IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A40/2010

DATE: 22 OCTOBER 2010

In the matter between:

IVAN SEBASTIAAN Appellant

and

THE STATE Respondent

J U D G M E N T

DESAI, J:

The appellant, a resident of Hawston, was convicted in the Regional Court at Hermanus on two charges of rape and sentenced to an effective term of ten years' imprisonment. He appeals against the convictions only and the matter comes before us with the leave of the trial court.

This case is somewhat unusual in that the charges against the appellant were only instituted more than three years after the offences were allegedly committed. That, of course, is not fatal to the State's case. The lapse of a significant period of time between the commission of an offence and the institution of criminal proceedings simply means that a greater degree of

caution is required in the evaluation of the complainant's evidence.

The real problems in this case are more fundamental. The complainant is also a single witness and her evidence is not corroborated by any objective evidence whatsoever. In order to overcome this problem, the trial court endeavours to find support for the State's case in appellant's version of what transpired on the evening these offences were allegedly committed. Its findings in this regard are incapable of fair-minded support. I shall revert to this aspect shortly.

Moreover, appellant's evidence was both consistent and coherent and he did not contradict himself in any material respect. His wife, the only other witness to testify at the trial, supports his version. She does not confirm the complainant's version that the first report of the rapes was made to her. She in fact denies that such a report was made to her and, in effect, contradicts an essential aspect of the complainant's case.

Her evidence was rejected by the trial court on rather tenuous grounds. The fact that she was nervous cannot be held against her. It seems that she was receiving medication for stress or a stress disorder. The trial court finds that her denial

amounts to a "botweg plat ontkenning". That can hardly be significant. The first report was either made to her or it was not. I do not think any negative connotation can be attached to a simple denial that such a report was not made.

Then there is the criticism that appellant is her husband and the father of her children and accordingly not objective. It may be that she is not, or may not be, objective, but she was the person to whom the report was allegedly made. She, and not some other more objective person, was the only one who could testify about the first report.

The appellant's version that she was taken to Fishershaven and raped and made the report on her return to the appellant's wife who pleaded with her not to report the matter is, on the face of it, plausible. The explanation for the delay in reporting the matter is also plausible. Less plausible is the explanation why she continued to stay with the appellant and his wife at their home until she was fetched a few days later.

However, on the whole, we will do her an injustice by not finding that her evidence was coherent, if not logical, and she did not materially contradict herself during cross-exxamination. Simply stated, she was a relatively good witness despite the

lapse in time and her young age when the offences were allegedly committed.

On the other hand, the appellant's evidence was also reasonably good. He was cross-examined at length by the prosecutor, his cross-examination runs from page 116 to 129 of the typed record, a total of 13 pages. His examination by the magistrate runs from page 129 to 144 of the record, a total of 15 pages. At times the questioning by the magistrate appears to be hostile, if not cross-examination. Such lengthy examination by the trial court could easily lead to a perception of bias in appropriate circumstances. I do not make, or imply, a finding to that effect in this instance.

In any event, a great deal of the questioning by the magistrate was directed to ascertain from appellant how he could remember what happened on a specific date four of five years earlier. There is an innocuous explanation for this. His attention was directed to the trip they made to Fisherhaven. He remembers this trip to Fisherhaven but on his version there were no rapes as testified by the complainant. In other words, he does not remember a specific date but he recalls the day on which he and the complainant went to Fisherhaven. They differ of course as to what happened at Fisherhaven.

The conclusion that something untoward must have happened because he remembers the day, is neither fair nor warranted in the circumstances.

The appellant's recollection of what happened at Fisherhaven does not, and cannot, amount to corroboration of the complainant's version. The trial court's conclusion "hoekom onthou hy dit as daar niks gebeur het nie" (page 190 of the record) cannot be supported as I have already indicated.

At best for the State, the trial court was confronted with two versions which are equally probable. The defence case is in fact stronger with the denial in respect of the first report, but whatever version is more probable, the trial court must ultimately decide whether the accused's case can reasonably possibly be true. Even without recourse to the applicable cautionary rules, that possibly cannot be excluded in this instance. In the peculiar circumstances of this case the trial court erred in not making such a finding.

In the result, I propose making the following order:

> The appeal succeeds, the appellant's convictions and sentence are set aside.

VELDHUIZEN, J: I agree.

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VELDHUIZEN, J

SALDANHA, J: I agree.

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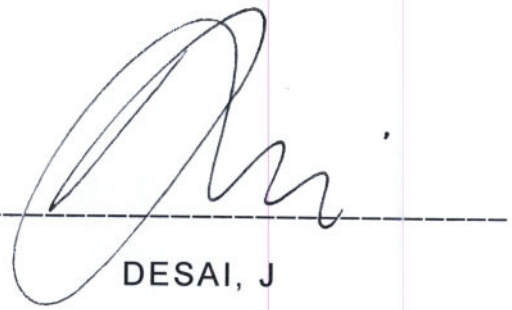
SALDANHA, J

DESAI, J: It is so ordered.



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DESAI, J

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