IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

"REPORTABLE"

Case No: A693/2005

In the matter between:

ISAK SWARTBOOI Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 07 DECEMBER 2005

GOSO, AJ

1. On 7 November 2000 the Appellant was one of two accused who appeared in the Regional Court held at Springbok, Western Cape on a charge of rape. On the 9th November 2000 both accused were convicted of rape and they were sentenced to direct imprisonment for a period of ten years each. Accused 1 now appeals to this court against both conviction and sentence. The appeal proceedings were coupled with an application for condonation which this court had no difficulty in upholding.

2. It has been argued that this court is entitled to interfere with both conviction and sentence on the following grounds:

"3.1 The presiding magistrate erred in finding that the complainant did not consent to sexual intercourse.

3.2 Lack of consent to sexual intercourse is not the only reasonable inference that can be drawn from the facts of the case.

3.3 The version presented by the state witnesses is capable of another reasonable interpretation, namely, that the complainant may have consented to sexual intercourse but she could not remember the next day because of excessive intake of alcohol.

3.4 The presiding magistrate erred in not accepting the appellant's version that he *bona fide* believed that the complainant consented to sexual intercourse.

3.5 The state did not prove its case beyond reasonable doubt.

3.6 The offence was committed on 26 April 1997 before the provisions of Act 105 of 1997 came into operation on 1 November 1998."

3. The facts can be summarized as follows:

The complainant, D.R. and her two friends, Leoni Boois and Gaironessa Stuurman were sitting together drinking on the eve of the incident. During the course of the evening the complainant became drunk to the extent that her friends had to carry her to another room where they left her on a bed. Thereafter they returned to their friends where they continued drinking. Later that evening they found the Appellant and his co-accused having sexual intercourse with the complainant. The complainant did not

appear to be awake and it was apparent to them that she was not participating although she was also not resisting. When the complainant woke up the following day she felt that her body was painful. When she went to urinate, her vagina was painful to the extent that she enquired from her friends whether they knew what had happened to her. They informed her of what had happened but she could not remember anything. As a result of the incident the complainant fell pregnant and subsequently it turned out that one of the accused was the father of her child.

4. At the commencement of the trial the Appellant and his co-accused pleaded not guilty and in amplification of their pleas they admitted that they had sexual intercourse with the complainant but they denied that it was not consensual. The state led the evidence of three state witnesses and the Appellant and his co-accused testified without calling any witnesses.

5. From the evidence led during the trial it appears that the following facts are common cause:

On the eve of the incident the complainant and her two friends were sitting and drinking in a certain house with friends and Appellant and his co-accused were amongst them. During the course of the evening the complainant became so drunk that she fell off the bench on which she was sitting. Her two friends carried her to an adjoining room where they left her lying on a bed. Thereafter they went back to join their friends and continued drinking. Later in the evening and on different occasions they found the Appellant and his co-accused having sexual intercourse with the complainant. They decided to carry her home.

6. During the trial the Appellant's defence was that he had sexual intercourse with the complainant with her consent. In the alternative, his defence was that he *bona fide* believed the complainant consented to sexual intercourse with him. *Miss Verrier*, who appeared for the Appellant during the hearing of the appeal, submitted that since *mens rea* is an essential element of the crime of rape, lack of specific intention to have sexual intercourse with the complainant without her consent on the part of the Appellant exonerated him from liability. The question that remains to be determined in this appeal is whether the complainant could have consented to sexual intercourse during her drunken state and whether the Appellant's version that he *bona fide* believed the complainant agreed to sexual intercourse could reasonably possibly be true and also whether holding a belief that the complainant had consented to sexual intercourse was reasonable in the circumstances which prevailed when the incident took place.

7. The two state witnesses who testified in the course of the trial, Leoni Boois and Gaironesse Stuurman, knew the complainant well since they were friends. Their evidence during the trial was clear and unequivocal that the complainant was drunk to the extent that she was in a state of blackout. When they carried her home after the incident, she was still drunk to the extent that she did not recognize them.

8. In her written heads of argument, *Miss Verrier* submitted that the conclusion that the complainant did not give her consent is arrived

at by way of an inference because no evidence was led during the trial which conclusively established lack of consent on her part. In her view the circumstances in which the incident took place are such that lack of consent on her part is not the only reasonable inference that can be drawn from the facts of the case. The complainant could have in her drunken state agreed to sexual intercourse. The other possible inference which could be drawn from the facts is that the appellant held a *bona fide* belief that the complainant consented to sexual intercourse because she did not resist. She submitted that in the circumstances there is a reasonable doubt whether the complainant did not consent. Therefore the state did not succeed in proving lack of consent beyond reasonable doubt and it is the Appellant who should receive the benefit of that doubt.

9. Leoni Boois testified that at some stage during the course of the evening when she entered the room in which the complainant was sleeping, she found the Appellant's co-accused having sexual intercourse with the complainant and she described the condition of the complainant in the following words:

" *Sy het nog getiep op daardie stadium*".

10. When she returned with Gaironessa fifteen to twenty minutes later, it was at that stage the Appellant who was having sexual intercourse with the complainant. When the appellant saw that they were watching him he left the room. They decided to carry the complainant away from the vicinity and at that stage she still could not recognize them.

11. An accused can only be convicted of rape if the state proves beyond reasonable doubt that sexual intercourse occurred without the consent of the complainant. The offence of rape consists in having sexual intercourse with a woman without her consent. If the state proves that there was no consent and that the accused was aware of this when sexual intercourse took place, it has established guilt.

12. In the ordinary kind of case absence of consent is established through the complainant's evidence that she did not consent. In such cases the complainant is often in possession of her mental faculties during the incident. If she yields as a result of force or fear of application of force she leaves the accused in no doubt that she is unwilling. The position in the present case is made more difficult by the fact that the complainant's mind was not affected by force or threats of use of force but by a pre-existent condition of excessive use of intoxicating liquor. In this case the complainant was so intoxicated that it cannot be said that he was a consenting party. It is also not easy to see how it can be said that she created an impression that she was consenting as would be the case if she was slightly intoxicated.

13. In instances where the complainant is incapable of consenting and this fact is known to the accused, the accused is guilty of rape. As to when this stage is reached as a result of having taken intoxicants is a question of fact.

14. It is clear from the evidence of the two state witnesses who witnessed the incident that there was no resistance to sexual

intercourse on the part of the complainant. At the same time it is clear from their evidence that she was not awake when the Appellant and his co-accused had sexual intercourse with her. In my view lack of resistance on the part of the complainant in the circumstances of the present case due to a state of drunkenness is to be distinguished from mere acquiescence. The former cannot be equated with consent for purposes of establishing whether the complainant was raped or not. Explicit opposition to sexual intercourse need not be proved. In instances where the complainant did not offer resistance in a manner that is capable of external observation this fact cannot be used against her.

15. It is a correct statement of the law to say that *mens rea* is an essential element of the crime of rape and in rape cases where the accused entertained a *bona fide* belief that the complainant had consented to having sexual intercourse with him, the accused cannot be convicted of rape on the grounds that he lacked the required specific intention to commit rape. The proposition that the appellant held such a belief does not have any evidential basis in the present case. In the absence of evidence which supports such a contention the entire exercise becomes sheer speculation without any credible evidence supporting it.

16. The Appellant clearly took advantage of the complainant during her moment of weakness. Predatory manoeuvres such as these cannot be allowed to take place without censure from the courts constituting as they do an infringement of a constitutionalized right to bodily integrity and dignity. The high prevalence rate of infringement of these rights in respect of women in the sexual

intercourse context places an obligation on the courts to mount the adoption of measures taken to ensure the kind of protection which the constitution demands. The Appellant in this case decided to approach the complainant at a time when she could not exercise her will either to agree to his advances or to reject him. The presiding magistrate in my considered view was correct in extending the protection to the complainant when she was most vulnerable. Approaching the complainant for consent when she was in a blackout was cowardice if not hideous on the part of the appellant. There is no way that this court or any court can find that the Appellant held a *bona fide* belief that the complainant gave her consent under such circumstances.

17. The defence that sexual intercourse took place with consent requires that the evidential basis that such a possibility exists be established beyond the realms of sheer speculation. The possibility that such consent was given should be weighed on the scale of possibilities. In the absence of such evidential basis the court is entitled to disregard an allegation that such consent was given especially in circumstances such as in the present case where the complainant's conduct during the incident was explained by eye witnesses with such vividness and convincing logic. Accordingly there is no basis in evidence in this case which justifies the acceptance of a possibility that the suggested consent took place.

18. The facts of the present case provide evidentiary basis for the suggestion that the version of the appellant and his co-accused is unreliable. On the other hand the version of the state witnesses accords with the version of the complainant who stated that she

was so drunk she could not remember the incident. Any consent given by her, if any, did not accord with her will and this fact was well known to the appellant and his co-accused at the time of the incident. Nevertheless they went ahead and violated her bodily integrity regardless of whether she consented or not. In ***S v Gentle*** 2005 (1) SACR 420 (SCA) at 431 a-c Cloete JA held as follows:

> "***Where sexual intercourse is common cause, what is required is credible evidence which renders the state version more likely that sexual intercourse took place without the complainant's consent thereby rendering the appellant's version less likely."***

19. Considering the record as a whole I am satisfied that the guilt of the appellant and his co-accused was proved beyond reasonable doubt. In ***S v Phallo and Others*** 1999 (2) SACR (SCA) at 558 b-c Marais JA with Zulman JA, Olivier JA and Farlam AJA concurring restated the law as follows:

> ***"It is worth recalling once more that there is no obligation on the state to close every avenue of escape open to the accused. It is sufficient for the state to produce evidence by means of which it demonstrates such a high degree of probability that a reasonable man concludes that no reasonable doubt exists that the accused committed the crime with which he has been charged .Benefit of doubt in favour of the accused is to rest upon a reasonable and solid foundation, created by positive evidence or reasonable inference."***

20. Although the complainant could not remember what happened to her, the evidence of the two witnesses that she was drunk to the extent that she fell off a bench on which she was sitting and as a result they decided to carry her to bed and also the fact that even after the appellant and his co-accused had had intercourse with her she was still so drunk that she could not recognize her own friends, support the contention of lack of consent. The evidence is quite clear that she was so drunk she could not have given consent and even if she did her actions could not constitute consent for purposes of establishing whether the sexual intercourse was consensual. No reasonable person could have formed an impression that she was consenting to anything including sexual intercourse. The trial magistrate reviewed the relevant evidence and concluded, for abundantly sound reasons, that the complainant's account of events was to be believed and that of the Appellant rejected.

21. The facts in this case are to be distinguished from the facts in ***R v K*** 1958 (3) SALR 420 (AD) at 422 e-f where Schreiner JA with the majority concurring held that a woman who did not know what she was doing at the time of the incident is not always as a matter of law regarded as incapable of consenting. This may be the case, depending on the facts but it is not necessarily always the case. In that case it was held that lack of consent was not established beyond reasonable doubt because the complainant did not give her evidence in a truthful manner and consequently in her case it was not possible to say whether in her condition she was able to give consent and if she did whether she gave it in a manner which led the accused into believing that she was consenting. In the

present case it was possible to establish beyond reasonable doubt that the complainant did not possess sufficient understanding to be able to consent to intercourse. Reluctant as I sometimes am to align myself with some of the *dicta* expressed on rape in some of the pre-constitutional era reported decisions, the views expressed by Schreiner JA in this regard are apposite. However, taking advantage of a woman by approaching her for her consent for sexual intercourse when she is in such a condition remains deplorable.

22. Whether a complainant has in fact consented to intercourse is largely a question of fact. Even if she fails to show any outward resistance the crime may be committed since mere submission is not equated with consent. For consent to operate as a defence it must be freely and consciously given. No valid consent can be given by a woman who is in a state of intoxication. This is so when she is incapable of fully appreciating what she is doing. It is sufficient to prove that the accused foresaw the possibility that the woman's free and conscious consent was lacking but nevertheless continued to have intercourse with her. Where reliance is placed on the woman's intoxication to show lack of consent, it must be established that the accused was aware of such a factor which vitiates consent. In the present case it is clear that the complainant was so intoxicated that she could not show any outward resistance but also she could not participate in the act. The Appellant was aware that the extent of the complainant's intoxication was such that it vitiated any possibility of exercise of her free and conscious will. Therefore, in my view, the suggested possibility of consent has no basis and the Appellant was correctly convicted. It is well to

remember the principles of law relating to hearing of appeals against findings of fact enunciated in ***S v Hadebe*** 1997 (2) SACR (SCA) at 641 d :

> ***".....in the absence of demonstrable and material misdirections by the trial court, its findings of fact were presumed to be correct and would only be disregarded if the recorded evidence showed them to be clearly wrong."***

23. Counsel for the Appellant is correct in her submission in her heads of argument that the provisions of Act 105 of 1997 were not applicable yet when the offence was committed. The aforesaid Act does not have retrospective application. However, in my view, the sentence of ten years imprisonment imposed by the magistrate is an appropriate sentence in the circumstances of this case and therefore there is no basis on which this court will interfere with the sentence imposed.

Therefore, I would dismiss the appeal and confirm the conviction and sentence.

GOSO, AJ

I agree and it is so ordered. **----------**

DLODLO, J