

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A326/2012

DATE: 31 AUGUST 2012

5 In the matter between:

PEDRO JACOBS Appellant

and

THE STATE Respondent

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J U D G M E N T

BOZALEK, J

The appellant was charged in the Paarl Regional Court with
15 one count of rape to which he pleaded not guilty. He was
convicted, however, of contravening Section 1 of the Criminal
Law Amendment Act 1/1988 namely of consuming or using a
substance which impaired his faculties to appreciate the
wrongfulness of his acts or to act in accordance with that
20 appreciation while knowing that such substance has that effect
and, while his faculties were thus impaired, committing, in this
case, the rape.

The accused was sentenced to 10 years imprisonment of which
25 three years were suspended for five years and now, with the

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leave of the magistrate, he appeals against conviction only.

In his grounds of appeal the appellant, who was legally represented at the trial, contends that the magistrate erred in
5 failing to take into account that the complainant, Ms Vanelise Fortuin, was a single witness whose evidence was not substantiated in any way and that she was heavily under the influence of alcohol at the time of the incident.

10 In heads of argument the appellant expanded on this ground by submitting that the complainant had testified that she could not really remember the events in question, that there had been no corroborative medical evidence, the state had failed to explain why it not called the witness to whom the
15 complainant first reported the rape and by pointing to the fact that the complainant had been an unwilling witness. It was further submitted overall that the complainant as a single witness was not reliable and had contradicted herself in material respects.

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In S v Jackson 1998(1) SACR 470 (SCA) at 474(F) to 475(E) Olivier, JA surveyed the history of the cautionary rule in sexual assault cases and concluded that:

25 "The evidence in a particular case may call for a

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cautionary approach but that is a far cry from the application of a general cautionary rule."

In this particular matter the evidence did call for a cautionary approach since the complainant was a single witness and no medical evidence was placed before the court, nor the evidence of the first person to whom the rape was reported. More importantly, the complainant was strongly under the influence of alcohol on the night in question.

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The complainant was a 20 year old mother who knew the appellant, a 47 year old male, well. On the night in question at his invitation she drank with the appellant and one or more friends at the former's house until the last remaining friend was sent by the appellant to purchase more alcohol.

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According to her evidence, that is the complainant, in the friend's absence the appellant locked the front door and after a point made advances to the complainant, pulled her to a room, clamped her mouth shut, threw her on the bed and forced himself upon her. He eventually pulled off her pants and raped her. The complainant then left the house and sat in the yard unwilling to go home and face her mother but eventually called for her girlfriend, Shanay, who then arrived. She told Shanay what had happened and spent the night at her

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house. The complainant neither reported the incident to the police nor sought any medical examination or assistance because she did not want to speak about it and, even when testifying in court, she was clearly still a reluctant witness.

5 After some days however, the complainant told her boyfriend about the incident and he phoned the police. Her mother then came to hear of the matter and a week after the incident she took her to a doctor. Shanay wanted no part in the matter and according to the magistrate's judgment it was common cause
10 that apparently no statement was taken from her by the police.

Much of the complainant's testimony, including the fact that both parties had been strongly under the influence of alcohol, was conceded by the appellant. However he denied forcing
15 his attentions upon the complainant, stating that he had merely playfully wrestled with her and he denied raping or even having intercourse with the complainant.

His evidence as to how the encounter ended was vague in the
20 extreme however, being that he could not recall would what had happened after the second occasion he found himself on top of the complainant on the bed.

In effect the only material dispute was whether the entire
25 incident had been consummated, if that is the correct word or

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the appropriate word in these circumstances, by the appellant having intercourse with the complainant against her will. The only evidence to this effect came from the complainant.

- 5 The magistrate not only expressly recognised that a cautionary approach to the complainant's evidence had to be adopted but subjected it to critical examination, pointing out that her account of events was initially faltering, but later improved.
- 10 In so far as the complainant was a single witness, as was stated in S v Sauls and others 1981(3) SA 172 (AD), there is no rule of sum, test or formula to apply when it comes to a consideration of the credibility of a single witness. Ultimately the court must be satisfied of the credibility of the witness and
- 15 that the truth has been told after the merits and demerits of the witness' evidence have been weighed. The cautionary rule does not mean that:

- 20 "The appeal must succeed if any criticism however slender of the witness' evidence is well founded."

And the exercise of caution must not be allowed to displace the exercise of common sense.

- 25 The magistrate concluded that notwithstanding a searching /RV /...

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cross-examination, the complainant ultimately impressed as a credible witness.

In contrast the magistrate found that the appellant was a
5 pathetic witness whose version of the events frequently
changed and which did not accord with the propositions which
had been put on his behalf by his legal representative.

Ironically the complainant's initial reluctance to press charges
10 against the appellant and her continuing ambivalence towards
proceeding with the case serves to underscore her credibility.
There was no evidence that anyone would have known of or
suspected a sexual encounter between her and the appellant
had she herself not disclosed this, first to Shanay and later to
15 her boyfriend.

In these circumstances the question is why would she tell them
that she had been raped by the appellant if this had not been
the case?

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Furthermore, the appellant was ultimately unable to deny that
the struggles on the bed, on his version merely a playful
wrestling, ended in intercourse. Conveniently at this point his
memory deserted him. His repeated denial that he raped or
25 even had consensual intercourse with the complainant was

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logically irreconcilable with his claim that he could not remember what happened after a certain point. It is significant furthermore that, even on his own version, the appellant clearly had a sexual interest in the complainant.

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The various criticisms levelled at the state's case and specifically at the complainant's evidence do not in my view cast any material doubt on the magistrate's findings. It was not the complainant's evidence that she could not really
10 remember what had happened that night. Her evidence was that she could not remember everything but she was able to give a logical and chronological account of what took place.

The complainant readily admitted that she had been drunk and
15 that she was not used to alcohol, but she ultimately gave a clear and quite detailed account of what took place which was not shaken in a searching cross-examination.

To sum up, the only material issue in this matter was whether
20 the sexual encounter between the complainant and the appellant culminated in intercourse without the former's consent. Little if any reliance can be placed on the appellant's evidence in this regard since ultimately he claims not to remember what happened beyond a certain point.

25 The complainant testified that she was ultimately raped and

there are no improbabilities in her version. There is no corroboratory evidence largely because the complainant was reluctant to take the matter any further.

- 5 In the circumstances it was incumbent on the magistrate to adopt a cautionary approach to the complainant's evidence which the magistrate did but ultimately found that the complainant was a credible witness.
- 10 It is trite that in the absence of an irregularity or misdirection a court of appeal is bound by the credibility findings of a trial court unless it is convinced that such findings are clearly incorrect. See S v Jackson Supra at 473(h – i).
- 15 In my view the magistrate committed no errors or misdirection in accepting the complainant's evidence and finding that the appellant had committed the rape in question, albeit at a time when his faculties were so impaired by his consumption of alcohol that he failed to appreciate the wrongfulness of his
- 20 actions or to act in accordance with such an appreciation.

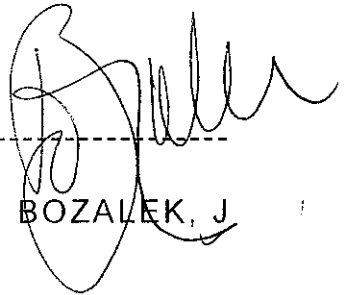
The evidence established furthermore that the appellant was well aware that his consumption of alcohol could have that effect.

- 25 In the circumstances I can found no fault with the conviction
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and for these reasons I would DISMISS the appeal against conviction.

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BOZALEK, J

I agree and it is so ordered.

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SAMELA, J