IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A510/2005

DATE: 31 OCTOBER 2008

In the matter between:

JOSEPH COZETTE

versus

THE STATE

JUDGMENT

SLABBERT, AJ:

On 18 August 2003, the appellant, who defended himself, was found guilty by a Regional Court magistrate of Wynberg of the following offences: two counts of rape; assault with intent to do grievous bodily harm in that he assaulted the complainant by hitting her and dragging her by the hair and threatening her with a knife; and attempted indecent assault. He was sentenced to an effective 18 years imprisonment.

There have been considerable delays in prosecuting this appeal and appellant has lodged an application dated 23 September 2008 requesting the reinstatement of his appeal

and condonation for the late filing of his heads.

After being sentenced on 18 August 2003, the appellant applied on 1 April 2005 for leave to appeal, which was granted. His appeal was not prosecuted and in February 2007 it was struck from the roll. With the assistance of his counsel, Ms Ruiters, he now applies for this Court's condonation and reinstatement of his appeal. He has explained the reasons for this and the State does not oppose the application for condonation.

The matter now turns on the prospects of success and a decision thereon will appear during the course of this judgment.

During the presentation of the State's case several red flags were raised warning of the dangers to come. These flags should have alerted the magistrate to exercise more caution in his evaluation of the witnesses' evidence. In my view, most of these red flags were ignored completely, or they were not given their due weight, and the headnote of S v K, 2008(1) SACR 84 (CPD) is instructive:-

> "Conviction of an offence referred to in part 1 of Schedule 2 to the Criminal Law Amendment Act has

a potential to attract heavy punishment, particularly in the light of the seriousness of the offence as referred to in the Schedule. Judicial officers ought to be vigilant in their assessment and evaluation of evidence in order to eliminate a risk of conviction on the basis of evidence of doubtful quantum. The complainants in matters of sexual assaults on women and children unfortunately happen to be the most vulnerable members of our society, but the vulnerability of this section of our society should not be allowed to be a substitute for proof beyond reasonable doubt or to cloud the threshold requirement of proof beyond reasonable doubt. Judicial officers ought to and are expected to evaluate evidence properly and objectively as a whole and against all probabilities in order to arrive at a just and fair conclusion. Anything falling short of this test is nothing other than a miscarriage of justice."

See also two other cases, which I will just refer to without reading any extracts therefrom. The first is S v Jones, 2004(1) SASV 420 (CPD), and S v Olckers, (2002) 2, All South Africa 81 (CPD).

In my experience it unfortunately happens in many trials that difficulties in the State's case are glossed over while the defence case is dissected almost sentence by sentence. Clear credibility and improbability issues relating to State witnesses are ignored or minimised. This analysis should be the other way round, in my view. Since the onus is on the State it is the State's version that should receive as careful, if not more so, a scrutiny than the defence witnesses.

The complainant's allegations can be briefly summarised as follows. The complainant and the appellant had been married for five years when he left her for another woman on 1 February 2002. He regularly brought her between 400 and R500,00 every month. On 1 August 2002, she was alone at home when the appellant arrived at about 18:00. She made him some coffee and they sat on her bed whilst he drank it and she watched TV. He then repeatedly asked her for sex, but she said no, because "hy lewe alreeds met 'n vrou". The appellant pressed her down on the bed and she struggled with him, to no avail, as he was too strong. He tried to penetrate her per anum but then turned her around and penetrated her vagina against her will. Her vagina sustained an injury in the process. Afterwards appellant got into his car and left. She reported the matter to the police and she was also examined by the district surgeon.

When the appellant pleaded to this charge, he said that the intercourse was with the consent of his wife.

On Monday, 12 August 2002, at about 09:00 he came to her house again, saying that he wanted to talk about the divorce. She said she "voel tevrede" about this. Her 20 year old daughter, Jessica, was sleeping in the complainant's room. Appellant took her by the hand and led her from the lounge to Jessica's bedroom and he asked for sex, but she refused. He replied that "my nee is vir hom a ja-woord". He then pressed her onto Jessica's bed, but she never fought back as she had on the previous occasion, because "ek kan nie meer baklei nie". He undressed her and had sex with her against her will. He then left.

The appellant asked her in cross-examination about Jessica. Her reply was somewhat evasive, and when the appellant asked her, "Sy is 20 jaar oud, vir hoekom het jy dan nie iets omgestamp of geskreeu sodat Jessica kan wakker skrik nie?" her answer was, "Soos ek in die hof geverduidelik, ek kan nie meer vir jou, teen jou meer veg nie, want..." and then she stops. Not a very convincing reply. This in my view was the first red flag that I have referred to. Help was at hand in the next room, why did she not scream or shout, or as the

appellant put it to her, knock something over to draw Jessica's attention to her plight?

Complainant then tried to contact the investigating officer, but he was off duty and she saw him only on the Friday. She did not go to a doctor and when asked why not, she replied, "Ek weet nie". In my view the second red flag was raised in respect of this. When Jessica awoke, why did she not tell her daughter about the rape? She did not tell her even during the period from the Monday to the Friday when she saw the police.

Jessica gave evidence and she said that when she awoke, the appellant and the complainant were chatting normally.

Appellant was arrested on these charges on 23 August 2002, but according to the complainant he was released on bail during November 2002. She saw him on Christmas day and New Years day at her house and she said that, "Ek is bly dat hy gekom het, want dis die einde van die jaar". She saw him again on 5 January 2003 and he asked her to come home, but she refused. She also saw him at her cousin's house. All this to me seems to be inconsistent with that of a traumatised victim.

On 15 March 2003 the events leading to counts 3 and 4 occurred. The appellant came to the house at about 18:00. He asked her to withdraw the charges. According to her, he became violent and dragged her by the hair from the kitchen to the bedroom. He tried to put his penis into her mouth, but she fought back. He went into the kitchen and obtained a long knife. He dragged her by the hair back into the bedroom, saying that he was going to kill her, but then he made a somewhat strange remark, "As hy nie vir my doodmaak nie, dan moet ek die mes vat en vir hom doodmaak". He then released her and when she started to, as she says, "Praat met die Here, toe begin hy ook te bid". Now these unusual events are not followed up by either the magistrate or the prosecutor. They seem on the face of it to be relevant to the appellant's emotional state and thus possibly relevant to sentence, and should have received some attention in the evaluation process. He then left.

She reported the matter to the police. The accused pleaded not guilty to these charges.

Under cross-examination, a somewhat different picture emerged. It seems that the complainant had been talking to some Jehovah Witnesses and when they left, the appellant came in. Complainant at first seemed to have denied it, but

she then agreed that the two of them had gone to buy some fish, but she said that he dragged her by the hair when she did not want to go with him. She then said, "Los die vis, ek wil huis toe gaan". Appellant saw a love bite on her neck, and according to the complainant he wanted to drag her over Prince George's Drive and to have sex with her there in the bushes. They passed some people standing in a flat, and when she was asked why she did not call for help she said that appellant had threatened to hurt her in the presence of these people. This is surely another red flag affecting the complainant's credibility. This new evidence throws a different slant on the situation. Going out together in public to buy fish is once again hardly compatible with that of a traumatised victim. For a second time she does not scream for help when help was at hand.

On 11 August 2003 the complainant applied for a family violence interdict, and her application differs from her evidence in some important respects, as well as displaying a possible motive for laying the charges. No mention of this appears in the judgment, even though it clearly affects her credibility, and I quote from a portion of her application that she lodged for this interdict:-

"Maar hy pla my gedurig deur my te vloek, beledig

en kritiseer, deur te sê ek is die grootste hoer, ek is sleg wat nie die waarheid praat nie, beskadig ook my eiendom om ingang tot die woning te verkry."

Then there is something completely new:-

"Ek vra die Hof om my asseblief te help, want ek is van plan om van hom te skei. Ek wil hom nie daar hê op my perseel of in my woning nie."

I think the magistrate should have had more regard to these contradictions, or to the new evidence, and he should have had some regard to a possible motive on the part of the complainant for laying a charge, because she was obviously desirous of wanting to get the divorce and have him out of her life.

Inspector Pietersen was a State witness. He was on duty on 1 August 2002 when the complainant came to lay the first charge of rape, but his evidence is virtually worthless as he said that he could not remember what she said. Ms Williams, the prosecutor, elicited some highly prejudicial evidence from this witness, and I quote a short extract from the record (the transcript was not very clear):-

"STAAT: Was dit nou die eerste keer dat u die klaagster in die polisiestasie sien?

GETUIE: Ek kan nie presies onthou daai dame (onduidelik) voor dit ook (onhoorbaar) gehelp.

STAAT: Met wat se tipe saak?

GETUIE: Ek dink dit was ook 'n verkragting of 'n onsedelike aanranding, maar ek het al vir haar voorheen gehelp.

STAAT: En wie was die verdagtes in die ander saak?

GETUIE: Dieselfde persoon."

This was a clear reference to the Appellant.

This tactic is repeated during the cross-examination of the accused, and I quote from the record:-

"STAAT: Hoeveel sake van verkragting het sy al teen u gemaak?

BESKULDIGDE: Twee sake van verkragting wat...

STAAT: Hierdie twee sake van verkragting?

BESKULDIGDE: Ja.

STAAT: En voor hierdie saak?

BESKULDIGDE: Die vorige verkragting saak was mos vir 'n ander dogter gewees, waarvoor ek die

sewe jaar uitgedien het, maar toe is nog nie getroud nie."

According to his judgment this tactic by the prosecutor appears to have had the magistrate's tacit approval, because the appellant had himself raised this matter in his cross-examination of the State witnesses, obviously in an attempt to show that the complainant was in the habit of laying rape charges against him. In my view, this type of gravely prejudicial evidence should be shunned when an accused is undefended, even if he is the one who in ignorance raised it, and the prosecutor should not be allowed to pursue this avenue without laying a foundation for it. The magistrate should at the least have advised the appellant about the legal dangers his questioning was leading him into, and it is pure semantics to claim that the evidence is now admissible because the accused raised it himself. In my view, this highly prejudicial evidence threatens the whole fairness of the trial.

The district surgeon, Dr Theron, gave evidence which seemed to have dealt a body blow to the appellant's defence of consent. He found a fresh injury to the complainant's fossa navicularis. He describes this injury as typically one found in rape cases, and it was not an injury brought about during normal consensual sex. However, as will be seen later in this

judgment, this potentially damaging evidence disappeared as mist before the morning sun. The appellant tried to deflect the import of Dr Theron's evidence by suggesting in cross-examination that his new girlfriend had taught him a new style, or as he put it "seks kunse", and that is what caused the injury after his wife had not had sex for six months. Dr Theron did not agree. When appellant gave evidence, Ms Williams asked him about the "styles" he had learnt from his young girlfriend. When he tried to reply, she stopped him dead in his tracks, as will be seen from the following extracts from the record:-

> " Kan ek vir die Hof miskien 'n demonstrasie doen wat die tipe van styl was ...(tussen beide)."

The State interrupts him:-

> "Nee, glad nie, meneer, ons stel glad nie belang nie."

The undefended accused was thus effectively prevented from explaining away a potentially fatal blow to his defence. Perhaps his explanation would have been unconvincing or crude, but that is not the point. His fundamental right to challenge and to adduce evidence in terms of Section 35(3)(i) of the Constitution was summarily dismissed by Ms Williams.

This violation of one of the vital components of a fair trial effectively undermined the whole concept of a fair trial guaranteed by the Constitution, and she should have been stopped by the magistrate. Her zeal has negated a potentially favourable witness for the State.

The complainant's daughter, Jessica, gave evidence for the State and if anything she exonerated the appellant completely on count 2, that is the second rape charge. I have already referred to red flags that had been raised in connection with count 2 namely, the complainant did not shout for help although Jessica was in the next room. But Jessica's evidence goes further than raising more red flags. She positively contradicted the complainant on important details. She testified that when she awoke the complainant and appellant had been sitting and talking, all was normal between them. Hardly the picture of a post-rape scene. She also contradicted the complainant in respect of the complainant's denial that she had prepared water for the appellant to wash himself after having had sex, as well as her denial that she had accompanied the appellant on "oujaar". Instead of finding that the State witness had now exonerated the appellant on count 2, as well as contradicting the complainant in other respects, thereby raising serious doubts about the complainant's overall credibility, the magistrate indulged in

speculation that favoured the State, and I quote from the record:-

> "Ek vind dit ook geensins vreemd dat die klaagster se dogter nie eers bewus was van enige verkragting nie. Ek glo dat die klaagster juis om enige verdere vernedering te voorkom, seker gemaak het dat haar dogter van niks agterkom nie om enige verleentheid ook vir die dogter te spaar."

This is pure speculation. There is no evidence that allowed the magistrate to make this finding.

The accused testified and his evidence was generally in harmony with his plea and his cross-examination of the State witnesses, which has already been set out herein above.

But what stands out in this case is the so-called cross-examination of the appellant by the prosecutor, Ms Williams. She interrupted and badgered the appellant constantly, giving him no chance to reply. Eventually he complained twice about this to the magistrate. The magistrate remained silent. Her attitude, just by reading the words appearing in the record, was arrogant and unreasonable, and I could quote several extracts from the record. I will not do so as the record speaks

for itself. She elicited highly prejudicial evidence during cross-examination, as I have indicated herein above. Prosecutors and magistrates should read S v Gidi, 1984(4) SA 537 (CPD), where Rose-Innes, J, said the following at page 539, paragraph I:-

> "A proper cross-examination does not permit the gratuitous intimidation of an accused. A prosecutor should not belittle an accused by insulting him, browbeating him or adopting an overbearing attitude which admits of no contradiction by the accused of what is put to him."

At page 540, paragraph B:-

> "Conduct of this kind offends against good manners, politeness and humanity."

At page 540, paragraph D:-

> "An accused must be given a fair chance to answer the questions put to him. His answer must not be interrupted from the bar. The next question must not be put before the previous one has been fully answered."

I just want to quote one portion of the record which illustrates the prosecutor's attitude towards the undefended appellant:-

"BESKULDIGDE: Nou gaan ek vir u weer sê ek vertel nie 'n leuen nie.

STAAT: Dan stry u nog met die Hof dat u nie leuens vertel nie, meneer, dis my punt wat ek in die hof maak, u het nie respek nie, meneer. Geen verdere vrae nie."

The magistrate should have intervened and stopped the prosecutor from badgering the undefended accused.

It is clear from my summary of the evidence that several red flags were raised alerting the magistrate to exercise caution. It is clear from his judgment that he was aware of his duty relating to single witnesses, but after an analysis of his judgment, I am of the view that he missed many of the red flags or he did not give them their due weight. But there are red flags other than the ones I've already referred to.

Firstly, there are strong indications of a possibly vengeful woman. I do not suggest that the complainant was in fact vindictive, but there are strong signs that this was a

possibility. I just want to give a few short quotations, to illustrate this point. The transcript is not always coherent, but the complainant says, and I quote:-

"GETUIE: Dit was meer in verband met geld want ek wou die vroumens gesien het met wie hy ge-involved gewees het."

"GETUIE: Wat ek die vroumens toe wat hy vir my en aan my geklap het, my gebruik het en wat ek was nietemin om die vroumens te gesien het en op die einde van die saak toe vat hy vir my na die vrou toe en ek vra vir die vroumens hoe voel sy as sy in my skoene moes gestaan het.

STAAT: Hang aan, ek wil nou nie weet wat die ander vrou, ek wil nie weet van die ander vrou nie, wat ek vra, het u en die beskuldigde nou bespreek gaan julle skei, woon julle apart, wat was die situasie?"

Here's another possible red flag, or another possible indication that the complainant might be vindictive. I am not saying she was, but the Court should have considered the possibility although the prosecutor stopped the witness.

I think that in the context of this case it was very important to know about the "ander vrou".

Another short extract from the record:-

"GETUIE:

dit is nou die klaagster:-

"Maar jy het dan vir my in die voorkamer driekeer vir my gesê jy gaan nie daai vroumens los vir my nie, en daar het ek jou gelaat."

A further quotation:-

"GETUIE: Ek het my kinders afgestaan om vir jou by te gestaan het."

These are all indications that maybe the complainant was not feeling all that happy about the situation, and I wish to emphasise again, I am not saying she was vindictive, my complaint is that the magistrate should have had regard to what the witness had said and he should have just paid it some heed. The love bite could also have been relevant to her motives. Surely all this should have set warning bells ringing.

Secondly, the actual assault on count 1 has puzzling aspects. According to the complainant, the appellant had pressed her down onto the bed and he had pinned her arms down with his legs. To do this, the appellant must have been straddling her chest in order to enable him to press her arms down with his legs. The question then arises how he could have removed her panties and had sex with her from this position. It is not clear from her evidence what actually happened, because the complainant's evidence, if one reads the record, was somewhat incoherent and vague on this aspect. It was the prosecutor's duty to adduce clear evidence that would enable the trial court to come to the conclusion that the complainant had been raped. Now it is true that the appellant admitted sexual intercourse, but the State alleges rape. The onus is on the State to prove its version and it should at the very least lay the basis to enable the Court to find beyond reasonable doubt that forced intercourse was physically possible. Forced intercourse from the position described by the complainant seems *prima facie* impossible. The complainant did say at one stage:-

"Ek het verswak toe sak hy."

But this would then have left her hands and arms free. The whole attack lacks coherent and credible detail.

Thirdly, count 4 reads as follows:-

> "Klagte, onsedelike aanranding, deurdat op 15 Maart 2003 naby Lavendar Hill in die streek afdeling van die Kaap, u opsetlike en op 'n onsedelike wyse vir Veronica Kozette aangerand het deur haar teen haar wil jou penis in haar mond te druk."

The State thus alleges a completed act. However, in her evidence complainant said that:-

> "Hy het probeer om sy penis in my mond te druk."

And the magistrate actually found the appellant guilty of attempted indecent assault. There is thus a difference between the charge and the evidence thereon. Now this difference seems to be minimal and unimportant, and there may be many explanations for it, but one explanation may be that she deviated from her statement. If this is so, this would certainly affect her overall credibility. Had the accused been defended, his counsel would have had the docket. The magistrate should have picked up on this apparent contradiction and advised the appellant that he is entitled to

the docket. Indeed there is a duty on the magistrate to do so. See S v Shiburi, 2004(2) SACR 314 (WLD).

In his judgment the magistrate does not even mention this contradiction but accepts the complainant's evidence *"in toto"*. This easy acceptance of her credibility is hard to understand. The magistrate again speculates in the complainant's favour. She had said that she did not know why she did not go to the doctor after the second rape, and the magistrate speculated in her favour that she did not go "waarskynlik vanweë die tydsverloop". There is no evidence to substantiate this speculative inference in her favour. The magistrate found the complainant to be:-

> "'n Baie goeie getuie, wie se getuienis kop en skouers uitstaan bo die weergawe van die beskuldigde. Niks wat sy gesê het word as vaag of onwaarskynlik bevind nie."

In my view he could only have come to this conclusion after a very superficial evaluation of the State's evidence, and he ignored or did not give due weight to the red flags I have set out herein before.

The magistrate was alive to the potential credibility problems for the State. He himself described them as "aspekte wat moontlik vreemd gevind kan word". He referred to an article by Tania Novitz entitled "Issues in Law Raised and Gender 2 (sic)". According to this article, a woman caught in a circle of domestic violence over time cannot easily escape from it and she tries to appease her abuser. Three phases are set out:-

1. Tension building.
2. Acute battering.
3. The contrition stage.

The magistrate classified the complainant's case as "boek voorbeeld van waarom die klaagster nie prakties hierdie sirkel van gemeld kon stop nie". This finding is difficult to support.

Firstly, apart from the tensions that arise from any arguments between couples, the evidence does not establish any of the three phases mentioned in the article, and there is especially no "acute battering" over a period of time. Jessica said that "hulle het baie gestry maar daar was geen fisiese geweld nie". Complainant herself only refers to the hair pulling incident and the slaps he gave her when she suffered a fit, and the appellant admits one assault with a mop. This is certainly not a "boek voorbeeld" as set out in the article, and the application

of the article is entirely inappropriate.

Secondly this article is cardinal to the Court's judgment in rejecting the appellant's version and accepting the complainant's version. The magistrate places the article on the same footing as that of an expert witness, without the benefit of her expert testimony. Who is the authoress, what are her qualifications and experience?

Thirdly, since that article was used to explain away possible adverse credibility findings against the State, the question arises whether the magistrate should not have called the authoress of this article in terms of Section 167 of the Criminal Procedure Act.

Fourthly, the magistrate used this article to justify a finding about the complainant's thought processes, thereby eliminating and sweeping under the carpet the necessity for addressing questions of credibility and improbabilities. There was no evidence by the complainant to substantiate this finding about "wat in haar gedagtes aangaan" as appears in the article quoted and relied upon by the magistrate, and the magistrate's conclusions are based on pure speculation in my view. An assumption or the taking of judicial notice of a fact without there being any evidence to prove it is a misdirection. See

S v M, 2000(1) SACR 484 (WLD) at 498 F - G.

To sum up, the undefended accused was badgered by the prosecutor and she did not allow him to present his case properly. This, and the cumulative effects of all the factors I have set out herein before, leads me to the reluctant conclusion that not only has the State not proved its case beyond reasonable doubt, but the appellant did not have a fair trial. In the premises I propose the following order:-

1. Condonation for the late filing and prosecution of the appeal is GRANTED.

2. The convictions and sentences are hereby SET ASIDE.

SLABBERT, AJ

I agree, the appellant's convictions and sentences are set aside.

DESAI, J

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