IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

Appeal Case No: A 556/08

In the matter between:

JOHN PAUL JAMES Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 16 OCTOBER 2009

VAN ZYL AJ

BACKGROUND

1. The Appellant, John Paul James (also known as James John Paul) together with a co-accused, Phenyo Phoffu, were charged in the Regional Court with the crime of rape. It is alleged in the charge sheet that upon or about 22 February 2003 and at or near Bloubergstrand, they unlawfully and intentionally had sexual intercourse with B A N (hereinafter referred as "the complainant") without her consent.

2. Both the appellant and his co-accused were convicted of the offence as charged. The matter was thereafter referred to the High Court for sentencing in terms of the now repealed section 52(1)(b] of the Criminal Law Amendment Act 1997 (Act 105 of 1997) (hereinafter referred to as "the Act").

3. When the proceedings commenced in the High Court, it was formally ordered that the record of the proceedings in the Regional Court should form part of the High Court proceedings. Both the appellant's and his co-accused's counsel submitted that the conviction should not be confirmed as being in accordance with justice in terms of section 52(3) (e) of the Act. The presiding judge thereafter decided to obtain a statement from the regional court magistrate (hereinafter referred to as "the magistrate") as to her reasons for the convictions in terms of section 52(3) (b) of the Act. Certain specific queries were directed to the magistrate in this regard.

4. The magistrate provided her reasons for the convictions and after hearing further argument on the magistrate's reasons, the presiding judge confirmed the? convictions of both the appellant and Phoffu.

5. Both the appellant and Phoffu were sentenced to seven years imprisonment. Applications for leave to appeal to the Supreme Court of Appeal by both the appellant and Phoffu were dismissed by the presiding judge. (As to the necessity for leave to be obtained see **S v Gentle 2005 (1) SACR 420 (SCA).)** The appellant thereafter applied for leave to appeal to the President of the Supreme Court of Appeal. On 23 June 2008 the appellant was granted leave to appeal to the Full Court of this division against his conviction only.

THE EVIDENCE

6. The complainant testified that on 22 February 2003 she attended a party held by her friend, B N (hereinafter referred to as "B"), at her house near Bloubergstrand. A number of people, including Phoffu attended this party. The appellant, who was previously in a relationship with B N did not attend the party. Apparently their relationship ended acrimoniously some time previously, leading to the laying of criminal charges against each other.

7. Late that night, according to the complainant, she accompanied Phoffu to a BP service station to procure soft drinks and more snacks for the guests. Phoffu however did not stop at the BP service station, but drove to the Snap club in Cape Town. He entered the club whilst complainant waited in the car.

8. After some time, Phoffu returned to the car and they drove back to Bloubergstrand. Phoffu did not return to the house at which the party was held, but drove to a secluded spot in the bushes at Bloubergstrand. There he made sexual advances to the complainant which she initially resisted. Phoffu then alighted from the vehicle, walked around to where the complainant was seated, opened the door and then proceeded to rape her in the front passenger seat of the vehicle. After Phoffu had raped her, she became aware of a second person who also got on top of her and raped her. She testified that the second person was the appellant.

9. Phoffu then took her back to the house where the party was held, where the complainant told her friend N G (hereinafter referred to as "N") what had happened to her. The police were phoned and they took the complainant to the district surgeon to be examined and then to the police station where she made a

statement.

10. Phoffu was arrested the next day and the appellant voluntarily went to the police station after being informed that he was suspected of having raped the complainant. He was then arrested.

11. Phoffu testified and denied that he had sexual intercourse with the complainant.

12. The appellant also testified and denied any knowledge of the alleged rape. He maintained throughout that he was not the second person who had allegedly raped the complainant.

13. The magistrate, in convicting both Phoffu and the appellant, accepted the complainant's evidence and rejected Phoffu's and the appellant's evidence as false.

14. The veracity of the complainant's evidence, insofar as she incriminates the appellant, is consequently the main focus of the appeal in this matter.

15. The magistrate found that the complainant made an excellent impression on her as a witness, but that when regard is had to her performance under cross-examination her evidence "leaves one with a bit of an ambivalent feeling".

16. The magistrate dealt with a few of the unsatisfactory aspects in the complainant's evidence and found them not to be of such a serious nature that they materially affect the complainant's credibility.

17. She further found that complainant's evidence that she had sexual

intercourse without her consent, was to a degree supported by the evidence of Dr Nel, the medical practitioner who had examined her. Dr Nel testified that he had found bruising that was indicative of "rough" sex.

18. The magistrate further found support for the complainant's evidence that sexual intercourse had taken place without her consent, in complainant's shocked state and the report she had made to N, after Phoffu had dropped her off at the house where the party was held.

19. The magistrate also found support for complainant's evidence that she was raped by both Phoffu and appellant in the evidence of B N who testified that she had seen both Phoffu and appellant's vehicles at the BP garage, when she and her friends were on their way to the Snap night club.

20. Finally the magistrate found that she was satisfied that the circumstances under which the complainant identified appellant were condusive to a proper and correct identification. The court pointed out that the complainant had seen Appellant before and thus knew what he looked like. Although the circumstances were not ideal for observation, the face of her assailant was a few inches from complainant's face during the act of intercourse and was visible to her for the duration of the act. She thus had sufficient opportunity to observe her assailant and to make a proper identification.

21. In these circumstances the magistrate rejected appellant's evidence, that he was not the second person that had allegedly raped the appellant, as not reasonably possibly true, although she could not fault appellant's demeanour as a witness. Appellant was accordingly convicted of the offence of rape.

22. It is trite law that a court of appeal should be reluctant to upset the findings of

the trial court on matters of fact and credibility, as the court has advantages in seeing and hearing the witnesses and being steeped in the atmosphere of the trial, which the appellate court cannot have **R v Dhlumavo 1948 (2) SA 677 (A) at 705-706).** This advantage of the trial court should however not be over-emphasised as that may result in an appellant's right of appeal becoming illusory **Protea Assurance Co Ltd v Casey 1970 (2) SA643 (A) at 648E, S v M 2006 (1) SACR 135 (SCA) at 202b-d).** As was pointed out by Nugent JA in **S v M *[supra)* at 202c** "The demeanour of a witness is no substitute for evaluating the context of the evidence, taking into account the wider probabilities".

23. The approach to be adopted in evaluating and weighing the evidence adduced by the State and by the defence was set out as follows by Nugent J (as he then was) in **S v Van der Meyden 1990 (1) SACR 447 (W) at 449j-450b** and approved in **S v Van Asweaen 2001 (2) SACR 97 (SCA) at lOla-e** and in **S v Tainor 2003 (1) SA 35 (SCA) at 40i-41a:**

> "The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which I reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable;' but none of it may simply be ignored."

24. Where a court looks for corroboration of a witness' evidence, it must be other reliable evidence "which supports the evidence of the complainant and which renders the evidence of the accused less probable on the issues in dispute" **S v Gentle 2005 (1) SA 420 (SCA) at para. [18] at 4301-431 A).**

The finding of support for complainant's evidence

25. As is pointed out above, the magistrate found support for the complainant's evidence, in the fact that she was in a shocked state on her arrival at B's house, in Dr Nel's evidence that she had rough sex and the evidence of B, that she had seen both the appellant and Phoffu's motor vehicles at the BP garage when she and her friends were on their way to the Snap night club. Further, the magistrate found a "level of a guarantee for her credibility" in her demeanour in the witness box.

26. The fact that the complainant was in a shocked state when she arrived at B's house, as well as Dr Nel's evidence as to the bruising to her genitalia, may support her evidence that she was raped, but do not support her evidence that she was raped by two persons and more importantly that appellant was the second person who had intercourse with her.

27. As to B's evidence with regard to the vehicles of Phoffu and the appellant at the BP garage. B testified that she noticed these vehicles at the time when they were on their way to the Snap night club. According to the complainant the only time that she was at the BP service station in Phoffu's vehicle was shortly after they had left B's house and before they went to Snap night club. The complainant specifically testified that they did not go to the BP service station after she had been raped, she was taken directly to B's house. B must thus have seen the two vehicles at the BP garage after Phoffu had taken complainant home. According to the appellant he had telephonically arranged with Phoffu to meet him at the BP garage so that Phoffu could follow him to his house and he could hand Phoffu the keys to his house, as Phoffu was staying with him during his visit to Gape Town from Johannesburg. He accordingly went to the BP garage, saw his car that Phoffu was driving, hooted and Phoffu followed him to his house. He didn't see anybody in the car with Phoffu. Appellant also testified that he had seen B at the BP garage.

28. The presence of the two vehicles at the BP garage is thus, at best, a neutral fact, and not supportive of complainant's evidence that appellant was the second person who had allegedly raped her. Insofar as the magistrate found that B's evidence with reference to the vehicles at the BP garage supported the evidence of the complainant that appellant was the second assailant, she misdirected herself.

The finding on the complainant's credibility

29. The question thus remains whether the trial court correctly found complainant to be a reliable witness with regard to whether appellant had intercourse with her and whether it correctly rejected appellant's evidence to the contrary, as false.

30. For the reasons that follow, I am of the view that the magistrate erred in finding that the complainant's evidence that appellant had raped her was reliable and in consequently rejecting appellant's evidence denying that he had sexual intercourse with the complainant.

30.1 Appellant deliberately lied in her affidavit to the police. She stated in her affidavit to the police that Phoffu offered to take her to the BP service station to purchase soft drinks and snacks for the partygoers. She went with him, but he drove past the service station and proceeded to a deserted area where he raped her. In her evidence in court she testified that Phoffu had stopped at the BP service station for a very short period and then drove on to the Snap night club in Cape Town where he had spent a considerable

time. She waited for him in his car. From there they returned to Bloubergstrand and Phoffu then drove to the deserted area where she was raped. Confronted with this discrepancy, complainant conceded that she deliberately did not tell the police that they had first gone to the Snap night club, as she feared that the truth might have created the impression that she went along willingly. Whatever complainant's reason for this material contradiction, it is clear that she deliberately did not tell the truth on a material point in her evidence in an attempt to make her version more believable. The magistrate readily accepted this explanation but completely overlooked the fact that complainant was willing to tell a lie under oath to make her version, implicating Phoffu and the appellant, more believable.

30.2 Complainant gave contradictory versions of when she saw appellant's vehicle for the first time that night. In her statement to the police, she created the impression that she first became aware of the appellant's vehicle on the sandy road leading to the secluded place where she was raped. In her evidence in chief she testified that she had already seen appellant's vehicle driving in front of them on the road from Cape Town to Blouberg. In cross-examination she testified that she had already seen appellant's vehicle in close proximity to the Snap night club in Cape Town. At one stage she even testified that Phoffu and the appellant came out of the Snap night club together. In the end result, it is impossible to determine on her evidence, when she first became aware of the appellant's vehicle. If she had in fact seen appellant's vehicle at any given point that night, she should be able to testify to that fact, and if she did not see it or could not remember where she first saw it, she should

equally have been able to explain that to the magistrate. This was also overlooked by the magistrate. The confused nature of her evidence in this regard points to a witness whose evidence should be treated with caution.

30.3 Her evidence of when she first saw appellant that evening is equally contradictory. At one stage she testified that he came out of the Snap night club with Phoffu. This she later indicated was not correct. She further testified that she first saw appellant when he climbed on her in Phoffu's vehicle. This she then changed to testify that she saw him when he, alighted from his vehicle and approached her at the secluded spot where she was raped. This testimony, on a material aspect of the case against appellant, is completely unsatisfactory. This unsatisfactory aspect of her testimony was also overlooked by the magistrate.

30.4 When the description in her statement to the police, as to what had taken place when appellant had allegedly raped her is compared to her testimony in court on this topic, a number of serious and material contradictions emerge. This was also completely overlooked by the magistrate. According to her statement to the police, in which she gave a detailed description of the events, she stated that as Phoffu had finished raping her on the front seat of the vehicle that she described as a bakkie, and before she could do or say anything further, another male person mounted her. As she looked at him she immediately recognised him to be B's ex-boyfriend, the appellant. She asked him what he was doing. He just looked at her and told her to relax. He then told her that he has a condom on and proceeded to rape her. During the act he told her to relax and kissed her on her face and cheeks. Her evidence

however differed markedly from her description of the events in her statement. In cross-examination, on behalf of the appellant, she told the magistrate that she had seen the appellant's car parked in the deserted area and that she saw him walking from his car to the vehicle in which she was seated. This person then opened the door where she was seated and entered the vehicle. She then said "please do not do this" and "what are you doing". She also called him by his name and he replied "no, you do not know me". When the prosecutor attempted to elicit from her what she had stated in her statement with regard to the appellant telling her that he had a condom on, with reference to her evidence that Phoffu had protection on, she stated "yes it was the same. I noticed from number two, that they both had protection on". These differences between her statement to the police and her evidence are material as it describes the only alleged interaction she had with the appellant that night and it was during this alleged interaction that she had identified the appellant. Counsel for the State reluctantly had to concede that these contradictions cast serious doubt on the veracity of the complainant's evidence with regard to the appellant. In my view this concession was correctly made.

30.5. Complainant avoided answering questions in cross-examination. This concerning aspect of her evidence was completely disregarded by the magistrate in the evaluation of her evidence.

30.6. A further worrying factor in the complainant's evidence is her evidence regarding her state of sobriety. She testified that she was completely sober at the time of the incident, as she only had three

drinks during the course of the evening. Dr Nel's evidence however paints a different picture. When he examined the complainant approximately 3Va hours after the incident, she was, according to him, definitely under the influence of alcohol. He was also of the opinion that it would be safe to say that her faculties were impaired as a result of alcohol at the time of the incident. The magistrate, in her judgment, seemed to accept that the complainant was to a degree intoxicated at the time of the incident. She mentioned that the complainant might not have been completely honest about her state of sobriety, that alcohol played a role that night, but that "the level is questionable" and "one cannot but wonder, if the degree of intoxication was not a teeny weenie bit more than she was willing to admit". In her written response to the queries by the presiding judge in the court a quo, the magistrate however stated that she did analyse the complainant's evidence with caution, and found that the police officer, Halt, corroborated the complainant's testimony that she was not drunk at the time she deposed to her statement. This was after she was examined by Dr Nel and more than 3/4 hours after the incident.

30.7 Dr Nel's evidence with regard to complainant's state of sobriety, explains on the probabilities, why the complainant, who spent a considerable time in the vehicle driven by Phoffu described it as a bakkie, a vehicle with no rear seats, whereas it is common cause that Phoffu drove a Toyota Conquest sedan, a vehicle with rear seats. It may also explain why complainant testified that on her arrival at B's house after the incident, the door was opened by N and that she had then told N what had happened to her, whereas

> the door was actually opened by one Pam and that the complainant had gone to N's room, who was asleep, woke her and made a report to her. The magistrate thus misdirected herself in ignoring Dr Nel's evidence with regard to the complainant's state of intoxication at the time of the incident and in preferring the evidence of the police woman who took the statement, to find that she corroborated complainant that she was not drunk, despite the magistrate's own misgivings in this regard.

31. The first complaint that the complainant in a sexual offence makes and its terms are admissible as establishing consistency in the complainant's evidence and therefore supporting her credibility (see **S v Hammond 2004 (2) SACR 303 (SCA) at 307i-310g** and specifically at **310, para. [17]).** In the circumstances of the present matter, the complaint made to N only supports complainant's credibility insofar as her evidence that she was raped by Phoffu is concerned. With regard to the issue in this appeal, whether she was raped by a second person and whether she had correctly identified appellant as the second person, the conclusion that her report to N supports her credibility as to the alleged rape by appellant, does not follow. The question remains, whether her evidence that it was appellant who was the second person that had raped her is correct, especially in the face of appellant's denial of this allegation. Furthermore N, in cross-examination, testified that initially the complainant only mentioned that she was raped by Phoffu. It is only when N went on asking questions, that appellant's name came up as well. In this regard N testified as follows:

> "I must say, she said Phenyo (Phoffu) raped me and then I went on asking questions and then Bi (appellant) came up as well."

32. As pointed out above, the magistrate's finding of credibility with regard to the complainant, is vitiated by a number of material misdirections. This allows this court to reconsider afresh the magistrate's findings of fact, including those based on the credibility of the complainant. In my view the complainant's evidence that appellant had intercourse with her is open to serious doubt.

33. The appellant's evidence emerged from cross-examination without any blemish. He also made a good impression on the magistrate as a witness. The magistrate seems to place great store on the fact that appellant was seen with Phoffu at the BP garage and that Phoffu was staying with appellant at the time. She described this as "such a big coincidence that it cannot be a coincidence". She then rejected the appellant's evidence insofar as it contradicted the evidence of the complainant. As was pointed out above, appellant's presence with Phoffu at the BP garage is a neutral fact.

34In my view the magistrate erred in rejecting the evidence of the appellant as not reasonably possibly true.

35. In the result the appeal should succeed and the appellant's conviction and sentence should be set aside.

VAN ZYL, AJ

I concur. The appeal succeeds and appellant's conviction and sentence are set aside.

ERASMUS, J

I concur.

GOLIATH, J