THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: A573/2013

In the matter between:

DEON RAYMOND LARRY **Appellant**

Versus

THE STATE **Respondent**

JUDGMENT: 13 JUNE 2014

BOZALEK, J:

[1] The appellant was convicted in the Regional Court, Parow on a charge of sexual assault i.e. contravening section 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 and sentenced, on 28 October 2013, to three years imprisonment wholly suspended for a period of five years. With the leave of the magistrate the appellant now appeals against conviction only.

[2] The charge alleged that the appellant sexually assaulted the complainant, an 18 year old woman, by touching her breasts and forcing his hand into her pants and touching her vagina.

[3] The appellant pleaded not guilty and was legally represented throughout the trial. The State led the evidence of the complainant and that of her friend, Mr Rudi Koopstad. The appellant testified in his own defence and called a witness, a Mr D Hope.

[4] After the notice of appeal had been filed the appellant applied to amend same by the inclusion of a further ground of appeal to the effect that the magistrate had *'unfairly and unjustly interfered with and curtailed/obstructed the cross-examination of the complainant, with the result that a fundamental irregularity occurred in the trial'*. An acceptable explanation for the late raising of this ground of appeal was proffered and the application was not opposed by the State. Accordingly the amendment was allowed.

[5] In short, the evidence led by the State was that the appellant was a business man who had purchased on auction the house in which the complainant and her family lived after they had fallen into arrears with their bond instalments. In the course of his dealings with the complainant's father the appellant had promised to secure a sponsor for the complainant's tertiary studies, she then being a matric scholar. To this end he purported to arrange for the complainant to be interviewed by the prospective sponsor, a Chinese national, and arrived at the complainant's house one evening at about 8pm to drive her to this appointment. The interview did not take place, however, and instead the appellant drove to various spots and houses in Cape Town that

night for various purposes. At the last house at which he stopped the appellant showed the complainant around and, in one of the bedrooms, purported to give her self-defence lessons. It was during the course thereof that the appellant was alleged to have sexually assaulted her in the manner described. After a struggle the complainant eluded the appellant and ran outside to wait at his vehicle. The appellant then drove her home. For various reasons the complainant did not immediately report the assault upon her to her family but only advised her boyfriend, Koopstad, some days later and then only partially when chatting with him through Mxit on her cell phone. This eventually led to her disclosing the assault to her family and the laying of charges against the appellant. Koopstad was called to confirm the first report made to him by the complainant through Mxit, a texting application.

[6] The appellant testified in his own defence, confirming in broad outline the events of the night in question save that he denied that anything untoward occurred during the self-defence lesson. Instead, he testified, the complainant had made demands for money from him which had made him most uncomfortable. His witness, Hope, testified that he had been employed by the appellant to look after a house in Blackheath where the appellant had first stopped off that night. The appellant had asked him to take the complainant home but she had declined to go with the witness.

[7] The magistrate accepted the evidence of the complainant who, she found, gave her evidence in a clear and satisfactory manner with no material contradictions. She found that there were guarantees for the complainant's version in the evidence of Koopstad who had received the first report of the alleged assault from her. By contrast the magistrate found that the appellant had not made a good impression as a witness. She found that his version was fraught with lies and contradictions and, ultimately, she rejected it as false beyond reasonable doubt.

[8] It is appropriate, firstly, to deal with the appellant's additional ground of appeal. The appellant cites the following three examples of how the magistrate curtailed and obstructed the cross-examination by the appellant's attorneys of the complainant:

> *'8.2.1 [MR VAN DYK]: "Now can you tell the court how did you get away? --- I just – in my statement you will read I got a gap and I don't know how I got away.*
>
> *[MR VAN DYK]: Ja maar you must please tell the court how did you get away.*
>
> *COURT: No I understand completely Sir. She doesn't actually need to repeat to me. I understand what she is trying to say. You can ask the next question.*
>
> *8.2.2 [MR VAN DYK]: "So when you got out, was the old man still there? --- Yes, he was standing outside.*

What did you tell him? --- I didn't tell him anything.

Pardon? --- I didn't tell him anything

Why not?

COURT: Was she supposed to?

MR VAN DYK: Pardon?

COURT: Was she supposed to?

MR VAN DYK: I would imagine Your Worship

COURT: No. Excuse me. You will not stereotype anybody who testifies in my court, because that's a perception you have. So if she says she didn't, then she didn't.

8.2.3 *MR VAN DYK: "Now in your evidence, ag in your statement, sorry Your Worship, paragraph 18 you say:*

"Ek het toe vir Cindy gelieg oor waar ons was. Ek het gesê dat ek by die huis by die vrou was wat vir my gaan sponsor. Ek het toe gaan slaap."

Now there you had a golden opportunity to tell Cindy what happened.

COURT: H'm, sorry. Who says she must?

MR VAN DYK: Pardon Your Worship?

COURT: Who says she must tell Cindy? Who says she must tell anybody? Where is the rule that says you must tell somebody? Explain that to me so that I can understand it, because I don't understand it.

MR VAN DYK: I am sorry Your Worship, please.

COURT: There is no such rule Sir.

MR VAN DYK: No there is no such rule, but there's also the rule … (intervention)

COURT: So to say to her you had a golden opportunity to now tell …

MR VAN DYK: That's right.

COURT: No. She doesn't need to tell.

MR VAN DYK: I am referring to the so-called You and Cry (sic) Your Worship.

COURT: No, this … (intervention).

MR VAN DYK: I am sorry if you find it funny.

COURT: I don't find it funny at all. This is a matter with sexual connotations to it Sir.

MR VAN DYK: H'n-'n?

COURT: A victim of sexual offence or a rape victim or those victims, it doesn't mean anything if they don't tell anybody. Do you understand?

MR VAN DYK: I accept your view on that.

COURT: It is not my view. It is just the way it is.'

[9] It was argued that the questions which the appellant's attorney was blocked from posing or pursuing were relevant and should have been allowed and further, that the magistrate had shown inappropriate and undue impatience and irritability in the conduct of the appellant's defence. In arguing that an irregularity had taken place the appellant's counsel relied *inter alia* on *S v Rall* 1982 (1) SA 828 (A); *S v Le Grange and Others* 2009 (1) SACR 125 (SCA), *S v Heslop* 2007 (1) SACR 461 (SCA) at 469 F; *S v Musiker* 2013 (1)

SACR 517 (SCA) and *S v Mlimo* 2008 (2) SACR 48 (SCA) at 51I – 52A. *S v Rall* was concerned with the limits within which judicial questioning should be confined and it was held that certain broad well-known limitations should generally be observed, chief amongst which was that the trial judge should so conduct the trial so that his/her open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused [1] . The Court held that any serious transgression of the limitations which it set out would in general constitute an irregularity in the proceedings. Whether or not the appeal court would intervene to grant appropriate relief at the instance of the accused depended upon whether or not the irregularity had resulted in a failure of justice. That in turn depended upon whether or not the irregularity prejudiced the accused or possibly whether the appeal court's intervention was required in the interests of public policy[2].

[10] In *S v Le Grange and Others* [supra] it was held that presiding over criminal trials was a difficult task and cross-examination could sometimes appear protracted and irrelevant. However, impatience was something that a judicial officer must wherever possible avoid, and always strictly control[3]. In regard to impatience in such a situation Ponnan JA stated as follows (at page 149 F – G):

[1] At 831 H – 832 A
[2] At 832 H – 833 A
[3] At para [18]

'4 …it can impede his perception, blunt his judgment and create an impression of enmity or prejudice in the person against whom it is directed, particularly when such person is an accused person. It may serve to undermine the proper course of justice and could lead to a complete miscarriage of justice. A judicial officer can only perform his demanding and socially important duty properly if he also stands guard over himself, mindful of his own weaknesses (such as impatience) and personal views and whims and controls them'.

[11] In determining whether the appellant in that matter had enjoyed a fair trial the Court made the following observations (at para [29]):

'It may well be that some of the irregularities complained of would, in themselves, not be a sufficient indication that the appellants did not have a fair trial. Taken cumulatively though, I have no doubt that they compel the conclusion that in fact the learned Judge President was not fair and impartial during the trial'.

[12] In *S v Mlimo* (supra) the attack on the fairness of the trial was directed at what was said to be the trial judge's impatience with the appellant's attorney and his alleged impeding of the latter's cross-examination. In that matter, however, it was found that the attorney had handled the trial judge's interventions with ease and had remained steadfast and composed. Having regard to the record as a whole, it could not be said that the manner in which the trial judge had conducted himself had affected the fairness of the trial.'

The Court said in this regard[4] *'There is no doubt that the judge participated actively in the proceedings and there were undoubtedly times when he was impatient with the appellant's attorney during the trial. As I read the record the judge did not impede cross-examination. After each verbal skirmish or exchange between himself and the defence attorney the trial judge was careful to invite him to proceed with his cross-examination and to thereafter lead whatever evidence he wished to place before the court. In my view there are times when the judge was justified in losing patience with the defence.'* The Court stated further, however, that *'undue impatience and irritability on the part of a judicial officer is inappropriate and undesirable. A trial judge or magistrate must ensure that 'justice is done'. He or she should so conduct the trial that his or her open-mindedness, impartiality and fairness are manifest to all those who concerned with the trial and its outcome especially the accused'* (relying on *S v Rall* (supra). This is particularly so, the Court continued, *'where an accused person is represented by a junior and inexperienced counsel or attorney who might easily be intimidated by improper conduct on the part of the Court. The same cannot, however, be said of the appellant's attorney. He never took a step back when the appellant's interests demanded that he forge ahead and handled the trial judge's impatient interventions with ease, true to his profession. He was steadfast and never lost his composure'*.

[4] At para [10]

[13] On an overall reading of the record in the present matter it appears that the magistrate at times kept a tight rein on the appellant's attorney's cross-examination but nevertheless gave him a full opportunity to cross-examine the complainant and her witness, including cross-examination on alleged discrepancies between the complainant's statement to the police and her *viva voce* evidence. Apart, arguably, from those instances relied on by the appellant, there are no explicit indications in the record that the attorney, Mr Van Dyk, was or felt that he was, being curtailed in his cross-examination let alone that he raised an objection to this effect. Therefore the argument that the magistrate obstructed or curtailed the cross-examination on behalf of the appellant must stand or fall largely by the examples cited above and certain further interventions which counsel raised in argument, all of which must then be considered against the background of the law cited above.

[14] The question which is at issue in this appeal is whether the conduct of the magistrate sustains the inference that, in fact, she was not open-minded and impartial and fair during the trial.

[15] Against this background I turn to consider the three interventions relied upon by the appellant in contending that his legal representative's cross-examination was unduly curtailed or impeded with the result that he did not enjoy a fair trial.

[16] The first intervention (referred to in para [8.2.1]) occurred in the context of the appellant's attorney questioning the complainant about how she escaped from the appellant's clutches in the bedroom after his alleged assault upon her, all the while contrasting her evidence with the contents of her police statement. Just before the intervention the attorney read the following extract from her statement to her:

> *'[COMPLAINANT] Ek weet nie hoe ek 'n "gap" gekry het nie, maar toe hardloop ek net uit die kamer, loop uit die huis uit en gaan staan by die kar.*
>
> *[MR VAN DYK] Yes. He tried to, but he didn't succeed and then you got a gap and you don't know how?*
>
> *[COMPLAINANT] Yes.'*

[17] Seen in this broader context the attorney's next question to which the magistrate reacted was somewhat obtuse since it had in effect been asked and answered by the complainant and there was nothing in the evidence to suggest that the answer was improbable or illogical. In effect the answer the complainant would in all probability have given had the court not interrupted would have been once again to repeat that she had *'got a gap'* and run out of the room and the house. There was, needless to say, no evidence that the room or the house was locked. That said, the magistrate's reaction was unnecessarily sharp. As it happened the attorney went on to question the

complainant as to whether she had to wrestle with the appellant and ultimately therefore he was not impeded in this line of cross-examination.

[18] Turning to the second intervention (referred to in para [8.2.2]), this questioning was obviously directed at testing the credibility of the complainant with reference to how soon after the incident she made a complaint that she had been sexually assaulted. The common law rule is that evidence may be given on a [voluntary] complaint made by the victim within a reasonable time after the commission of the alleged sexual offence although it must be borne in mind that the absence of a complaint made within a reasonable time after the event is not fatal to the prosecution's case. See *S v Cornick* 2007 (2) SACR 115 (SCA). In addition sections 58 and 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 provide as follows: *'(e)vidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: provided that the court may not draw any inference only from the absence of such previous consistent statements';* and *'(i)n criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof'*.

[19] The question which the attorney posed and to which the magistrate took exception was, no doubt, directed at ascertaining from the complainant why she did not immediately complain to the *'old man'*, that she had been sexually assaulted seconds before. The magistrate presumably took exception to the question on the basis that implicit in it was the suggestion that unless the complainant reported the alleged sexual assault to the very first person she came across this reflected adversely on her credibility. Such an approach on the part of defence counsel would of course have been a gross over-simplification of the legal position. This perception by the magistrate of the appellant's attorney's line of questioning seems to have resulted in her remarks that the attorney should *'not stereotype anybody who testifies in my court'*. In turn, however, this response by the magistrate was misguided or at least premature, since the attorney was at the least entitled to ask why the complainant did not report the assault to that person and therefore the question was relevant.

[20] In my view, however, no harm was done because immediately after the intervention the attorney asked:

> *'Okay you didn't feel endangered that you have to tell him something --- I did feel endangered, but why am I supposed to tell him?*
>
> *Okay. Now you walk passed the old man and you got in the car and you went home ---Yes, yes.'*

In other words the attorney was allowed to address the question and was not curtailed in his cross-examination. That said, again I consider that the magistrate's intervention was rather sharp and unnecessary at that point.

[21] Turning to the last of the three interventions relied on, this occurred in the context of the same question being explored, namely, when the complainant made, or could have been expected to have made, her first report. There again the magistrate appears to have taken exception to the implicit assumption that the complainant's credibility was affected by her not confiding in her sister as soon as she got home that she had been sexually assaulted. The magistrate's objection and intervention was premature, however, since it had not been put directly to the complainant that her credibility was questionable because she had not immediately done so. Her reasons for not telling Cindy and in fact giving her sister a false account of what had happened had not yet been explored by the attorney in cross-examination. The magistrate's intervention was heavy-handed. Be that as it may the attorney dealt with the situation with aplomb as appears from the following extract which follows immediately after the passage which the appellant relies upon:

> *[MR VAN DYK]:* *"No with respect, I accept your view on that Your Worship. Now why didn't you tell her --- Cause I didn't want to tell her. I was afraid.*

> *[MR VAN DYK]: "Who were you afraid of? ---I was afraid if I tell anybody my parents or her we were going to lose the house that's why I didn't tell them.*

The complainant went on to explain and was cross-examined about her communications to her father regarding the alleged assaults.

[22] During argument appellant's counsel broadened his challenge to include other passages in the record which he contended showed that the magistrate had improperly obstructed or curtailed the appellant's attorney's cross-examination. First was a passage when the magistrate intervened when the complainant was being questioned on an apparent discrepancy between her evidence and statement as to when on the journey she had mentioned to the appellant that she had been involved in an earlier incident when an older man had made unwanted sexual advances towards her. The magistrate ended her intervention by saying *'Accept her answer. Move on please.'* which could be seen as obstructing the appellant's attorney in pursuing his line of cross-examination. One again, however, the attorney was undeterred and came back to the topic and put what he perceived as the discrepancies to the complainant over two pages of the record and was not curtailed or even interrupted by the magistrate in any way.

[23] Finally, the appellant's counsel sought also to rely on an intervention by the magistrate when the appellant's attorney sought to cross-examine the complainant regarding what he perceived as a contradiction in different parts of her evidence regarding whether, immediately after the police had taken down a statement from her, she had read it. The magistrate intervened to point out that the complainant had not earlier stated what the attorney was ascribing to her. The force of this objection depends ultimately on whether the magistrate was correct in stating that there was no discrepancy between the complainant's earlier evidence that she had not immediately read her statement after it was taken from her by a police official. Although the appellant's counsel argued that the complainant's evidence was clear that she had read her statement immediately after it was taken down I am not persuaded that this was the case or, at the very least, that this was clearly so, with the result that the magistrate's intervention, with the substance of which the prosecutor agreed, was justified. I might add in this regard that at the end of the exchange appellant's attorney appeared to accept that the magistrate and the prosecutor were correct in their recollection of the complainant's earlier evidence and their interpretation thereof.

[24] I thus do not consider that the further examples relied upon by appellant's counsel add much to his case that, viewing all the interventions either singularly or cumulatively, they were such as to justify a finding that

there was a material irregularity in the trial, namely, the magistrate's curtailment or obstruction of cross-examination.

[25] In the circumstances, although the magistrate exhibited unnecessary impatience and some of her interventions were premature and heavy-handed, the appellant's attorney appeared to deal well with the situation and upon closer analysis was not curtailed or blocked or obstructed in his cross-examination of the complainant to any material degree. To the extent that there was any such curtailment it was limited and the attorney was allowed to broach the topics which he wished to address albeit from a slightly different angle. Accordingly, I do not consider that these interventions, either singly or cumulatively, amounted to misconduct on the part of the magistrate which rendered the appellant's trial unfair in that his representative's cross-examination of the complainant was materially obstructed or curtailed. That said, the undue impatience and irritability on the part of the presiding officer was inappropriate and undesirable.

[26] It follows, in my view, that the magistrate's conduct neither amounted to nor caused a fundamental irregularity in the trial which in itself justifies the appellant's conviction and sentence being set aside.

[27] I turn now to the remaining grounds of appeal which are that the magistrate erroneously found that the evidence of the complainant was

sufficiently satisfactory and credible to secure a conviction and that she failed to take proper cognisance of the value of the evidence of the appellant's witness, that she over-emphasised the discrepancies in the evidence of the appellant and failed to properly apply the onus that rested on the State. In support of the first of the abovementioned grounds of appeal appellant's counsel cited the magistrate's finding that *'the complainant did not contradict herself, is my opinion as the court'*. This is a partial quotation, however, since the magistrate preceded this observation by stating that the appellant's attorney used the complainant's statement to elicit contradictions but that in the court's view these could hardly be described as material contradictions.

[28] In my view the magistrate's finding in this regard was correct. The various *'contradictions'* between the appellant's statement and her viva voce evidence and within her evidence on its own were matters of detail and in many instances related to matters which were common cause between the appellant and the complainant. In all instances they did not, in my view, affect the general thrust and outline of the complainant's evidence. In any event, as the courts have repeatedly stated, the weight which can be given to discrepancies between a witness' police statement and his or her evidence is limited and must have regard to the circumstances in which the statement is given. See in this regard *S v Govender* 2006 (1) SACR 322 (ECD) at 324I – 325C and 326C – 327B and *S v Mafaladiso and Others* 2003 (1) SACR 583 (SCA) for pertinent observations regarding the phenomenon of differences

between a witness' police statement and viva voce evidence and how they are to be assessed. In short it is a mistaken view to see a witness' statement to the police in all circumstances as a full and detailed statement of a witness' evidence regarding a particular matter or incident and then to fault the witness for omissions and minor errors therein. As it happened a relatively lengthy statement was taken from the appellant which, save in a number of unimportant details, was confirmed and borne out by her evidence before court.

[29] As to the alleged contradictions between the complainant's evidence in court, only three were cited. The appellant raised the issues of whether the complainant had read her statement after the police official had taken it down and whether she had conversed with the appellant after the alleged incident. These topics were, on a proper examination of the record, not the subject of any contradiction whilst the third *'contradiction'*, how many buttons of her pants the appellant had opened, was so trivial a question in the circumstances as to be virtually meaningless. The appellant's counsel also criticised the complainant's evidence on the basis that she had initially not disclosed the truth about the sexual assault upon her to her sister and parents and had only made part disclosure to her boyfriend, Rudi Koopstad. This conduct on the part of the appellant was fully and convincingly explained by her, however. She testified that she had initially been afraid to tell her parents and her sister

what had happened because the appellant had told her that if she did tell her parents then they would lose the house.

[30] Against the background of the appellant having purchased at an auction the house in which the complainant and her family lived on, they being tenants there, and his statements that in effect he was going to allow them to occupy another house which he owned, this reaction on her part was entirely understandable. What must also be borne in mind is that the complainant was a naïve 17 year old school girl whilst the appellant was a 43 year old businessman in a position of power over the complainant and her family.

[31] The attack by the appellant's counsel on the complainant's credibility relied heavily on an apparent contradiction between where the complainant stated the sexual advances had taken place and what Koopstad testified in this regard. Appellant's counsel referred in his argument to this as a very material and important contradiction between the evidence of the complainant and Koopstad. In her evidence the complainant made it clear that although the appellant drove at some point to a shopping centre at Milnerton and met a man named Sammy in the parking area, the sexual advances against her were made at a house in Rosendal, Delft.

[32] In cross–examination she testified that approximately a day after the incident she had chatted with her boyfriend over Mxit and she had told him

what had happened. She added in this regard that the man who had bought their house was going to take her to a sponsor, that they drove together and that he touched her on her breast. She told him no more than this partial account because she did not feel comfortable telling him more, particularly the fact that he had touched her vagina. Koopstad testified that after the incident he had no contact with the complainant other than through Mxit and in fact had not seen her again since the incident. In other words the relationship, such as it was, had ended. His initial account was that the complainant had said no more than what she had testified, namely, that she and the appellant had driven in a vehicle together, had spoken and then the appellant had begun making advances upon her. He made it clear under cross-examination that according to the account he had received from the complainant they had driven to a mall in Milnerton, a fact which the appellant confirmed, but further that this was where the sexual advances had taken place. Importantly, however, he qualified it by saying *'waar dit alles sou plaasgevind het as ek reg verstaan'*. When the magistrate sought clarification he again expressed himself in terms of some uncertainty as is evidenced by the following: *'HOF: Is dit wat U dink of het sy dit vir U op Mxit gesê --- Sy het my gesê op Mxit hulle het gery en ek dink dis by Milnerton'.*

[33] Seen in context I do not consider that this is a material difference at all. Firstly, it is evident that the complainant and the witness did not even have a

face to face conversation about what took place. Their communication was confined to a Mxit conversation or conversations. Secondly, it is also clear from the tenor of both the complainant and the witness' evidence that she did not give a full account of what happened in these Mxit conversations. Thirdly, given the number of stop-offs that the appellant made in his motor-vehicle before finally arriving at the house in Rosendal, Delft where the complainant testified the incident actually took place, it is quite understandable that confusion could have crept in between the complainant and the witness. The complainant never wavered in her evidence that the incident took place in the room of the house in Rosendal, Delft where the appellant purported to give her self-defence lessons. On the appellant's own version he did give such lessons and the only dispute was whether he made sexual advances at the same time. In the circumstances I do not regard this discrepancy as material or as having any adverse effect on the complainant's credibility.

[34] Before the court could place any reliance on the complainant's evidence, as that of a single witness, it had to be clear and satisfactory in every material respect. However, as was stated in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180 f – h, quoting from Schreiner JA in *R v Nhlapo,* the cautionary rule does not mean *'that the appeal must succeed if any criticism, however slender, of the witnesses evidence were well-founded'.*

[35] As regards the contention that the magistrate failed to take proper cognisance of Hope's evidence I can see no substance therein at all. He could only testify about the first stop that the appellant made in his somewhat confusing and roundabout journey to take the complainant for an interview with a prospective sponsor. That stop was at a house in Blackheath where the appellant became embroiled in an argument with a tenant who would not vacate the house. This incident was common cause and on no one's version is it suggested that anything untoward took place there. Nor can I find any indication that the magistrate did not accept Hope's evidence. The magistrate simply found that the evidence took the matter no further, a finding with which I agree.

[36] The next ground of appeal advanced by the appellant is that the magistrate over-emphasised the discrepancies in the evidence of the appellant most notably concerning the existence or otherwise of a couple named only as Mary and Sammy, the Chinese nationals who were supposed to have been the complainant's prospective sponsor and her husband. It is so that neither of these persons were called as witnesses by the appellant which, together with other evidence, incidentally casts some doubt on whether the proposed sponsorship interview was in fact ever a reality. The appellant's convoluted account of how he drove from one spot to the next en route to this interview which never transpired but at most amounted to a meeting with the Chinese national's husband in a parking lot at a shopping mall in Milnerton,

adds to the doubt concerning this issue. The magistrate was, as I have indicated, critical of the appellant's evidence and the manner in which he gave such evidence. In my view this criticism was justified. On a reading of the appellant's evidence it was filled with improbabilities, contradictions and characterised by his persistent failure to answer questions directly as well as evidence which was not put to the witness in cross-examination on his behalf, for example that Hope was requested to give her a lift back to her home but which she had refused, that the appellant was in fact taking food to a security guard at the house in Rosendal where the incident is alleged to have taken place. By way of example of an improbability, the appellant, a 43 year old man with a tertiary education and wide business experience, testified that he did not understand what the complainant meant when, according to him, she allegedly suggested that he be her '*sugar daddy'*. It bears mention that on the complainant's version this proposal came from the appellant after the incident. The appellant's evidence, that although no untoward incident took place, he realised at the time that in being with the complainant he had done *'the most stupid thing in my life'* is, to my mind, in the context of the evidence as a whole, a telling indication that something untoward did take place, as testified by the complainant.

[37] Finally, it was contended on behalf of the appellant that the magistrate had failed to properly apply the onus of proof that rested on the State. In

support of this submission appellant's counsel relied on the magistrate's remark, in regard to the appellant's failure to call either of the Chinese couple, that in her view the sponsor did not exist I do not consider this remark to amount to placing an onus upon the appellant but rather an expression of scepticism regarding this element of the appellant's version of events. Indeed the magistrate explicitly recognised, and stated, that the onus of proof lay on the State and that if the appellant was able to demonstrate that his version was reasonably possibly true he was entitled to his acquittal.

[38] Although the complainant was a single witness the magistrate found that she gave her evidence in a clear and satisfactory manner and that it contained no material contradictions. She found further that there was a guarantee for the complainant's evidence in the evidence of her first report to Koopstad telling him of the sexual assault and the identity of the person who had assaulted her. The magistrate then examined the evidence as a whole finding that the inherent probabilities favoured the complainant's version of events. She found too that the appellant made a poor impression as a witness and that his evidence was riddled with improbabilities and unsatisfactory aspects as well as the fact that various salient parts of his evidence had not been put to the complainant in cross-examination. Finally, the magistrate found that Hope's evidence took the matter little further. I cannot fault any of these findings and thus cannot accept the conclusion contended for on behalf of the appellant that his conviction should not be sustained.

[39] In the result for these reasons the appeal against conviction is dismissed.

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L J BOZALEK

JUDGE OF THE HIGH COURT

I agree.

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CTS COSSIE

ACTING JUDGE OF THE HIGH COURT