IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A461/2012

DATE: 16 NOVEMBER 2012

In the matter between:

OWEN SOLOMONS Appellant

and

THE STATE Respondent

J U D G M E N T

LE GRANGE, J:

The appellant in this matter was convicted of three counts of rape in the Regional Court, Parow, and sentenced to a term of six years direct imprisonment on each count. The appellant, with the leave of the court *a quo* now appeals only against conviction in respect of count 2.

The appellant's main ground of appeal is that the magistrate erred in accepting the evidence of the complainant that sexual intercourse took place. Moreover, the appellant contended

that even if it did take place, the magistrate erred in accepting that the state proved beyond a reasonable doubt that it was without her consent.

The state relied on the evidence of the complainant, Fasselyn Seconds, her boyfriend at the time, Morné Davids, and the complainant's aunt, Nazeema Andrews. The medical examination of the complainant, compiled by Dr Mensa (the J88 medico-legal report) was, by agreement between the state and the defence, handed in as an exhibit in the court *a quo*.

The appellant, in respect of the other two rape counts, after certain evidence was led, admitted in terms of section 220 of the Criminal Procedure Act, Act 51 of 1977, that during March and May of the year 2010, he unlawfully had sexual intercourse with the other two complainants against their will. He also admitted that the incidents where he raped his victims, occurred at the derelict building of the old Northlink College in Belhar.

It appears that these admissions mainly came about after the result of the DNA forensic report became available and the appellant's DNA genetic material was found in the semen that was deposited on the panties of both complainants. In respect of count 2, the DNA material that was found on the

complainant's pants, excluded the appellant. The appellant, pursuant to the admissions, elected not to testify in the defence case. He also did not call any other witnesses to testify on his behalf.

The evidence of the state in respect of count 2, can be summarised as follows. The complainant testified that the appellant is known to her. On the day in question in April 2010, she agreed to walk with him to a local shop, where Lotto tickets are sold. They proceeded to walk in the direction of the shop. On the way, and in order to take a shortcut, they proceeded to walk through the premises of the old Northlink College, which is presently a derelict building. As they were walking, the appellant suddenly forced her to go into one of the open derelict rooms of the building.

In the room, he pulled at the front of her pants and said she must undress. As a result of the force used, her pants started to tear in the front. According to her, the appellant stared at her in a threatening manner, as if he wants to injure her. She then decided to undress herself. The appellant ordered her to lie on the ground, where he forcefully had sexual intercourse with her. Thereafter he told her not to tell anyone and she agreed. They left the old building and he accompanied her to her aunt's house after the incident.

At the house, she immediately washed her entire body. She also noticed certain bloodstains on her panty, which she washed. She did not inform anyone at the house of the incident, but later that day, told her boyfriend, Morné Davids, that the appellant had raped her. She requested her boyfriend not to do anything or to report the matter to the police.

Morné Davids testified that he arrived at the premises of the complainant's aunt, as he was looking for her. She was not at home and he proceeded to go and play dominoes. According to him, the complainant arrived the afternoon at her aunt's place. It was then that she reported to him that she was raped by the appellant. Davids testified that the complainant indicated that he must not do anything, as he first wanted to inform her father about the incident.

Nazeema Andrews confirms that the complainant and the appellant left her premises at about 1 p.m. on the day in question and that the complainant's boyfriend was playing dominoes her place. According to her, she was informed about the incident about two days after it was allegedly committed. Nazeema further testified that the appellant accompanied the complainant home and stood in her yard for a while before he left.

The main attack against the evidence of the complainant was that she was not a reliable and credible witness. According to the appellant, there was some contradiction between her testimony and that of her boyfriend, Davids, pertaining to the time period when she and the appellant left and returned to her aunt's premises. Furthermore, according to the appellant, the complainant's failure to not immediately report the incident to the police, is indicative that she was not sexually abused by him and the absence of his DNA genetic material on her pants must be a further indication that he did not rape her.

Having read the record, I am of the view that the state did prove its case in respect of count 2 beyond a reasonable doubt. The complainant's evidence, to a large extent, accords with the appellant's plea-explanation. According to the plea-explanation, sexual penetration was the only material point in dispute. The appellant's plea-explanation is recorded as follows:

> *"Verder, Agbare, met betrekking tot aanklag 2, is ook my instruksies, Agbare, dat beskuldigde seksuele penetrasie gaan ontken. Beskuldigde gaan alhoewel nie die datum in geskil plaas nie, Agbare, die beskuldigde - dit is ook my instruksies*

om op rekord te plaas dat die beskuldigde wel met die klaagster was op die dg van die voorval, Agbare. Hulle het gaan Lotto tickets koop in Belhar. Hy het die klaagster gaan haal om dit te doen, Agbare. Na dit, het hy weer na klaagster se huis toe gegaan, waar hy dominoes gespeel het. Hy ontken alles verder, Agbare."

The complainant, with regard to the main point in dispute, testified as follows:

"Toe is hy besig om vir my te verkrag. Soos hy - hy het bo-op my gelê en hy het beweeg bo-op my op en af, soos 'n man en 'n vrou seks het, so. Maar vir my was dit nie seks gewees nie, vir my was dit soos verkrag. Hy gebruik my, want ek het hom nie gesê hy moet dit doen nie. Hy het sy penis gebruik en my vagina moes nou - hy het dit ingesteek, geforseer, hy het my bene so oop beweeg, oopgeruk so. Hy het nou vir my verkrag. Na 'n tyd na daai, toe sê hy vir my kom, ons is nou klaar, ek moet vir niemand sê nie. Toe sê ek vir hom ja, Owen, ek gaan vir niemand sê nie. Hy lag. Toe was ek maar - sê maar ek was - het bang gevoel. Toe sê ek gaan vir niemand sê nie."

The evidence of the complainant clearly indicates before, during and after the rape, that she was scared and frightened of the appellant. She also testified, in no uncertain terms, that her fear was induced by the violent and threatening conduct of te appellant and that he forced himself on to her. He grabbed at the front of her pants and it was torn. In this circumstances, it is inconceivable to suggest that there was consent to the sexual penetration.

The trial magistrate adopted a correct approach in evaluating the evidence of the complainant. The contradictions alluded to between the evidence of the complainant and her boyfriend regarding the time she left her aunt's premises with the appellant and when they arrived back, was properly considered by the trial court. The complainant also corrected the issue regarding her police statement, when it was mentioned that the appellant pushed her towards the ground. In my view the trial court correctly found the contradictions to be minor and did not impact on the overall trustworthiness and credence of her evidence.

The complainant did take the first reasonable opportunity to inform her boyfriend on the same day of the events about the incident. This shows consistency, which clearly impacts on

her credibility and reliability as a witness. She also testified that after the rape, she washed her entire body, including her panty that was soiled with blood. The absence of DNA material is, therefore, not unusual in these circumstances.

The criticism levelled at the complainant for the delay in report the incident to the police, is misplaced. The complainant's version that she did not want to go immediately to the police station and only went a day or two later with her aunt and a group of other persons to the police, cannot be regarded as improbable. It, therefore, does not impact negatively on her credibility.

The trial court also adopted a correct approach when the appellant elected to remain silent and not to call any witnesses. In S v Brown 1992 (2) SACR 49 (NC) at 51, the following was held:

> *"1. The fundamental constitutional right of an accused to remain silent at all times, including after the close of the prosecution case, will be subverted if its exercise were to result in any inference to the effect that the accused's silence amounts to an admission, either that he is guilty or that he has no answer to the*

prosecution case.

2. *The correct approach, both as a matter of law and of logic, is to recognise that the accused's silence adds nothing to the strength of the prosecution.*

3. *What it does, is no more than to leave the prosecution case undisturbed by any evidence that he either challenges it or explains it away.*

4. *The prosecution case must be evaluated on its own merits and without purporting to bolster it, specially by reference to the accused's exercise of his rights of silence."*

The complainant's version in respect of count 2 stands undisturbed. It is also noteworthy that the complainant in court 2 testified that she was taken to the same place, where the appellant admitted he raped the other two complainants. All three incidents occurred within a period of three months and are strikingly similar in the manner appellant requested the complainants to walk with him. He then took them to this derelict building called Northlink College. In fact the complainant in respect of count 1, is his cousin.

On a conspectus of all the evidence, I am satisfied that the trial court adopted the correct approach in accepting the evidence of the complainant and in finding that the state proved its case beyond a reasonable doubt. It follows that the appeal against the conviction of count 2 cannot succeed.

In the result, the following order is made:

The appeal against the conviction of count 2, is dismissed.

LE GRANGE, J

I agree:

FORTUIN, J

/bw