IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A443/2010

DATE: 12 NOVEMBER 2010

In the matter between:

ADRIAN KLAASEN Appellant

and

THE STATE Respondent

JUDGMENT

MANCA. AJ:

The appellant was charged and convicted of raping the complainant, L Lo, on 28 August 2004 in Parkdene, a residential area just outside George. He was sentenced to 10 years imprisonment, which is the minimum sentence prescribed for this offence. The appellant was legally represented throughout the trial.

The complainant's version of events was relatively straightforward. She explained how she had visited a tavern with her friends, got drunk, left the tavern and was assaulted and raped by an unidentified man on her way home. This evidence went

completely unchallenged by the appellant. The appellant was, however, identified by other witnesses.

The first of these witnesses was one Samuel du Preez. He testified that he saw the complainant being assaulted by the appellant on the night in question. Afraid to intervene, he raised the alarm by running to the complainant's mother's house and describing to her what he had seen. This resulted in the complainant's mother telephoning the police who, it would appear, notified the neighbourhood watch. Within minutes the police and members of the neighbourhood watch descended on the scene. The were taken by Du Preez to where he last saw the complainant and the appellant.

The complainant and the appellant were no longer there and the search was expanded to a nearby field where, according to one Hendrik Swartbooi, a member of the neighbourhood watch he and others came across what he described as a *swart bondeltjie* lying in the grass. On closer inspection, a man jumped up and ran away and Mr Swartbooi and others gave chase. The fact that the man who ran away had been lying on top of the complainant was not challenged.

As I have indicated, Swartbooi and others chased this man, who was shortly thereafter apprehended by a Mr Van Buhlen, also a member of the neighbourhood watch. Mr Van Buhlen was not called as a witness, because he died before the trial took place. However, Mr Swartbooi told the Court that he never lost sight of the man who was caught by Mr Van Buhlen. That man was the appellant.

The Court was also told by Mr Swartbooi and a Captain Cornelius that whilst in

custody, Captain Cornelius removed a condom from the appellant's penis. The Court also heard evidence, tendered by way of affidavits admitted in terms of section 212 of the Criminal Procedure Act, that the condom which had been handed in, had been examined and that it contained a DNA profile which matched that of the complainant.

The appellant's evidence was that he had been at Daniel's Tavern on the night in question and that when he was on his way home, he was apprehended for no apparent reason, taken to the police cells, not offered an explanation for his arrest, only to be told the following day that he was charged with rape. He denied that a condom was removed from his person by Captain Cornelius.

Ms Arnott, who appeared for the appellant, argued that the evidence adduced by the State did not establish that the identity of the person who raped the complainant was the appellant. She submitted that, in the first instance, the identification evidence of Du Preez was open to criticism and should not have been relied upon. Whilst there is much to be said for this criticism, in my view the unsatisfactory elements of Du Preez's evidence, do not assist the appellant.

Mr Swartbooi testified that he saw a man get up from what he described as the *swart bondeltjie* in the field and ran away from him and the other neighbourhood watch members. Mr Swartbooi and others gave chase, and although Swartbooi was not the one who apprehended the appellant, he never lost sight of him. In this regard, Ms Arnott submitted that because Mr Swartbooi had not identified the perpetrator when he first gave chase, that there was a reasonably possibility that the person who was apprehended and the person who fled the scene were two different persons.

In my view there is no such reasonably possibility. Mr Swartbooi chased the man

who got up from the *swart bondeltjie* and never lost sight of him while he was chasing, up until the time when that person was apprehended by Mr Van Buhlen. As far as the evidence of Captain Cornelius is concerned, no reasons have been advanced why his evidence that he removed a condom from the appellant's penis should be rejected. The appellant's evidence on the other hand was most improbable and unconvincing.

In the circumstances I am of the view that the appellant was correctly convicted by the magistrate and that his appeal against his conviction should fail. As regards his sentence, he was sentenced to 10 years, which is the prescribed minimum for this offence. In my view, there are no substantial and compelling reasons that we should interfere with that sentence. In the circumstances I am of the view that the following order should be made. The appellant's appeal against his conviction and sentence is refused.

MANCA, AJ

BLIGNAULT, J: I agree and it is so ordered.

BLIGNAULT, J