

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A51/2017

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

15/6/2017

DATE

SIGNATURE

In the matter between:

MICHAEL STAVARISH

Appellant

and

Respondent

THE STATE

J U D G M E N T

FISHER J:

[1] This is an appeal against conviction and sentence with leave of this court given on 16 February 2017. The appellant was charged and convicted of rape, for which he was sentenced to 10 years imprisonment.

[2] Only the complainant was called by the State. This is not necessarily a problem. Section 208 of the CPA provides that an accused may be convicted of any offence on the single evidence of any competent witness. In *S v Sauls and Others* 1981 (3) SA 172 (A) 180 it was said that there is no rule-of-thumb test or formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and should consider its merits and demerits and, having done so, should decide whether it is satisfied that the truth has been told despite shortcomings or defects or contradictions in the evidence. In *S v Webber* 1971 (3) SA 754 (A), it was decided that the evidence of a single witness should be approached with caution and such evidence ought not necessarily be rejected merely because the single witness happens to have an interest or bias to the accused. The correct approach is to assess the intensity of the bias and to determine the importance thereof in the light of the evidence as a whole.

[3] It was not in dispute that the appellant and the complainant had been in a romantic relationship. The version of the complainant was to the effect that the relationship ended some weeks before the rape and the appellant stated that they were still in a relationship up to the day of the incident. His version was that he ended their relationship because he found her with another man the night before. It is not in dispute that she was found by him walking with

another man. It was also not in dispute that they inhabited the same block of flats in the CBD. She claimed to live with a friend on the eighth floor whilst he said that, up until he insisted, that she leave his flat on the morning after the alleged incident – which took place on 3 May 2014, she resided with him. The version of the appellant is that she had begged to be allowed to stay and for him to take her back.

[4] A central dispute in the matter is whether the complainant went to the flat of the appellant of her own accord or whether she was dragged there, up at least two flights of stairs, whilst being assaulted. Essentially, her version amounts to her being kidnapped, imprisoned, and raped. A further central dispute is whether she was repeatedly assaulted throughout the whole night of the incident with the fists and open hand of the appellant, beer bottles, and a vase. The injuries of the complainant are obviously crucial to a weighing up of the two versions.

[5] The version of the complainant was that she escaped from the flat on the morning of 4 May 2014 and went to the flat on the eighth floor where she was staying with her friend. The friend was asleep when she entered and was with a man. She and the friend lived in the same room. The friend awoke and asked why her face was swollen and she replied that she had been assaulted by the complainant. She stated that she never mentioned the rape as she did not want to do so in the presence of the man.

[6] It is not disputed that she then went to the police station to report the rape and that she was then taken to a doctor who examined her vaginally and, I must assume, from a general physical perspective as well.

[7] One of the perplexing features of this matter is that, notwithstanding the vivid description of the assault and the dragging of the complainant by force to the appellant's flat, no charges were prosecuted against the appellant in relation thereto. He was neither charged with assault nor kidnapping – as one would have expected in light of the version of the complainant. An inference which presents itself in relation to the absence of these charges is that there was not sufficient corroborating evidence of the assault to warrant such charges being brought. Given that the evidence of the assault and kidnapping is an integral part of the coercion aspect of the rape – the existence of such a possibility causes concern.

[8] The anomaly of the failure to bring these concomitant charges was raised by the Magistrate and it has some significance in relation to the manner in which the evidence unfolded and the case was conducted.

[9] The Magistrate expressed his view that, on the basis that the evidence of the complainant was to the effect that the friend had not been told about the rape but only that she was assaulted, her evidence would be irrelevant to the charge of rape as it was not a first report of rape. The Magistrate was strongly

of the view that her evidence would have been unnecessary in light of the lack of charges for assault and kidnapping.

[10] Taking this lead from the Magistrate - the prosecutor indicated that she would not call the friend as *"this would be a waste of the Court's time"*. The Magistrate went as far as to state that he would not need to hear the representative for the appellant on the aspect of whether it would be relevant to call the friend. Thus the friend, who was who was at court and available to testify, was excused by the Magistrate.

[11] A further problem in relation to this version of kidnapping, assault, and coercion, was that the State did not secure the attendance of the doctor who examined the complainant on the morning after the alleged rape and assault. Because there had been numerous attempts to secure this doctor's attendance and, it appears, indications of bungling on the part of the State as to the issuing of subpoenas which had caused other postponements, the Magistrate denied the State a further postponement for the purposes of securing the evidence of the doctor.

[12] Bearing in mind that point of departure in the versions is the kidnapping assault, and rape on the one hand versus no sexual intercourse having taken place at the time alleged time and a denial of any assault and kidnapping - the absence of evidence of force and coercion being applied to the

complainant (when such evidence was indeed available to the State) - is of concern. One would have thought that, in light of this denial of sexual intercourse, the evidence of the doctor would have been of crucial significance. Indeed, the State did not even seek to hand in the J88 medical report. The need for this medical evidence was not treated by the Magistrate as being of such a crucial nature in the context of the granting of the postponement. Indeed he held the view that it was irrelevant.

[13] The Magistrate further misdirected himself in failing to take the absence of this evidence into account when he weighed the version of the complainant against that of the appellant. In fact the Magistrate involved himself in the exclusion of this evidence.

[14] The version of the appellant also has aspects which cast some doubt on the version of the complainant – which aspects were not weighed in the balance:

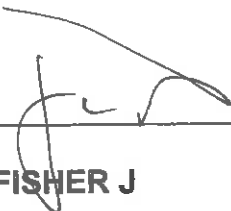
[14.1] He had been stabbed some days before and was in pain from his wounds – having only been discharged from the hospital the day of the alleged offence. This was not disputed. It appears that this injury may have militated against the probabilities of him involving himself in the violent physical confrontations testified to by the complainant and the rape.

[14.2] It is not in dispute that the complainant and appellant had been in a romantic relationship; that they lived at close quarters at the time of the incident; and had apparently lived together at some stage of their relationship.

[15] My assesment of the matter is that it should not have been found, on a conspectus of the evidence led and that which the State failed to lead, that the version of the appellant is not reasonably possibly true.


I thus order as follows:

The conviction and sentence are set aside.



D FISHER J

I agree,



D DOSIO AJ

Date of Hearing: 15 June 2017.

Judgment Delivered: 15 June 2017.

APPEARANCES:

For the Appellant: AH LERM instructed by LEGAL AID SA.

For the Respondent: VH MONGWANE instructed by DPP GAUTENG.