REPUBLIC OF SOUTH AFRICA

REPORTABLE

evdw/ Case no: 35/97

IN THE SUPREME COURT OF APPEAL OF
SOUTH AFRICA

In the matter between:

RODNEY JACKSON

Appellant

and

THE STATE

Respondent

Court: Mahomed CJ, Van Heerden DCJ, Olivier, Stretcher JJA

and Farlam AJA

Date of Hearing : 23 February 1998 Date_

of Judgment: 20 March 1998

JUDGMENT

OLIVIER JA

At the conclusion of atrial in a regional court the appellant was convicted of attempted rape. He was sentenced to eighteen months imprisonment in terms of the provisions of s 276(1)(i) of the Criminal Procedure Act 51 of 1977 and, in addition thereto, eighteen months imprisonment conditionally suspended for five years. He appealed unsuccessfully to the then Cape Provincial Division of the Supreme Court of South Africa against both his conviction and the sentence imposed by the trial court. His appeal against the conviction and sentence now serves before us, leave having been granted by the court a quo.

The complainant's evidence is the following. In the early hours of 26 December 1993, the complainant, a slightly built 17 year old schoolgirl, accompanied by her sister, R., and some friends, set off to a park in Sydneyvale, Bishop Lavis in Cape Town to have some fun. They took a case of

beer along. After a while the appellant, a married and well-built 24 year old policeman, arrived at the scene with his car. He was known to the complainant. The atmosphere was convivial and they drank the beer. The complainant had one beer. Subsequently the appellant offered to take some of the girls for a drive in his car, at the same time giving them driving lessons. The complainant, R. and a friend, Brigitte, accepted the offer and off they went. After a while, R. and Brigitte were dropped off in the park and the appellant and complainant drove to another nearby park in Sly Road. The complainant was driving the car. At this park the appellant instructed the complainant to stop the car. When she asked why they had to stop, he replied that he wanted to finish the beer which he was drinking. She stopped the car and he drank a few glasses of beer. He tried to kiss her, but she turned away. He then told her that he had desired her for a long time. After that he grabbed both her hands and, with one of his hands, raised them above her head. He overpowered her and proceeded to take off her plimsoles and

he lowered her jeans and panties to her ankles. Having succeeded in removing one leg of her jeans completely, he lowered the driving seat on which she was sitting, and heaved himself upon her. She tried to fight him off and eventually they ended up on the back seat of the car. She started shouting and screaming, but he put his hand over her mouth. She scratched him on the forehead. He then exposed his penis, forced her legs apart and tried to have intercourse. He also inserted a finger into her vagina. She pleaded with him, but he persisted in trying to force himself into her, still lying on top of her. She became hysterical, screaming and crying, and he desisted. She immediately jumped out of the car,

pulled up her panties and jeans, and ran off, leaving her plimsoles in the car. She ran to a nearby house in search of help, but nobody opened the door. Two young men then approached her but, because she was terrified, she ran away. Eventually she ended up in the park where her sister and Brigitte were still enjoying themselves with friends. She was still hysterical and crying, and immediately told

R. that she had been raped by the appellant. After a while he arrived at the park. The complainant accused him of having raped her, which he denied. R. tried to assault him with a beer bottle and a friend removed the complainant's plimsoles from the appellant's car. The police later found one of the complainant's earrings in the car. The complainant then proceeded to the home of the appellant's parents, there also complaining of having been raped by him. Later that morning she and the appellant were separately examined by the district-surgeon.

The complainant's version was supported by R.'s evidence, at least in respect of the events before and after the appellant's alleged conduct. This evidence confirmed that the complainant arrived at the park with her sister and friend; that they drove about with the appellant and then returned to the park; that the complainant and the appellant then drove off; that she later returned on unshod feet in a state of hysteria, complaining that she had been raped by the

appellant and that she accused the appellant of having raped her when he returned to the park.

The appellant's version of events is essentially different from the complainant's. He said that they were conversing in his car about intimate affairs. He kissed her, and she did not resist, but returned his attentions. They both moved to the passenger seat, which he let down. She allowed him to lie upon her. He started petting her breasts and private parts, while she remained fully clad. She did not resist. After about two or three minutes things started "hotting up". Suddenly the complainant pushed him away, got out of the car and ran away. At no time did he expose his penis, take off her clothes, or put his finger into her vagina. The appellant added that when the complainant accused him in the presence of R. and others that he had raped her, he denied having done so.

The appellant denied having raped, or having attempted to rape, the complainant.

When the appellant was examined by the district-surgeon, later that morning, scratch marks were found on his forehead and right ear. His explanation for this is that his wife attacked him and scratched him on the forehead and ear when she heard of the complainant's accusations against him.

According to the evidence of the district-surgeon, the complainant was in a shocked and withdrawn condition when he saw her and she found the examination painful. He could not confirm that full penetration had taken place, but there were abrasions on her vaginal mucosa and buttocks, which are reconcilable with unlubricated sexual intercourse, but not readily reconcilable with the appellant's version of what happened.

The complainant's mother testified that since the night in question the complainant had become withdrawn, had lost interest in her school work and had in effect dropped out of school.

The regional court magistrate rejected the appellant's evidence as untrue

and unreliable and accepted the complainant's version. The conviction was confirmed by the court a quo (Van Reenen J with whom Van Deventer J concurred). Unfortunately, this judgment is marred by a misdirection. Van Reenen J found that it was reasonable to assume that the complainant had told the police in her statement that penetration had occurred.

But he pointed out that complainant in her viva voce evidence had expressly stated that she did not know whether penetration had occurred and to what extent. The learned judge, therefore, held that there was a discrepancy between her statement and her evidence and that the prosecutor should have made her statement to the police available to the defence. Van Reenen J stated that because this was not done, an irregularity had been committed and the credibility finding of the magistrate should be ignored. Van Reenen J held that the court a quo was at liberty to decide the issue on the record before it. He came to the conclusion that the appellant's version was irreconcilable with the complainant's conduct in

running away from the car, leaving her plimsoles behind, immediately complaining of having been raped by him, and in presenting vaginal abrasions not readily explicable on his version. Accordingly he upheld the magistrate's verdict. In my view, no irregularity such as that found by the court a quo, was committed. It is pure speculation to say that the complainant used or would have used the word "penetration" in her statement to the police. Under cross-examination she repeatedly stated that, according to her understanding, she had been raped, whether penetration had taken place or not, because the appellant had forced or tried to force his exposed penis into her vagina without her consent. It is, therefore, highly unlikely that she would have told the police that "penetration had taken place", instead of rather saying that she "had been raped". In any event, a court of appeal should not on the basis of mere assumptions and in the absence of clear evidence find that a trial court has committed an irregularity. There was consequently no error committed failure by the prosecutor in not handing the

complainant's police statement to the defence, and no finding that an irregularity had occurred should have been made.

In the absence of an irregularity or misdirection, a court of appeal is bound by the credibility findings of the trial court, unless it is convinced that the such findings are clearly incorrect.

In this Court it was argued on behalf of the appellant that the trial court misdirected itself in not truly applying the cautionary rule in respect of the evidence of complainants in sexual cases. It was argued that the magistrate merely paid lip service to the rule. Counsel for the State gainsaid this, but also argued that the basis, meaning and ambit of the cautionary rule should be revisited. She argued that the rule, as it is now applied in practice, is discriminatory towards women, should not be countenanced, is unnecessary, and unfairly increases the burden of proof resting on the State in cases involving sexual offences.

The rule was expressed by the Court in S v Snyman 1968(2) SA 582(A) at

585 C-H per Holmes JA as follows:

> "Unlike an accomplice in a criminal trial, a complainant in a sexual case is not ex hypothesi a criminal. Nevertheless in respect of both of them there exists an inherent danger in relying on their testimony. First, various motives may induce them to substitute the accused for the culprit. Second, from their participation in events which actually happened, each has a deceptive facility for convincing testimony, the only fiction being the deft substitution of the accused for the real culprit. Hence in sexual cases there has grown up a cautionary rule of practice (similar to that in accomplice cases) which requires -
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> a) the recognition by the Court of the inherent danger aforesaid; and
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> b) the existence of some safeguard reducing the risk of wrong conviction, such as corroboration of the complainant in a respect implicating the accused, or the absence of gainsaying evidence from him, or his mendacity as a witness . . .
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> Satisfaction of (a) and (b) will not per se warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt; and this depends upon an appraisal of the totality of the evidence and the degree of safeguard aforesaid... In this connection I respectfully agree with

> the observations of MACDONALD, A.J.P., in the Southern Rhodesian Appellate Division case of R v J, 1966(1) SA 88 at p 90, to the effect that, while there is always need for special caution in scrutinising and weighing the evidence of young children, complainants in sexual cases, accomplices and, generally, the evidence of a single witness, the exercise of caution should not be allowed to displace the exercise of common sense."

The academic and legal literature on the history, raison d'etre and justification of the said rule is extensive and impressive. I have considered these contributions, but in view of the clear conclusions to which I have come, it is not necessary to review them in detail. I shall summarise my conclusions as follows:

The notion that women are habitually inclined to lie about being raped is of ancient origin. In our country, as in others, judges have attempted to justify the cautionary rule by relying on "collective wisdom and experience" (see the judgment of this Court in S v Balhuber, 1987(1) PH H 22(A) as discussed in S v F, 1989(3) SA 847(A) at 853 et seq.; 854 F - 855 B. See also S v M 1992(2)

SACR 188(W)). This was also the justification, before the reform of the law, in the UK (see R v Hester 1973 AC 296 at 309; Director of Public Prosecutions v Kilbourne [1973] AC 729 at 739 et seq). This justification lacks any factual or reality-based foundation, and can be exposed as a myth simply by asking: whose wisdom? whose experience? what proof is there of the assumptions underlying the rule?'

The fact is that such empirical research as has been done refutes the notion that women lie more easily or frequently than men, or that they are intrinsically

See esp S v D and Another, 1992(1) SA 513 (Nmb HC) at 516 A-C; and the references in Labuschagne Versigtigheidsreel by seksuele sake Obiter 1992: 131 -137; 1992:136. Armstrong Evidence in rape cases in four Southern African Countries Vol 33 No 2 Journal of African Law 1989:183 says at 193 g-h:

> "The cautionary rule in rape cases is based on the principle that women are naturally prone to lie and to fantasise, particularly in sexual matters and that they are naturally vengeful and spiteful and therefore likely to point a finger at an innocent man just out of spite. There is absolutely no evidence that women are less truthful than men, or that they fantasise more or that they are naturally vengeful and spiteful. Such a suggestion is misogynistic, and should be dismissed out of hand. Therefore the cautionary rule is based on a principle which is discriminatory towards women, and inappropriate in countries committed to equal rights for men and women, and the rule should be prohibited on this ground alone. The cautionary rule has been called a lingering insult to women."

unreliable witness.[2]

An English Law Commission Working Paper (No 115, 57-58) also found no evidence to substantiate the cliche that the danger of false accusations is likely to exist merely because of the sexual character of the charge, and the Supreme Court of California, in P v Rincon-Pineda (14 Cal 3d 864), despite a detailed examination of empirical data, found no evidence that complainants in sexual cases are more untruthful than complainants in other cases. It concluded that the rule was one without a foundation; that it was unwarranted by law of reason; that it discriminates against women, denies them equal protection of the law and assists in the brutalization of rape victims by providing an unequal balance between their rights and those of the accused.

[2] See also Colleen Helen Hall, Sexual Politics and Resistance to Law Reform: A critique of the South African Law Commission Report on Women and Sexual Offences in South Africa. LLM Thesis, University of Cape Town, 1987:88; Dianne Hubbard, A critical discussion of the law on rape in Namibia. University of Namibia, Windhoek 1991:34.

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The New York Sex Crimes Analysis Unit carefully analysed all allegations made to them over a period of two years. They found that the rate of false allegations for rape and sexual offences was around 2 percent, which was comparable to the rate for unfounded complaints of other criminal offences (see DJ Birch, Corroboration in Criminal Trials : a Review of the Proposals of the Law Commission's Working Paper. Criminal Law Review 1990:667 at 678 note 69).

The oft quoted statement by Lord Hale CJ in the seventeenth century that it is easy to bring a charge of rape (and difficult to refute it) is, with respect, insupportable.

Few things may be more difficult and humiliating for a woman than to cry rape: she is often, within certain communities, considered to have lost her credibility; she may be seen as unchaste and unworthy of respect; her community may turn its back on her; she has to undergo the most harrowing cross-examination in court, where the intimate details of the crime are traversed ad

nauseam; she (but not the accused) may be required to reveal her previous sexual history; she may disqualify herself in the marriage market, and many husbands turn their backs on a "soiled" wife.[3]

It is also sometimes said that the rule does not affect the State's burden of proof. This is not correct. In R v W 1949(3) SA 772(A) Watermeyer CJ at 783 said that had the case been one of theft, the evidence would have satisfied the test of proof beyond reasonable doubt; but because the case was one of sexual assault, the same evidence would not suffice. In that case the accused was found not guilty because the case against him had not been proved beyond reasonable doubt although the trial court found strongly in favour of the truthfulness of the complainant and against that of the appellant.

[3] As regards Lord Hale's views, see Geis : Lord Hale, witches, and rape 27 British Journal of Law and Society 1978:90. In general see Fryer Law versus prejudice : views on rape through the centuries, vol 1, SA Criminal Law Journal 1994:74-77. I agree with the contrary view expressed by Frank J in S v D and Another, supra at 515 J, and with the similar views of Labuschagne, supra, 1992:136 and Armstrong, supra, 1989:182-183.

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In comparable modem systems, the cautionary rule and its variations have been abolished.

In Namibia, this was effected by the judgment of Frank J in S v D and Another, supra, and in Canada by s 8, chapter 93 of the Criminal Law Amendment Act, 1974-75-76. (See Jeffrey G Hoskins The Rise and Fall of the Corroboration Rule in Sexual Offence Cases, vol 4 Canadian Journal of Family Law 1983:173-214.)

In the UK the obligatory nature of the rule was abrogated by s 32(1) of the Criminal Justice and Public Order Act, 1994. (Discussed by Peter Mirfield 'Corroboration' after the 1994 Act in Criminal Law Review 1995:448 et seq.)

In New Zealand the rule was abolished by the Evidence Amendment Act (No 2) of 1985 (See John Hatchard in Journal of African Law 1993:97 at 98 note 9), and in Australia by s 62(3) of the Crimes Act (see Law Reform Commission of Victoria : Report on Rape and Allied Offences : Procedure and

Evidence, March 1988 : 39 par 94).

In California it was held in P v Rincon-Pineda, supra, that the rule was unwarranted by law or reason (see also the discussion by John Hatchard, supra, at 98 et seq).

In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt - no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.

In formulating this approach to the cautionary rule under discussion I respectfully endorse the guidance provided by the Court of Appeal in R v Makanjuola R v Easton ([1995] 3 All ER 730 (CA)), a decision given after the

legislative abrogation of the cautionary rule in England. Although the guidelines in that judgment were developed with a jury system in mind, the same approach, mutatis mutandis, is applicable to our law.

At p 732 f to 733 a Lord Taylor CJ stated:

> "Given that the requirement of a corroboration direction is abrogated in the terms of s 32(1), we have been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge ought in summing up to a jury to urge caution in regard to a particular witness and the terms in which that should be done. The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to carry on giving 'discretionary' warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the 1994 Act. Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider

> it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content."

Lord Taylor CJ then formulated eight guidelines, the third of which is particularly important for our purposes. It reads as follows (see p 733 c-d):

> "(3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to

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be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel." (My emphasis.)

It follows that the magistrate was not obliged to apply such a rule.

I am not convinced that the trial court misdirected itself on the evidence before it, nor that the decision was wrong. On the contrary, the guilt of the appellant was proved beyond reasonable doubt. The actions of the complainant were consistent with the allegations made by her. The abrasions found by the district-surgeon were compatible with her evidence and difficult to reconcile with the version of the appellant that he merely rubbed the complainant's private parts without using any force and while she was fully clad. His explanation of the scratches on his forehead and ear, uncorroborated as it was, would mean, if true, that the complainant was lying on this score. But how would she have known that he was injured, as it was never suggested that she was present when he was

allegedly scratched by his wife?

Furthermore, on both versions the complainant fled from the car, leaving her plimsoles there. This is incompatible with the accused's version of consensual and non-violent love making. When the complainant reached her sister and friends, she was hysterical and immediately complained of having been raped. The district-surgeon also reported that when he examined her, she was in a state of shock. This is incompatible with the accused's version.

There appears, from the evidence, to be no reason why the complainant would have lied to her sister and friends, to the district-surgeon, to the police and to the trial court. There was no enmity between the complainant and the accused before the incident occurred; on the contrary, they were driving around and he chose her to go with him for a further drive. He was a brother of her friend. There appears to be no reason for falsely implicating the accused in a serious crime and for bringing shame and hurt upon herself.

In my view, the appeal against the conviction must fail.

If the sentence imposed by the trial court is open to criticism, it can only be that it sins on the side of leniency. The complainant was at the time a young, slimly built schoolgirl. The accused was older, bigger and stronger. It emerges from the evidence that she knew the accused was a policeman, and that she trusted him as a friend. His treatment of her was a despicable abuse of physical strength, and a violation of friendship and trust. The fact that he was a policeman whose duty it was to uphold law and order and not subvert is, is an aggravating factor. He acted in a manner unacceptable in our society, which is committed to the protection of the rights of all persons, including, pertinently, the right of women to their physical and moral integrity. Moreover, his actions had a serious detrimental effect on the psyche of the complainant.

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In short, there is no merit in the appeal against the sentence.

In the result, the appeal against the conviction and sentence is dismissed.

I concur:

Mahomed CJ

Van Heerden DCJ

Streicher JA

Farlam AJA