have run across the N3 freeway into the night, at not inconsiderable danger to herseif, have stopped the first car that approached and told the occupants that she had been raped, have gone off with them, and have laid a charge with the police, if, as appellant alleges, not only was she willing to have intercourse, but in fact intercourse did not take place? Moreover, is it likely that in the circumstances alleged by appellant she would have been able to simulate a state of being very hurt, upset and emotionally disturbed well enough to convince Minnaar and others; and have been able to participate with an apparent show of seriousness in prayer at the roadside? A minor, but significant, point is appellant's evidence to the effect that complainant said to him that if he had inter-course with her she would have him up for rape. It is dif-ficult to reconcile this with his assertion that she was

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willing to have intercourse with him. It is true that in cases of sexual assault false charges do get laid, for a variety of reasons, and it is for this reason that the court is required to observe caution in such cases (see judgment of BOTHA JA in S v Balhuber, unreported, 25/9/86), but, one asks, what could have been the reason in this case? No reason was suggested by appellant at the trial. In his affidavit in support of the application appellant said:

"It is my firm belief that the whole matter started as a prank for the com-plainant, and that she did not believe it would have serious repercussions."

This is an obvious afterthought and, in my view, it is a highly improbable theory. A far more likely theory, consistent with all the bjective facts, is that she was raped.

Having regard to all this evidence and to the

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probabilities, the question which must be asked is whether the evidence falling into category (1) can materialiy affect the outcome. And here the evidence in this category must be weighed against the evidence adduced at the trial and the probabilities generally. A material factor is the Magistrate's perception of the credibility of the I witnesses, based upon his observation of them in the witness-box. His findings in this regard have already been noted.

It may be accepted that the evidence in category (l) portrays the complainant as a high-spirited, mischievous young woman, prone to exhibitionism (particularly in regard to her physical charms), certainly no prude, either in her attitudes or in her way of life, and inclined to tease men. It also shows her as someone given to dagga-smoking (though not to a great degree) and fond of liquor. It also seeks to establish that the complainant and the appellant had a prior sexual relationship. This evidence would have been

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of more relevance and cogeney had appellant's case been that intercourse had taken place with the complainant's consent. But, as I have shown, his case is that no inter-course took place. And his only explanation, at this late stage, for the complainant's conduct is that she was playing a prank. As I have indicated, I find this expla-nation, viewed in the light of the objective evidence, utter-ly far-fetched. In the judgment of the Court a quo granting leave to appeal it was stated that if the complainant was a woman in the habit of abusing drugs and if she was "high on drugs" at the time, this could"easily" explain her con-duct in laying a false charge. But there is no evidence to suggest that the complainant was "high on drugs". At most she had shared a dagga cigarette with the appellant four or more hours earlier. Neither of the State witnesses with whom she came in contact that night appears to have noticed anything about her behaviour to indicate that she

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was under the influence of drugs, or anything else for that matter. I would, therefore, not regard the evi-dence of her drug-taking as being likely to affect the outcome.

The evidence of a prior sexual relationship, even if true, appears exaggerated, as appellant himself deposed to only one such prior episode. The evidence also portrays the appellant as being impotent, or tending to impotency, while under the influence of drugs. This kind of general and rather unspecific evidence does not carry much weight when compared with the evidence of what actually happened. And, in any event, it appears from the complainant's own evidence that appellant experienced some difficulty in achieving an erection prior to raping her.

In all the circumstances I am not persuaded that the evidence in category (1.) would be materially relevant to the outcome of the trial and that for this reason as

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well the application for remittal to lead such evidence must be refused.

I come now to category (2). This relates to a singie issue, viz. a spermatozoa test. It appears from Dr Noche's report that in the course of his examination of the complainant he took two slides and a swab and placed them in a sealed envelope, upon which the complainant's name and the date were written. No reference to these slides and the swab were made by Dr Noche in his evidence-in-chief and he was not asked about them by appellant's attorney in cross-examination. From affidavits filed in support of the application for remittal, it appears that these slides and the swab related to vaginal smears taken by Dr Noche; that they were submitted to the medico-legal laboratory of the South African Police at Durban for exami-nation; and that they were examined there by a Mrs Barbara Fisher, a registered medical technologist, who found that

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they wcre "negative for spermatozoa". According to a deponent,

Dr H F J Schumann, a medical officer in the em-ploy of the State

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" 5. The fact that slides and swabs taken from a rape victim are established to be negative for spermatozoa, does not necessarily mean that the victim was not raped. In such a case, a rape could have taken place where the assailant has undergone a vasectomy, ejaculated outside the vagina, has not ejaculated, suffers from aspermia, has used a condom, or where blood is in existence in the vagina either due to injury or menstruation.

6. Where none of the considerations set forth in the second sentence of paragraph 5 hereof apply, absence of spermatozoa or of any evi-dence of spermatozoa is virtually conclusive proof that ejaculation did not occur in the vagina, and had not so occurred for at least 72 hours prior to the slides and swab being obtained."

(Obviously the phrase "none of thc considerations" in para.6

must be read as not including ejaculation outside the vagina.)

Another deponent, Dr R Maller, gives the same evidence.

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The State filed an affidavit by Prof J P Nel, a legal pathologist in the employ of the State and having links also with the medical faculty of the University of Natal. He adds to Dr Schumanu's list in para. 5 above certain other factors that may cause a spermatozoa test to show incorrectly a negative result, including an im-proper technique in the taking of the swab and bhe making of the slide.

Applying the tests laid down in De Jager's case, supra, there is no question as to the truth of this evidence concerning the test and its result. As to whether there is a reasonably sufficient explanation as to why it was not led at the trial, there is undoubtedly substance in the argu-ment that the taking of the gwab and slides is explicitly referred to in Dr Noche's report and that in the circum-stances appellant's attorney could have pursued the matter had he wished to do so. On the other hand, it appears

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that the prosecutor at the trial had Mrs Fisher's report in his possession, but did not tendor it in evidence or inform the defence attorney of its existence and contents. In an affidavit filed the prosecutor seeks to justify this on the ground that such a negative result is "not only in-conclusive but neutral" on the issue as to whether ejacu-lation took place in the vagina or not. And in this con-nection he states that in his own experience in more than half the rape cases where it is common cause that intercourse and ejaculation occurred the apermatozoa tests have been negative.

In my view, the prosecutor's failure to place the affidavit containing the result of the test before the Court, or at least to inform the defence attorney of it, was an error of judgment and in breach of his general duty to disclose information favourable to the accused (see Lans-down and Campbell South African Criminal law and Procedure,

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vol. V, pp 511-12 and the cases there cited). lt is true that a negative result is not conclusive and that various other imponderables have to be resolved before any defi-nite inference can be drawn, but nevertheless it does tend to support the proposition that no ejaculation in the vagina took place and is favourable to the appellant. It was for the Court, not the prosecutor, to evaluate the cogency of the evidence. Whether a failure to elicit evi-dence, the existence of which should have been apparent to the defence, is neutralised by the prosecutor's wrongful failure to disclose the evidence is not a matter that need now be decided for I am not persuaded that this evidence would materially affect the outcome of the trial.

It is true that, although the complainant's evi-dence is not altogether clear on this aspect, she would seem to have alleged that ejaculation took place during penetration. There are, however, three factors to be

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considered. Firstly, there are the imponderables, referred to above, which would have to be eliminated before the negative result of bhe test could carry any cogency. And in this regard, it seems to me that it would be difficult to determine a number of these, eg. whether or not the technique in obtaining the swab and slides had been faulty. Secondly, absence of spermatozoa does not disprove rape. Penetration could have been achieved without ejaculation having occurred in the vagina. In this regard the complainant may have been genuinely mistaken in her belief that ejaculation took place during penetration. After all she was, on her version, being raped and was not in a position to make accurate observations. Thirdly, though this evidence might thus affect the reliability of the complainant's evidence on this particular point, it must again be weighed against the evidence on record, the strength

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and weakness of the versions given by complainant and appellant, the Magistrate's findings on credibility and so on having given the matter careful consideration, I have come to the conclusion that the evidence in cate-gory (2) is not materially relevant to the outcome of

the trial.

Finally, there is the evidence under category (3). I shall assume in appellant's favour that the evidence of complainant's post-trial conduct would be admissible at any further hearing upon remittal (cf. S v Lehnberg and Another 1976 (1) SA 214 (C), at p 216 G). This evidence consists of (i) complainant having burst into tears after sentence was passed upon appellant, (ii) a suicide attempt on complainant's part, (iii) a meeting between complainant, the appellant and appellant's brother

at the Malibu Hotel, Durban in July 1985, ie after appel-

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lant's appeal to the NPD had failed, at which the complainant is alleged to have passed certain remarks, (iv) a meeting between complainant and appellant's attorney on about 31 July 1985 and the discussions which took place at this meeting and (v) statements which

complainant is alleged to have made to other witnesses. All this evidence is said to establish that the complainant falsely accused the appellant and gave perjured evidence at his trial.

The situation created by a recanting witness was dealt with by this Court in R v Van Heerden and Another, supra, where CENTLIVRES CJ made the following statement (at p 372 H - 373 A):

"To accept at their face value affidavits made by material witnesses who allege therein that they knowingly gave false evidence at the trial would leave the door wide open to corruption and fraud. It is not in the interests of the proper administration of justice that further evidence should be allowed

47
on appeal or that there should be a retrial for the purpose of hearing that further evidence, when the only further evidence is that contained in affidavits made after trial and conviction by persons who have recanted the evidence they gave at the trial. To allow such further evidence would encourage unscrupulous persons to exert by means of threats, bribery or otherwise undue pressure on witnesses to recant their evidence. In a matter such as this the Court must be extremely careful not to do anything which may lead to serious abuses in the administration of justice."

And in S v W 1963 (3) SA 516 (A) OGILVIE THOMPSON JA said (at p 524 E) —

".... the mere circumstance that a witness called at a trial has subsequently made a statement inconsistent with his evidence will seldom in itself be a sufficient ground for reopening a concluded trial....."

(See also S v Zondi, supra, at p 655 F.)

I do not propose to deal with the evidence falling under category (3) in detail. I have studied it carefully, together with the complainant's replying

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48

affidavit. From this it appears that the complainant is not a recanting witness in the true sense. Indeed in her affidavit the

complainant denies that what she testified to at the trial was anything but the truth. She also denies, incidentally, the compromising statements alleged to have been made by her. Much of the evidence under category (3) relates to incidents from which appel-lant seeks to deduce an admission by the complainant (often by inference) that she gave untrue evidence at the trial. In most instances the inference cannot be drawn. In a few cases, eg. the alleged admission to. appellant's brother, Mark Nel, before going to see appel-lant's attorney, the evidence is clear but, in my view, somewhat suspect. (In regard to the example given, not only does the evidence not ring true, but there is also the factor that the Magistrate found Mark Nel to be a biassed witness.) Moreover, all this evidence

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must also be weighed against the evidence adduced at tho triai, the findings of the Magistrate etc. to deter minc its materiality. Having thus considered it, I am of the opinion that the evidence under category (3) does not pass the materiality test and on that ground alone the application for remittal to hear such evidence cannot succeed. For these reasons I hold that the application to set aside the conviction and sentence and for the remittal of the matter for the hearing of further evidence should be refused.

That leaves only the question of sentence to be considered, In his judgment the Magistrate emphasized the prevalence of the crime of rape and the need for a sentence which will serve as a deterrent to others.

He pointed out, however, that the complainant was not a virgin and was not seriously injured. Against this the

/ appellant.....

appellant showed no remorse. He added —

"On the night in qucstion you had obviously made up your mind that you were going to rape hcr at all costs. It will be recalled that after she fled to Mrs Schoeman's house, you pulled her away from there, forcibly took her back into the motor vehicle and eventually stopped at the side of the road where you had her at your mercy."

It was suggested in argument that this amounted to a misdirection. If this statement should be interpreted to mean that the appellant set out at the beginning of the evening with the crime of rape in mind, then it would be a misdirection, since there is no evidence to substantiate this. But I do not think thak thak is what the Magistrate intended to convey. What he probably meant was that as from the time of the Kombi incident the appellant had made up his mind that he was going to rape the complainant, if she did not consent to intercourse, and I think that this is a fair inference from the facts.

Having mentioned the appellant's personal circum-

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stances, including the fact that he had no previous convictlons, the Magistrate conciuded that the only appropr.la ke sentence was a reasonable term of imprisonment. This he Eixed at five years' imprisonment in the concluding portion of his judgment on sentence the Magistrate said:

"This is not the usual or ordinary type of case where the rapist grabs an unknown person and rapes her. In this case you knew the complainant well and you had often associated with her."

it is not clear whether he regardcdthis as a mitigating or an aggravatihg factor. To my mind, it is a mitigating factor in that the shock and affront to dignity suffered by the rape victim would ordinarily be less in the case where the rapist is a person well-known to the victim and someone moving in the samc sociai milieu as the victim.

The sentence imposed by the Magistrate is sub-

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stantially heavier than the one I would have imposed had I originally been seized of the case. And I think that the disparity is sufficient to warrant interference on appeal. In my opinion, particularly bearing in mind the appellant's personal situation, including the fact that he has no previous convictions, the lack of any serious injury to the complainant and the fact that she was evidently a woman of experience from the sexual point of view, justice would be served by a suspension of half the sentence imposed.

The following order is made:

(1) The application for the setting aside of the conviction and sentence and for the remittal of the matter for the hearing of further evi dence is refused.

(2) The appeal against the conviction is dismissed.

(3) The appeal against the sentence is allowed and there is substituted for the sentence imposed by the Magistrate the following:

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"Five years' imprisonment, of which two-and-a-half years are suspended for a period of five years on condition that appellant is not convicted of the offence of rape or indecent assault or an attempt to commit either of these offences committed during the period of suspension and for which offence the appellant is sentenced to a period of imprisonment without the option of a fine."

M M CORBETT

VILJOEN JA)CONCUR

NESTADT JA) CONCUR