

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

CASE NUMBER:

A353/2012

5 DATE:

7 SEPTEMBER 2012

In the matter between:

MORNE JACKSON

Appellant

and

10 **THE STATE**

Respondent

J U D G M E N T

NYMAN, AJ:

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The appellant, Morne Jackson, who was legally represented, was convicted of rape in terms of the Sexual Offences Act 32 of 2007, on 29 September 2011 in the Bellville Regional Court and he was sentenced to seven years imprisonment on 12 October 2011. Leave to appeal against the conviction was granted by the trial court. The complainant is a married woman with four young children. She and the appellant are cousins who had a close relationship, the appellant having occasionally stayed over at the complainant's house. On 20 November 2010 a number of friends and relatives, including /RG /...

the appellant, joined the complainant and her husband at their home in Delft to celebrate their anniversary.

They spent the evening talking and consuming alcohol. Later
5 that evening, the complainant went to her bedroom where her children were sleeping. In the early hours of the morning the complainant complained to her husband, who had been in a drunken sleep (*getiep*), that she had been raped by the appellant, whereupon he threw the appellant out of their
10 house. Thereafter the complainant went to the police station and made a statement resulting in the appellant's arrest. At the commencement of the trial the appellant pleaded not guilty and he was informed that section 51 of Act 105 of 1997 was applicable to the proceedings.

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At the trial the state witnesses were the complainant, her husband and the medical doctor who had examined the complainant. The complainant testified that on 20 November 2010, at about 11 pm, when she was sitting in the lounge she
20 told her husband that she was going to sleep because their baby was crying and had to be breastfed. She went to the bedroom and laid on the bed with her two daughters and baby son. The complainant fell asleep and during the night she felt someone lying on top of her. She felt that it could not be her
25 husband because he was too heavy. She opened her eyes and

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saw that it was the appellant who was busy having sex with her without her consent.

5 She screamed and ran away half naked, looking for her husband. While she was running she saw Lee Jackson, her cousin, coming out of the one room. She found her husband fast asleep in the lounge. She woke him up and told him what had happened. The complainant testified that she was hysterical and that she was shouting and screaming.

10 The complainant's husband testified that on the night of the incident he and his wife, the appellant and his brother named Michael and another man sat in the lounge. His wife told him that she was feeling drunk and that she was going to sleep.

15 The men continued sitting in the lounge. The appellant's brother then stated that he was going to sleep. The remaining three men then watched a movie. The complainant's husband fell asleep during the movie. During the night he was woken up by his naked and screaming wife who told him that the

20 appellant had raped her.

Doctor Collison testified that he had examined the complainant on 21 November 2010. The complainant informed him that she was very drunk during the incident and she was not sure

25 whether the appellant had worn a condom or had ejaculated

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during the incident. Doctor Collison testified that the complainant had not suffered any injury as a result of the alleged sexual assault and that no semen deposits were found on the complainant.

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The appellant testified that on the night of the incident his brother and himself, the complainant, her husband and his cousin, were sitting in the lounge consuming alcohol. At about 1 am the complainant's husband and his cousin fell asleep.

10 The complainant got up and said that they should continue drinking. The two of them then went to the bedroom together and continued drinking. When the alcohol was finished, the complainant told him that she felt like having sex. The appellant told the complainant that her husband was in the
15 lounge whereupon she replied that he should not worry because her husband was a heavy sleeper.

They then proceeded to vry and while they were busy, someone was on the way to the bathroom and touched the
20 bathroom door. Both the bedroom and bathroom doors were open. This caused him and the complainant to jump up. The appellant continued to sit on the bed while the complainant got up and quickly went to the lounge. The appellant denied that he had sexually penetrated the complainant. He testified that
25 the complainant was wearing a short red pants and a t-shirt at

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the time of the incident. The appellant testified that he and the complainant were very close and that they had vry'd and had previously had sex on many occasions. Michael Jackson, the appellant's brother testified that on the evening of the
5 incident after they had been drinking in the lounge, he fell asleep and was woken up by a noise.

He saw the appellant going to the bedroom and on his return, the complainant's brother put him out of the house. He saw
10 the complainant entering the lounge crying and sitting on her husband's lap. He then continued to sleep. He testified that the complainant was wearing a pair of red short pants. Jackson stated that the complainant was close to the appellant and she often teased him and grabbed him by his private parts.
15 He said he did not know if the appellant had an affair with the complainant but he would not be surprised if he had been told that they did have an affair. Under cross-examination Jackson testified that he did not see the complainant sitting in the lounge before he fell asleep.

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Veronica Jackson, the appellant's mother, testified that the complainant had told her that she wanted to withdraw the complaint against the appellant but she could not do so because her husband would divorce her. She testified that the
25 complainant and her son were very close and that the

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complainant liked to touch the appellant. She was suspicious of their relationship.

In its judgment, the court *a quo* drew attention to the fact that
5 the state relied on the evidence of the complainant as a single witness and that in terms of section 208 of the Criminal Procedure Act 51 of 1977, the appellant may be convicted on this basis.

10 However, the evidence of the single witness must be satisfactory in all material respects and must be approached with caution at all times. It was the trial court's opinion that there was a guarantee of reliability in the complainant's version because she immediately made a first report to her
15 husband after the rape, while the appellant did not make a good impression as a witness. In the opinion of the court *a quo* the witnesses for the defence, supported the complainant's version that she was not with her husband and the appellant in the lounge and that she was at another place.

20 This evidence lends credibility to the complainant's evidence that she had gone to bed before the appellant. The trial court rejected the appellant's version that the complainant had invited him to have sex with her and furthermore, that they
25 have had an affair on the ground that it was improbable that

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the complainant would have woken up her husband, if she had a secretive affair with the appellant. The court *a quo* therefore concluded that on an evaluation of all the evidence, it could not come to any conclusion other than that the version of the
5 appellant was: "*Onsinnig en leuenagtig*". In consequence, the State had proven its case beyond a reasonable doubt. In the grounds of appeal submitted on behalf of the appellant, it is contended *inter alia* that the court *a quo* erred in finding that the State proved its case beyond a reasonable doubt, by
10 accepting the evidence of the complainant as a single witness because the complainant's evidence as a single witness should have been approached more consistently. It is furthermore contended that the court *a quo* erred in not considering the totality of the evidence. I agree.

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In S v Webber 1971(3) SA 754 (A) at 758G-H the court held that it is impossible to establish a formula in terms of which the evidence of a single witness should be evaluated, but it is necessary to approach such evidence with caution and to
20 balance the good qualities of such evidence with all the factors that will negate the credibility of the witness. It is further necessary to compare the quality of the evidence of the complainant with that of the appellant (see: Marke v DPP (2011)1(SA) 460 (SCA) at 628.) It is trite that the Court
25 should not adopt a compartmentalised approach to the
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evidence by assessing the State's case separately from that of the defence, but the Court should consider the totality of the evidence. In its assessment of the contradiction in the evidence of the complainant and the appellant in respect of whether the complainant had gone to sleep before the appellant, the trial court accepted the evidence of the complainant on the ground that her version is corroborated by the evidence of the witnesses for the defence.

10 In my opinion, by so doing the court *a quo* failed to consider the evidence of the complainant's husband who had testified that the complainant had sat together with him and the other men in the lounge. This version corroborates the appellant's version and contradicts the complainant's version. It would

15 have been expected that in all probability the complainant's husband, whose evidence should be approached with caution, given that he had an inherent bias in the proceedings as the complainant's husband, would have given evidence in his wife's favour. In my view, his evidence in this respect is

20 therefore reliable. He furthermore contradicts the complainant's evidence in another material respect. He testified that the complainant had told him that she was feeling drunk and that she was going to sleep, while the complainant testified that she had told her husband that she was going to

25 sleep because the baby was crying and had to be breastfed.

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The court *a quo* ignored these material contradictions.

5 The court *a quo* failed to evaluate other relevant evidence such as the fact that the appellant's mother and brother had testified that the appellant and complainant had a close relationship which transcended the normal boundaries of "brother and sister relationship", given that such evidence if accepted, lends credibility to the appellant's version that the sexual interaction between him and the complainant was at the
10 behest of the complainant and was consensual. In my opinion the trial court could not ignore this evidence but should have evaluated the weight to be attached to such evidence, which it failed to do. The trial court placed great emphasis on the evidence that the complainant had made a first report of the
15 alleged rape to her husband. In my opinion, two inferences can be drawn from the proven fact that the complainant had made such a report.

The court *a quo* accepted one of the two possible inferences,
20 namely that such a first report makes the complainant a reliable witness. However the trial court failed to consider the second inference which is the version that was proffered by the appellant in his evidence, that the complainant felt compelled to make a report to her husband because she was
25 under the impression that she and the appellant were caught in

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the act when they were disturbed by someone who was on his way to the bathroom. This evidence is consistent with the complainant's evidence, that when she was running from the bedroom she saw Lee Jackson coming out of the one room.

5 A troubling aspect of the reliability placed by the court *a quo* on the complainant's evidence is the proven fact that the complainant was very drunk when she went to bed. Doctor Collison had testified that the complainant had informed him that she was very drunk during the incident and that she was
10 not sure whether the appellant had worn a condom during the incident. In my opinion, the complainant's condition at the time when she went to bed undermines her credibility. If she could not remember whether or not the appellant had worn a condom, how could she remember whether or not she had
15 given her consent to the appellant.

In S v Van Aswegen 2002(2) SACR 97(SCA), the court relied on the following passage in S van der Meiden 1999(1) SACR 447 (W) at 449(G), for its decision that a court should not base
20 it's decision on whether to convict or acquit on only a portion of the evidence, but that the decision had to take into account all the evidence.

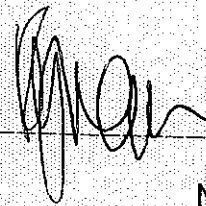
25 "The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond

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reasonable doubt and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be born in mind however is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored".

Given the material contradictions in the evidence, it is my view that the State has failed to prove its case beyond a reasonable doubt. On the conspectus of all the evidence, in particular the material contradictions in the evidence, it is reasonably possible that the appellant is innocent. In the result I would dismiss the conviction.



NYMAN, AJ

I agree.

DAVIS, J