

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**Case No:**

**A532/07**

In the matter between:

**ANTHONY JACOBS**

**Appellant**

Versus

**THE STATE**

**Respondent**

**JUDGMENT DELIVERED ON 19 FEBRUARY 2010**

**Allie, J**

[1] The appellant was arraigned in Parow's Regional court on one count of rape and one count of assault. He pleaded not guilty and had legal representation at the trial. He was convicted and sentenced to 10 years imprisonment on the rape count and 3 months imprisonment on the assault count, the latter sentence was ordered to run concurrently with the sentence imposed on the rape count.

[2] He now appeals against the convictions and sentence.

[3] The state alleged that the appellant, who was a friend of the complainant's brother and therefore known to her, dragged the complainant down the stairs of her flat, over a field, kicked her in the ribs and slapped her in the face. He then allegedly dragged her into a disused creche building, pushed her to the ground and raped her before the police arrived.

[4] The appellant's version was that he and the complainant were in a sexual

relationship and she had consented to having intercourse with him on the night that the offences were allegedly committed.

[5] The evidence of the complainant do not accord with her testimony of rape in the following respects:

51 She said that he dragged her down the stairs of her flat one floor below her front door, yet she decided not to shout for help. In that time there were people around, yet she did not shout. She said that at that point he was pulling her and she was pulling back. She said that she did not know then that he intended raping her. That may well be correct, but she must have realised that he intended hurting her as he was pulling and dragging her and it was not friendly behaviour. She chose not to shout even when being dragged over a field.

52 Even when he twisted her arm in front of a lady who passed by, she did not ask for help. When he pushed her into the disused creche building and knocked her to the ground, she still did not call for help. At no stage in her evidence did she allege that he threatened to harm her if she should shout.

[6] Her testimony that the appellant told her outside the creche building that a woman was peeping through her window at the house on the opposite side is strange. It is not consistent with the conduct of a rapist who wanted the complainant to go into the building with him.

[7] She also testified that he placed his jacket on the ground for her to lie on before he

forced her to the ground. That is also not consistent with the behaviour of someone who intended forcibly having sexual intercourse with her without her consent.

[8] The complainant testified that while the appellant was raping her, the police arrived. She failed to tell the police then that she had been raped. She stood behind the appellant instead of running to the police. She waited until the police asked her in the police van on the way to the police station whether she had consented to having sexual intercourse with the complainant, before saying that she did not give consent. She agreed with the defence that when the police arrived, they said they were going to arrest them both.

[9] Her testimony that her bruises on her head were visibly blue when she saw the doctor is not confirmed by the doctor.

[10] The complainant's friend Nadia Snell who testified in the state's case said that the complainant had previously pointed the appellant out as her boyfriend. During cross examination the complainant denied that the appellant was her boyfriend. However, the fact that the perpetrator of rape was in a relationship with the victim, does not justify rape. The discrepancy between the evidence of the complainant and Nadia Snell on this issue does cast doubt on the complainant's credibility.

[11] More importantly however, the *court a quo* drew an inference that the police was alerted by an unknown man who alleged that a woman was beaten and dragged into the building without the testimony of the unknown man. That evidence is hearsay. An inference can only be drawn from conclusively proven facts. The finding of the *court a quo* on that aspect, is a material misdirection.

[12] The medical evidence is of no assistance to the state as it is not unequivocal. By not being satisfied with the appellant's inability to explain the presence of a tear on the complainant's fossa navicularis, the regional magistrate inadvertently placed the onus of proof on the appellant. There is, of course, no obligation on the appellant to explain the tear in the light of the indeterminate nature of the medical evidence.

[13] On a conspectus of all the evidence, I am of the view that the appellant's testimony seen together with aspects of the state's case that support his version, is reasonably possibly true. The state has not, in my view, discharged its onus of proof beyond reasonable doubt.

[14] I would accordingly set aside the convictions.

**ALLIE, J**

I agree

**KING, A J**