**IN THE HIGH COURT OF SOUTH AFRICA**

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

CASE NUMBER: A146/2012

DATE: 25 MAY 2012

In the matter between:

**FREDERICK ALFONSO SWARTZ** Appellant

and

**THE STATE** Respondent

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**J U D G M E N T**

**CLOETE, AJ**:

The appellant, who was legally represented throughout the trial and who had been charged with assault with intent to cause grievous bodily harm, and two counts of rape, was convicted in the Parow Regional Court on 10 March 2011 on one count of rape and sentenced on 1 April 2011 to 10 years direct imprisonment. With the leave of the trial court, he now appeals against both his conviction and sentence.

The appellant had pleaded not guilty and had exercised his

right to remain silent and not to provide a plea-explanation. The state called five witnesses, including the complainant, who had been 20 years old at the time of the incident and the district surgeon, Dr Collison, who had examined the complainant a matter of hours after the incident.

Although the evidence of the lay witnesses called by the state was contradictory in various respects as to the events which preceded and succeeded the incident, it was common cause that there were no witnesses to the alleged rape itself, which had occurred in the early hours of the morning of 24 January 2009, other than the complainant and the appellant. It was also common cause that the appellant and the complainant were standing alone between a wall and a vehicle parked in the yard of a house, where a party was being held.

The complainant testified that the appellant had started to kiss and touch her and when she asked him to stop, he accused her of leading him on. He then hit her on her right cheek and she fell to the ground. The appellant climbed on top of her and began to unfasten her pants. He throttled her and then penetrated her vagina with his penis. He did not use a condom. She closed her eyes out of fear. He eventually got off her, but about five to 10 minutes thereafter, when she had stood up and was trying to fasten her pants, he swore at her

and again raped her, also without using a condom.

Someone then came outside and the appellant let her go. She ran into the house. She was thereafter accompanied to her home. The incident was reported to the police and she was later examined by Dr Collison. She admitted that she had been drinking, but denied that she had been drunk, although she had later reported to Dr Collison that she had indeed been drunk. She claimed that she had been a virgin prior to the incident.

The appellant's version was put to the complainant through his legal representative. He claimed that the complainant had led him on. After they had spoken for a while, they had kissed. He admitted that they had landed on the ground, but denied that they had sexual intercourse, claiming that matters ended there. The evidence of the complainant and other lay witnesses, who had been in the company of the complainant before and virtually immediately after the incident, showed that despite their contradictions as to the exact sequence of events, the complainant was never alone from the time she ran back into the house, after the incident, where the party was being held until she was returned to her home, where she lived with her mother and the matter was reported to the police.

One of the witnesses, Valencia Smith, testified that after the incident, she had seen the complainant buttoning her pants and that her face was swollen. Her clothing was in disarray. Another, Junita Simons, confirmed that she had seen a red hand mark on the complainant's face and that the complainant had told her that the appellant had hit her. Valencia Smith confirmed that the complainant had reported to her that the appellant had raped her.

Dr Collison's observations during his examination of the complainant some eight hours later, supported the complainant's version that she had been raped and that she had been a virgin prior to the rape. He testified that her injuries were consistent with forceful vaginal penetration and that her vaginal bleeding was consistent with an injury which had occurred between six to eight hours prior thereto. He had also observed redness on her cheek, although he had not found evidence of her having been throttled. However, the complainant's testimony that bruising had appeared the day after Dr Collison's examination, was not raised with him by the appellant's legal representative as a medical possibility.

The appellant applied for his discharge at the close of the state case, after his legal representative had informed the court that he would testify in his defence. The magistrate

refused his application, pertinently drawing to his attention that the state's evidence was such that he had a case to answer, in spite of the contradictions of the complainant and lay witnesses. This notwithstanding, and despite having been given ample time by the magistrate to consider his position, the appellant then closed his case without testifying or calling any witnesses. It is against this background that the magistrate found the appellant guilty on one count of rape. She concluded that to have also found him guilty on the other counts would have amounted to a duplication of charges.

In my view, the magistrate's reasoning and findings cannot be faulted. It is clear from the record that she carefully weighed and evaluated the evidence of the state witnesses, including that the complainant was a single witness to the incident itself. I agree that the appellant indeed had a case to answer, in the sense set out in S v Boesak 2000 (1) SACR 633 (SCA) at paragraphs 46-47, where it was said that:

> "It is trite law that a court is entitled to find that the state has proved a fact beyond reasonable doubt if a *prima facie* case has been established and the accused fails to gainsay it, not necessarily by his own evidence, but by any cogent evidence. We use the expression "*prima facie* evidence' here in the

sense in which it was used by this court in *ex parte* The Minister of Justice in re R v Jacobson & Levy 1931 AD 466 at 478, where Stratford, JA said at 478:

> "*Prima facie*" evidence, in its more usual sense, is used to mean *prima facie* proof of an issue the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive proof and the party giving it, discharges his onus.
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> Of course, a *prima facie* inference does not necessarily mean that if no rebuttal is forthcoming, the onus will have been satisfied. But one of the main and acknowledged instances where it can be said that a *prima facie* case becomes conclusive in the absence of rebuttal, is where it lies exclusively within the power of the other party to show what the true facts were and he or she fails to give an acceptable explanation."

This notwithstanding, the appellant declined to put his version before the court. He was correctly convicted and it follows that the appeal against conviction must fail.

I turn to the sentence. It is trite that the circumstances in

which a court of appeal may interfere in a sentence which another court has passed, are limited. There must be either a material misdirection by the trial court, or the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed, had it been the trial court, is so marked that it can properly be described as "shocking, startling or disturbingly inappropriate". See S v Malgas 2001 (1) SACR 469 (SCA) at 478d-g.

It is common cause that the appellant was timeously informed of the provisions of the minimum sentencing legislation contained in section 51 of Act 105 of 1997. As a first offender for rape, he became liable on conviction to 10 years imprisonment unless the court found that substantial and compelling circumstances existed which justified the imposition of a lesser sentence.

In his heads of argument, the appellant's legal representative submitted that a lesser sentence was justified due to his personal circumstances, that he is a first offender for rape and that the injuries suffered by the complainant were apparently not serious. As to the last submission, section 51(3)(aA) specifically provides that an apparent lack of physical injury to a complainant does not constitute a substantial and compelling circumstance for purposes of the minimum sentencing

legislation. In any event, it was clear from the evidence of Dr Collison that the complainant was still bleeding vaginally when he examined her. This submission also overlooks the long term effect of the trauma suffered by the complainant and which was detailed in her Victim Impact Affidavit, which was presented to the court without any objection from the appellant.

As to the appellant's personal circumstances, he was 29 years old at the time of the incident. He had not been incarcerated while awaiting trial, although the case took two years to finalise. He had completed Grade 10 and was self-employed, selling fruit and vegetables, earning about R500,00 per week. He supported his three young children and his mother. One of the children lived with the child's mother and the other two with the appellant, although he was still in a relationship with their mother. There was no evidence that they would not be cared for by their mother during the appellant's absence. The appellant has three previous convictions, one of robbery and two relating to the unauthorised possession of a firearm and ammunition. All three convictions had taken place within 11 years prior to this incident.

In my view, the magistrate correctly weighed up the nature of the offence, the appellant's personal circumstances and the

interests of society. The appellant's personal circumstances could not take preference over the seriousness of the offence, its consequences to the complainant and the need to heed the call from society to meet out appropriate punishment to offenders such as the appellant. The magistrate did not materially misdirect herself and there is no basis for this court to interfere. It follows that the appeal against sentence must also fail.

In the result, I propose the following order:

1. The appeal against both conviction and sentence are dismissed.

2. The conviction and sentence are confirmed.

CLOETE, AJ

I agree. It is so ordered:

ZONDI, J

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