Republic of South Africa

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

A530/12
Case Number ~~16/12~~

In the matter of:

DENNIS VAN DER MERWE Appellant

versus

THE STATE Respondent

Judgment: 28 November 2012

BOZALEK, J

[1] The appellant was convicted on the 7th June 2010 on a charge of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 i.e. rape and was sentenced to 15 years imprisonment. The appellant pleaded not guilty at the trial during which he was legally represented and raised an alibi defence.

[2] His application for leave to appeal against conviction and sentence was refused but, on petition to this Court, he was granted leave to appeal against his conviction. Leave to appeal against sentence was specifically refused however.

[3] The state's case against the appellant was that on 5 March 2009, and at Mitchells Pass in the Ceres district he raped Christo Anne Goeieman ("the complainant") when she was some six days short of her 16th birthday. It led the evidence of the complainant to testify that she had accompanied a friend, Shereleen Booysen ("Booysen") and the appellant after meeting him in town. They proceeded to a railway tunnel nearby the golf course where the appellant had told her to wait and had then gone through the tunnel with Booysen. Shortly thereafter he returned alone, laid his jacket on the ground, threw the complainant down on it and raped her. Thereafter he secured the complainant's hands and feet with two small blue cords and forced her to drink some beer. By this time the complainant was crying and screaming. When she noticed Booysen approaching she called out to her for help but the appellant headed the latter off. The appellant was then able to free herself of the cords and escape. Out of fear for the consequences she did not immediately tell any family member what had happened to her but when Booysen found her later that day she told her that she had been raped by the appellant.

[4] On the Saturday, two days later, the complainant broke down and told her aunt, Mrs Christina Nel, that she had been raped by the appellant and this led to her laying a charge that day and being medically examined. Mrs Nel was called as a state witness and confirmed the complainant's evidence. Booysen similarly testified and confirmed the complainant's evidence save for what had happened whilst the witness had waited on the other side of the tunnel after the appellant had left her there. She confirmed, however, that after waiting a long time she

had gone back to where the complainant had been left and, upon approaching, observed the latter calling out to her for help and standing with her hands behind her back. Before she could reach the complainant, however, the appellant had stopped her and took her back through the tunnel leaving the complainant behind. She asked the appellant what he had done to the complainant and his answer had been that he had done nothing. When she returned later to look for the complainant she was gone and she had then searched for her including at the police station. She eventually found the complainant later that day who then told her that she had been raped by the appellant.

[5] The state also led the evidence of Dr Arno Rossouw, the doctor who medically examined the complainant some two days after the incident. He found a 4cm abrasion in the middle of the complainant's back but was not able to observe any injuries to the complainant's genitalia and was unable to conclude that she had been raped. He testified, however, that his findings were not inconsistent with the complainant having been raped since she had been menstruating at the time of the incident which not only rendered the examination more difficult but would both have provided more lubrication and resulted in whatever abrasions there might have been healing more quickly. A further relevant factor explaining the lack of visible injuries, the doctor testified, was the elapse of two days between the alleged incident and the medical examination.

[6] Finally, the state led the evidence of the investigating officer, Inspector F Boer, to the effect that prior to one of the court appearances he had a meeting in

his office with a delegation comprised of members of the complainant's family, the complainant herself and the appellant's sister, Ms Yvonne Jabani. In this meeting it emerged that Ms Jabani was proposing to pay the complainant's family the sum of R4 000 in return for dropping the charge against the appellant. Inspector Boer spoke alone with the complainant who made it clear that she did not want to drop the charge whereupon he advised all in the delegation of this fact and warned Ms Jabani to drop the proposals since it amounted to intimidation of the complainant. This evidence tied in with that of Mrs Nel who also testified of overtures from the appellant's family to the complainant's family involving the payment of money in return for dropping of the charge.

[7] The appellant testified in his own defence and denied raping the complainant, being at the scene of the alleged incident or even being in her company that day. He testified that he had spent the day at home repairing the ceiling of the hut which he occupied in the back yard of his family's home. As corroboration for his alibi defence he called his sister, Ms Lena van der Merwe, who testified that she was at home in the family house on the day in question and confirmed that the appellant had spent the day together with a friend repairing the ceiling of his hut.

[8] Finally, the appellant called another sister, Ms Yvonne Jabani, who testified that although Inspector Boer had warned her about not intimidating the complainant she had not been part of any pre-arranged delegation to go and see him but had merely been hailed off the street. She denied any attempt or offer by

th[illegible]ellant's family to pay money to the complainant's family in return for dr[illegible]g the charge. According to her it was the complainant's family who approached her family and were immediately rebuffed in this regard.

[9] On appeal Mr Buurman, on behalf of the appellant, contended that the magistrate had erred in not attaching sufficient weight to the facts that the medical evidence was inconclusive, that there was no evidence corroborating the complainant's testimony that she had been raped and that she had not immediately advised her friends or family that she had been raped. He submitted further that there were discrepancies between the evidence of the complainant and Booysen regarding how long it took for the events at the tunnel to unfold and further that, even if the version of the complainant was more probable than that of the appellant, he should have been afforded the benefit of the doubt and acquitted.

[10] The magistrate was well aware that she was dealing with the evidence of a single witness as far as the rape was concerned and furthermore that the complainant was very young with the consequence that her evidence had to be approached with particular caution. She found, however, that the complainant had made a good impression as a witness and as one who readily made concessions. Shereleen Booysen had also left a good impression as a witness, similarly not hesitating to make concessions where appropriate. In the limited ambit of her evidence, Ms Christine Nel was also found to be an excellent and independent witness.

[11] By contrast, the magistrate found, the appellant's evidence and that of his two witnesses contained various inconsistencies and unsatisfactory features, most of which are not necessary to set out. Perhaps the most striking example was the appellant's denial that he had more than a passing acquaintanceship with Shereleen Booysen. He initially gave this testimony in the face of her evidence to the effect that they had an on-going intimate relationship and that she would sleep over with him, notwithstanding that he was betrothed to another woman. Under prolonged cross-examination the appellant was forced to admit that he indeed did have an intimate relationship with Ms Booysen. There is no doubt that the appellant attempted to mislead the court in this respect. Apart from its implications for his general credibility his admission of this relationship, coupled with Ms Booysen's evident reluctance to testify against him, rendered it all the more improbable that the evidence which she gave placing him on the scene of the alleged rape, as well as the indirect corroboration which she provided for complainant's account, was a fabrication.

[12] The question inevitably arises as to why the complainant and Ms Booysen, who was clearly favorably disposed towards the appellant, would conspire to falsely implicate the appellant in an alleged rape at a time and the place when, on his account, he was not even present. Serious doubts arose regarding the veracity of the appellant's alibi defence when the detail of his evidence and that of Ms van der Merwe were considered; for example, she was not able to satisfactorily explain why she would have spent much of day in her brother's hut observing him and his friend repairing the ceiling. The obvious

witness to have called in support of the appellant's alibi was the friend with whom he allegedly worked on the ceiling throughout the day, one Mr Andy Kabaho, but no explanation was ever furnished as to why he was not called. What also has to be put into the equation was the evidence from both Ms Nel and Inspector Boer that appellant's family had made strenuous attempts to have the charge dropped in return for the payment of a considerable sum of money to the complainant's family.

[13] Although the complainant was a single witness, the magistrate found her evidence to be satisfactory in all material respects and she found guarantees for its credibility in the corroborating evidence of Ms Booysen. The medical evidence was neutral save for the doctor's finding that the complainant suffered an abrasion in the middle of her back which would have been consistent with the manner in which she alleged she had been raped. Against this the magistrate had to weigh up the appellant's alibi defence which was not particularly convincing, and the general probabilities. In considering these the question remains unanswered as to why the complainant would falsely allege that the appellant had raped her and be indirectly corroborated by the evidence of Ms Booysen who had an intimate relationship with the appellant and no reason to be ill-disposed towards him.

[14] As regards the specific criticisms raised by appellant's counsel it is clear from what I have said that the magistrate approached the complainant's evidence with caution yet found that it met the standard required of a single witness. On

proper analysis the medical evidence did not support the appellant's case. The fact that the doctor did not detect any signs of cord marks or a love bite was quite explicable by reason of the time that had passed since the initial assault and the lack of any evidence that this love bite would still have been visible or indeed that the complainant was alive to the need to point out any such marks to the doctor. On the complainant's evidence and that of Ms Booysen's, the primary reason for not disclosing the rape immediately to her family was clear and understandable and in any event completely offset by the fact that she disclosed it, at the first opportunity, to Ms Booysen. Although there were differences between the complainant and Ms Booysen about the amount of time which elapsed when the events unfolded near the railway tunnel, these differences were not material and, indeed, are hardly unexpected in the circumstances that prevailed. Finally, notwithstanding Counsel's submission, given the strength of the evidence furnished by the state witnesses viz that of the complainant and Ms Booysen and its complete incompatibility with the appellant's version, it was not simply a question of the state's case being more probable than that of the version proffered by the appellant. In my view, when the evidence is considered as a whole the magistrate cannot be said to have erred in rejecting the appellant's version as false beyond reasonable doubt.

[15] Mr Buurman devoted much of his heads to challenging the sentence of 15 years imprisonment. In this regard it is worth recording that the appellant in fact qualified for a life sentence but that the magistrate found that the existence of substantial and compelling circumstances justified the imposition of a lesser

sentence; furthermore, the appellant had previously been convicted of rape as a 23 year old man in 1997 and sentenced to 8 years imprisonment. Be that as it may, the simple fact is that no appeal against sentence is properly before this Court since the terms of the petition which was granted were that leave to appeal against sentence was refused. In these circumstances the complainant's remedy is or was to approach the Supreme Court of Appeal to challenge this ruling, a step he has not taken.

[14] In the circumstances and for these reasons, I would dismiss the appeal against conviction and confirm both it and the sentence of 15 years imprisonment.

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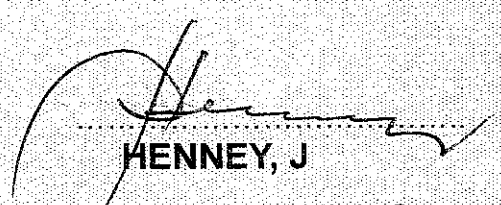
BOZALEK, J

Judge of the High Court

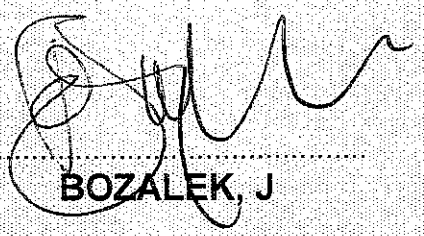
I agree.



HENNEY, J

Judge of the High Court

It is so ordered.



BOZALEK, J

Judge of the High Court