IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

APPEAL CASE NO.: **A350/09**

In the matter between:

PHILIP CORNELIUS First Appellant

NICOLAS PLAATJIE Second Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 18 MARCH 2010

KING AJ

1. The two appellants were charged in the Wynberg Regional Court with kidnapping, rape and attempted rape. It was alleged that on or about the 22 October 2004 and at or near Ottery the appellants had abducted Joanne Hartzenberg (hereinafter referred to as “the complainant”), they had raped her and then had attempted to rape her again.

2. Both appellants had previously been tried on the same charges in the Regional Court but those proceedings had been set aside by the Cape High Court as the accused had not been adequately represented. The matter was referred back to the Regional Court for a new trial to be conducted before another magistrate. That judgment is reported.[1]

3. After evidence was led before the trial magistrate in the present matter, both appellants were found not guilty of the offences of kidnapping and attempted rape but guilty of the crime of rape, the first appellant as a perpetrator and the second as an accomplice.

4. First appellant was sentenced to 8 years imprisonment and second appellant to 6 years imprisonment of which 3 years was ordered to run concurrently with a sentence he was serving in prison at that time. On the 4 May 2009 the trial magistrate granted leave to both appellants to appeal to this court in respect of their conviction and the sentences imposed on them.

5. The complainant testified that during the evening of the 22 October 2004 she was at a shebeen in Ottery with her boyfriend. At about 20h00 she went across the road from the shebeen to a 'hokkie' that acted as a toilet for women. The appellants were standing outside the shebeen. She knew both of them. They were friends of and in regular contact with her father.

[1] **S v Cornelius and Another** 2008 (1) SACR 96 (C).

She was forcibly taken by both appellants to an open piece of ground. She screamed that she did not want to go with them and that they must not take her with them. At the veld second appellant threw her onto the ground and said to the first appellant that she, the complainant, "--- *het hom lankal vir 'n gat gevat*". The second appellant took off her jeans and her shoes after which the first appellant lay on top of her and raped her. She did not resist as she had been told that she would be stabbed with a knife. She saw a knife that was in the second appellant's possession. Whilst the first appellant was raping her the second appellant sat at her head and held her hands.

6. When the first appellant stood up the second appellant took his place on top of her. His pants were however on. He said to her that if she promised not to tell anyone about the incident he would not have sexual intercourse with her. She promised not to tell anybody. The second appellant then did nothing further to her. She got up, got dressed and then, accompanied by both appellants, returned to the shebeen. The distance from the shebeen to the place where the crime was committed was approximately 5 to 10 minutes walk away. She was away from the shebeen for approximately an hour.

7. Back at the shebeen she sat next to her boyfriend but told him nothing about the rape incident as she was too shocked. She however told her sister and a friend Angelina about how she had been raped when she got

to their house shortly thereafter. Natasha told her mother-in-law who then told the complainant's father. She later followed her father and Angelina's mother to the first appellant's home where her father asked her "*het hy dit gedoen?*" She answered yes.

8. The complainant was taken to the police station and then to a doctor. She says she had no injuries. The doctor told her that they had found semen in her.

9. In answer to a question if she felt any pain when she was being raped her answer was "*nie eintlik nie*". She was at the time of the trial still negatively affected by the events of that night.

10. Exhibit "A", a statement made by the complainant to the police shortly after the incident was put to her in cross-examination. In the statement no mention is made of a knife. According to the complainant the statement had not been read back to her at the time it was taken and she insisted that she had told the police and her sister about the knife.

11. The complainant emphatically denied that she had had a relationship with the first appellant or that the two of them had arranged to meet that Friday evening. She denied that she willingly went with the first appellant and she insisted that the second appellant was present at all relevant times and had assisted first appellant in raping her.

12. Natasha Hartzenberg, the complainant's sister, gave evidence. She stated that on the night of the 22 October 2004 the complainant arrived at her home crying with her boyfriend William. The complainant called her to the bedroom and said that she had just been raped. She confirmed that the complainant did tell her one of her assailants had a knife with which she was threatened. The complainant also told her that after the first appellant had raped her that the second appellant wanted to but the first appellant told him not to.

13. The next witness was William Wassung. He was the complainant's boyfriend at the time of the rape but had subsequently married her. He stated that he and four of his friends had been drinking at the shebeen when the complainant joined them. She later left them to go to the toilet. She stayed away for some time and he thought she had gone home. The complainant returned about an half an hour to an hour later. She was upset and was crying. She did not tell him why she was upset but told her sister when they got to her sister's house shortly thereafter.

14. By agreement a medical report prepared by Dr Theron who had examined the complainant on the morning after the incident was handed in to court and the contents admitted by the defence. The report shows a tear in the vagina of the complainant.

15. Angelina Adams, the other person to whom the complainant had made a report could not be found and that then concluded the evidence for the State.

16. First appellant gave evidence under oath and alleged that he and the complainant had had a "*liefdes verhouding*" and that they had arranged to meet that evening. He had arrived at the shebeen, seen the complainant but had gone and drunk some beers with second appellant. He saw the complainant leave. He had called her back and they then talked about an arrangement. He suggested that they had to go to Philippi together. The complainant said that she had a child who she had to put to bed or look after and that she could not stay out late. The two of them then however walked to the open field under trees where they had consensual sex. They were alone. He had taken her home after arranging to meet later at his room. Later that night the complainant's father arrived with other women and asked him what he had done and then assaulted him with an axe on his head and on his left foot. He was further assaulted but managed to escape. He was later arrested.

17. Under cross-examination first appellant explained that he did not speak to the complainant when he arrived at the shebeen because she was busy with her friends, he did not know that William was her boyfriend, the complainant was willing to accompany him but not for long and that they both knew that they were going to have sex.

18. When questioned as to why he took the complainant to the open veld when he had a room not far from the shebeen he stated that his sister did not agree with him bringing women to the room even though he is 54 years of age. For the first time under cross-examination he alleged that they had previously had sexual intercourse and that this had happened in her father's girlfriend's house and outside in the veld.

19. When asked as to why the complainant should lay a false charge he stated that he and her father had had a falling out and that he suspects that the father was using his daughter to get at him.

20. The second appellant also gave evidence and confirmed that he was at the shebeen that night, confirmed that he had seen the complainant but denied that he had ever accompanied the complainant and the first appellant anywhere that night. He had remained at the shebeen and later seen the first appellant at his house and even later had also been assaulted. When asked why he was pointed out by the complainant as being an accomplice he answered that it came about as a result of his being first appellant's friend.

21. In his judgment the trial magistrate accepted that the complainant was a single witness and that her evidence as such should be approached with caution. He found that the complainant had made a very good impression on the court, she had cried when she gave evidence and that it was quite

clear that after all the years she was still traumatised by the events of that evening. He gained the impression that she could remember the incident of that night very clearly. He did not get the impression that the complainant and William were under the influence of alcohol but accepted that alcohol had been drunk by these witnesses. He took into account that there were discrepancies between the evidence of the complainant and that of William but after analysing such discrepancies found them not to be material or to negatively impact on the State witnesses credibility.

22. The trial magistrate found that the complainant passed the test for a single witness with flying colours. Her evidence was more than acceptable, it was corroborated in material respects and it bore the hallmark of the truth.

23. Turning to the evidence of the appellants the trial magistrate found that first appellant's evidence was "*onsamehangende getuienis*". The record of the proceedings certainly confirms this finding. He found that it is inherently unlikely that the complainant would have made up this rape charge. This was not a case where a *bona fide* mistake was made but it was a case where either the accused had raped the complainant as she says or the complainant was telling a lie.

24. The trial magistrate further found that the probabilities accorded with the complainant's evidence, and accordingly, that the denial by the appellant of guilt was so unlikely that it could not reasonably possibly be true.

25. The trial magistrate found that this was not a case of kidnapping nor of attempted rape but one of rape and assisted rape (as an accomplice by the second appellant) and convicted the appellants of this latter charge accordingly.

26. The trial magistrate was faced with two opposing versions. After weighing up the evidence of the State and Defence he looked at the overall probabilities and evidence and, together with the serious flaws in especially first appellant's evidence, came to the conclusion that the evidence of both the appellants could not reasonably possibly be true. I can find no fault with such reasoning. I can also find no fault with the reasons advanced by the trial magistrate as to his acceptance of the evidence for the State, his findings regarding the probabilities and his rejection of the evidence for the Defence.

27. Although Natasha gave a slightly different reason why second appellant did not proceed to rape the complainant, the remainder of her evidence supports the complainant's evidence in material aspects. Her perception of what the complainant related must be seen against the clearly distressed condition of the complainant at the time.

28. The conflict between William Wassung's evidence concerning where the complainant was when she returned to the shebeen and his allegation that she was crying and the evidence of the complainant that she sat

quietly in the shebeen and tried not to reveal her distress must be evaluated against the distressed state of the complainant who cannot be expected to recall clearly the minute detail of the impression that she left with William when she was clearly more focused on returning home and reporting the offence to people she knew better than William.

29. Support for the State's case existed in the consequential conduct of the complainant by making report of the incident shortly after it had happened, her obvious distressed state at that time and by substantial support in the version of her sister Natasha. The first report 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.[2]

30. It is trite law that a Court of Appeal would be slow to interfere with the findings of the trial court on matters of credibility, as the trial court has the advantages of seeing and hearing the witnesses and being steeped in the atmosphere of the trial, which the appellate court cannot have.[3] The decision in **S v M**[4], however counterbalances the aforegoing and, as was pointed out by Nugent JA,[5] "*The demeanour of a witness is no substitute for evaluating the context of the evidence, taking into account the wider*

[2] **S v Hammond 2004 (2) SACR 303 (SCA)** at 307i to 310g and specifically at 310, para [17].
[3] **Rex v Dhlumayo 1948 (2) SA 677 (A)**, at 705 – 706.
[4] 2006 (1) SACR 135 (SCA), at 202 B-D.
[5] *Supra* at 202 C.

probabilities." Nugent J (as he then was) in **S v Van Der Maiden**[6] commented on the approach to be adopted in evaluating and weighing the evidence adduced by the State and by the Defence as follows:

> "*The proper test is that an accused is bound to be convicted if the evidence established 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."*

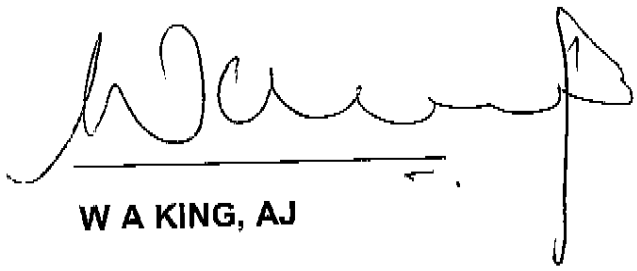
31. I am satisfied that the trial magistrate properly evaluated the evidence and applied correct reasoning in reaching his verdict.

32. Turning to the sentences imposed sight can never be lost of the fact that rape is a particularly brutal offence. Not only is the victim physically assaulted but the psychological damage caused to the victim is enormous. The sentence imposed on the appellants is to my mind

[6] 1990 (1) SACR 447 (W), at 449 J – 450 B. (See further **S v Trainor 2003 (1) SA35 (SCA)**, at 50I- 41I.

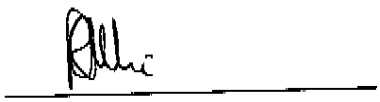
accordingly somewhat on the light side, notwithstanding the mitigatory facts placed before the trial court. Counsel for the appellants, correctly so, did not pursue this ground of appeal with any vigor. I can in any event find no reason for this court to interfere in the decision of the trial magistrate regarding the sentences he imposed.

33. In the result the appeal is dismissed. The conviction and sentence of both appellants are confirmed.



W A KING, AJ

I agree and it is so ordered



R ALLIE, J