IN THE KWAZULU NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. AR 460/07

In the matter between:

JONATHAN KARRIM APPELLANT

and

THE STATE RESPONDENT

APPEAL JUDGMENT Delivered on 06 August 2009

SWAIN J

[1] The appellant appeals against his conviction in the Regional Court on a charge of rape, with the leave of Pillay J, to whom the matter was referred in terms of Section 52 of the Criminal Law Amendment Act 105 of 1997, for sentencing. Pillay J confirmed the conviction and sentenced the appellant to eighteen years' imprisonment.

[2] The sole issue is whether the Magistrate erred in rejecting the appellant's defence that he had consensual sex with the complainant.

[3] It is clear that the dispute of fact as to whether the appellant raped the complainant, or whether he had consensual sex with her, must be resolved by the Court applying its mind not only to the merits and the demerits of the State and defence witnesses, but also to the probabilities of the case

S v Singh 1975 (1) SA 227 (N)

[4] Crucial to a resolution of this issue is whether the complainant became aware before or after the incident, that the mother of the appellant's child, had torn some of the complainant's clothes. It is common cause that some of the complainant's clothes were torn by the mother of the appellant's child and that these clothes were left at the room of the appellant, when the complainant spent the night with the appellant, a week before this incident, on 31 December 2004. She had taken a change of clothing with her on that occasion, so that she would have fresh clothes to change into the following day.

[5] The relevance of this issue is as follows. The complainant's version was that the appellant had undertaken to return these clothes to her at work the following week, but had failed to do so. She denied

the appellant's version that these clothes had been specifically left by her, as she intended to return to his house the following weekend and they would then be available to her as a change of clothing.

[6] In addition the complainant maintained that she became aware that her clothes had been torn by the mother of the appellant's child during the week preceding the alleged rape. She stated that the mother of the appellant's child had brought them to her at her work. According to the appellant however, he only told the complainant about her clothes being torn after they had consensual sex.

[7] Consequently, on the complainant's version she had ended her relationship with the appellant before the date of the incident. She stated that she felt betrayed by the appellant because he had misled her to believe that the mother of his child was a quiet person who was not aggressive, who had no problem with the relationship between the appellant and herself. If this was so, then on the complainant's version, she would have no reason to voluntarily accompany the appellant to his room and she was forced by the appellant to do so.

[8] On the appellant's version however, the relationship was not over, the complainant was unaware of the fact that her clothes had been torn and that the mother of the appellant's child was vehemently opposed to their relationship. Consequently, the complainant

accompanied him voluntarily to his home, in accordance with their prior arrangement.

[9] In resolving this conflict of fact certain aspects of the complainant's evidence are, in my view, of vital importance.

[10] The first aspect relates to the complainant's description of how she was forced to accompany the appellant to his home. She only revealed in cross-examination that they had stopped at a bottle store on the way so that the appellant could speak to the owner "so that the owner could take me home in his vehicle". When asked why she did not flee whilst the appellant was inside the bottle store and had left her outside, for a period of some four minutes, her response was that she did not know where she was and the appellant had also said that if he could not get transport at the bottle store, he would take her to the police station.

[11] It is quite obvious that the appellant would not act in this manner if he was forcing the complainant to accompany him to his home. In addition, of telling significance was her response, when asked why she had not revealed this aspect in her evidence-in-chief, when she said "Oh well it is because that did not help me on what I experienced on that day".

[12] I also find the complainant's explanation of why her friend Ivy did not report the complainant's abduction at the hands of the appellant, equally unconvincing. She said that Ivy had no time to report to the police station because "she was in a hurry to get home". This is particularly improbable when it is recalled that the complainant testified that the appellant had grabbed her by force at the taxi rank, in the presence of Ivy, who had remonstrated with the appellant. The response of the appellant was simply to tell Ivy to leave, which she did without further ado.

[13] Of equal concern is the complainant's explanation as to why she was unable to alert the other tenants where the appellant lived, of her predicament. Although the appellant lived in a room in the yard of the main house, she agreed that there were people at home, that the appellant had to unlock a gate to enter the yard and that this caused the dogs to bark. Her explanation for not shouting for help was because the appellant was threatening her and had said that "I was going to make him quarrel with the people who were in the main house because even the dogs were barking". I find this explanation totally illogical, because a quarrel between the appellant and these people would be precisely what the complainant would desire in order to reveal her plight. In addition, it appears that these factors did not deter her from screaming at a later stage, when she alleged that the appellant threatened her with a knife in his room and she said "I screamed because I wanted the people at the residential house to hear me but nobody heard me because it was raining".

[14] As regards the force the complainant said she was subjected to by the appellant in order to rape her, she stated she was throttled by the appellant on four separate occasions. She said that on one of the occasions the appellant throttled her "until my eyes turned white". The complainant said there were however no visible marks or injuries on her neck, but her neck was so painful she could not turn her head. Her throat area was however swollen and when she was examined by the doctor who completed the J88 Form, he could not find any marks on her neck. She however told the doctor that she could not turn her neck. Surprisingly however, the doctor recorded that there were no signs of assault. I find it incomprehensible that the doctor, being told by the complainant that her neck was so painful she could not turn it, as a result of being throttled by her assailant, would make no note of this.

[15] A further aspect of the complainant's evidence which I regard as grossly improbable, is her allegation that after the appellant had raped her "he then said I must go with him to the police station so that I could charge him for raping me" and later she said that the "police said the accused came and reported himself that he had committed a rape and they then locked him up". No evidence was lead by the State to prove the latter allegation. The appellant advanced a far more plausible reason why he visited the police station the following day, namely that he wanted certain documents certified by the police, at which stage he was arrested. When he asked why he was being arrested, he was informed that the complainant had laid a charge of rape against him.

[16] All of the above evidence leads me to the conclusion that it is grossly improbable that the appellant forced the complainant to accompany him to his room and to then submit to his sexual desires. The shortcomings in the complainant's version also lends credence to the appellant's version that the complainant only became aware of the incident involving the tearing of her clothes, after she had spent the night with the appellant for the second time.

[17] This would also explain why the complainant was angry and upset, causing her to falsely implicate the appellant. She had just found out that the mother of the appellant's child was not, as the appellant had led her to believe, a quiet person who would not oppose the relationship, but on the contrary was violently opposed to her to the extent of tearing her clothes. In her own words the complainant felt betrayed by the appellant and realised there was no future for her in a relationship with the appellant. In addition, she was fearful that her father, who was very strict, would assault her for not coming home. The following evidence of the complainant is particularly revealing "Yes he was angry when he realised that I was not coming back but on the following day, when he heard my problem, the story he then understood my problem".

[18] There was therefore, in my view, sufficient grounds for the complainant to falsely implicate the appellant in answer to the question why she would behave in such a manner after apparently spending a pleasant evening with the appellant.

[19] In my view therefore, the defence of the appellant that the complainant had consensual sex with him, was reasonably possibly true and the Magistrate erred in convicting the appellant. I would therefore propose the following order:

The appeal succeeds, the conviction and sentence of the appellant is set aside.

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Swain J

I agree

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Van Zyl J

I agree and it is so ordered

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Levinsohn D J P

Appearances/…

Appearances:

Counsel for the Appellant	:	Adv. P. Marimuthu
Instructed by	:	Pietermaritzburg Justice Centre. Pietermaritzburg
Counsel for the Respondent	:	Adv. J. Du Toit
Instructed by	:	Director of Public Prosecutions Pietermaritzburg
Date of Hearing of Appeal	:	31 July 2009
Date of Judgment		06 August 2009