CASE NO.: SA

IN THE SUPREME COURT OF NAMIBIA

In the matter between

VERNON RITTMAN APPELLANT

And

THE STATE RESPONDENTS

CORAM: Strydom, C.J., Dumbutshena, A.J.A, *et* O'Linn, A.J.A. HEARD ON: 2000/04/13 DELIVERED ON: 2000/08/22

APPEAL JUDGMENT

STRYDOM. C.J.: After having heard argument the Court made the order set out at the end of this judgment, and indicated that it will furnish its reasons at a later stage. What follows are the reasons.

The appellant was convicted in the regional court of the crime of rape and sentenced to ten years imprisonment of which two years were suspended for five years on condition that he was not again convicted of rape committed during the

period of suspension.

The appellant's appeal to the High Court was partially successful in that, although the appeal against conviction was dismissed, the sentence was altered to seven years imprisonment of which two years were suspended on the same conditions previously set out.

After the dismissal of the appeal by the High Court certain events occurred as a result whereof the appellant, when he applied for leave to appeal to the Supreme Court, applied to the High Court to hear new evidence and to allow him to put this evidence before the Supreme Court. This latter application was made in terms of s. 316(3) of the Criminal Procedure Act, Act No. 51 of 1977. The new evidence which the appellant wished to introduce was set out in an affidavit to which was attached a transcript of a tape recording and the record of criminal proceedings whereby the appellant was charged with the crime of defeating or attempting to defeat the course of Justice.

Before dealing more extensively with the new evidence, and other evidence before the Court a *quo,* it is necessary to set out the chronological sequence of events which led up to the appellant's application for leave to appeal in the Court a

quo. These are the following:

(i) The appellant was convicted and sentenced in the regional court on 23 April 1997.

(ii) After appellant filed a notice of appeal against the conviction and sentence he was released on bail on 13 May 1997.

(iii) During the time that the appellant was out on bail he was charged with defeating, alternatively attempting to defeat, the course of Justice. This trial commenced on 23 September 1998 in the magistrate's court, Rehoboth.

(iv) In the mean time appellant's appeal to the High Court was set down for argument and judgment was delivered on 4 August 1998.

(v) An application for leave to appeal and application to receive new evidence was postponed from time to time until the criminal proceedings in the magistrate's court, Rehoboth, were completed. This happened on 24 February 1999, and appellant was found not guilty and was discharged on the charge of defeating, or attempting to defeat, the course of Justice.

(vi) On 27 September 1999 appellant was granted leave by

the High Court to appeal to the Supreme Court which leave included leave to bring the new evidence before this Court.

The grounds of appeal on which the leave was granted are as follows:

The court erred on the law and/or on the facts in that it did not hold that the learned magistrate's decision should be overruled, and the appeal be upheld, and more particularly for the following reasons:

1.1 they failed to hold that the learned trial magistrate erred and/or misdirected himself on the law and/or the facts in:

1.21 failing to caution himself of the dangers of relying on the evidence of the complainant as is required on a charge of rape, coupled with the fact that the complainant was a single witness in relation to the issue of consent and particularly in the light of the learned judges finding that the essential facts of the matter were not much in dispute, alternatively;

1.22 that the learned magistrate only paid lip service to such caution;

1.2 they failed to hold that the learned magistrate erred on the law and/or the facts in finding that the prosecution proved the case of rape against the appellant beyond reasonable doubt, and more particularly in that:

1.23 there was insufficient evidence to sustain a conviction of rape;

1.24 he (the magistrate) wrongly failed to accept the version of the appellant as reasonably possibly true, especially in the light of the fact that there was no basis on which the appellant's version could be said to be a lie.

2. The learned judges erred in that they made a negative inference from the fact that the appellant remained silent and/or did not dispute it, when he was confronted by a sergeant with the allegation that the rape took place in the veld, and particularly because the appellant had no duty to speak in the circumstances and/or because he was entitled to remain silent in the circumstances.

Please take further notice that the court a *quo* received further evidence that will form part of the record for the appeal in the supreme Court and more particularly the evidence led in case number 418/98 (magistrate's court, Rehoboth) as well as the evidence set out in appellant's affidavit sworn on 19 November 1998.

Please take further notice that the appeal is hereby also noted against the conviction of the appellant in light of the newly admitted evidence, because, had the learned magistrate and or the court a quo been appraised of and/or

been able to take the new evidence into consideration, the appellant would - -not been convicted and/or.the court *a quo* would have allowed the appeal against conviction."

Against the above background it is now necessary to look at the evidence. In this regard Mr. Heathcote, who appeared for the appellant, submitted that, in considering the appeal, the Court should follow the guidelines laid down in *S_v Nyhwagi,* 1988(3) SA 118 A where the following is set out in the heading, namely:

> "In an appeal in which leave has been granted to the appellant not only to appeal against his conviction on the evidence adduced before the trial court but also to adduce further evidence, in terms of s. 316(3) of the Criminal Procedure Act 51 of 1977 for consideration by the Appellate Division, the disposal of the Appeal can sometimes most conveniently take place in two phases. The first phase then consists of a consideration of the conviction in the light of the evidence adduced at the trial. If, on that basis, there is not sufficient reason to interfere with the conviction, the second phase will then follow wherein the additional evidence is considered and the Appellate Division then decides whether the conviction should in the light thereof be confirmed or not."

See also 5_vT, 1997(1) CR 507 (SCA).

Although there can be no doubt that in certain circumstances an approach, such as set out, will be convenient, it seems to me that in the circumstances of the present case it will be

more convenient to dispose of the appeal in one phase. I say so because the further evidence adduced does not consist of new evidence in the sense of additional witnesses having come forward. The new evidence in this matter is evidence of the same complainant in the rape case, given in another related case, which will in my opinion inevitably lead to drawing of comparisons between the two

Mr. Truter, who appeared on behalf of the State, - conceded that in the light of the new evidence; he could no longer submit that the complainant was a reliable witness. As I am of the opinion that this concession was correctly made it follows that the matter can be more conveniently disposed of in one phase.

During the trial in the regional court the State called three witnesses namely the complainant, a friend of hers, Miss Mouton, and a Sgt. Isaaks. The appellant, who was not legally represented, gave evidence on his own behalf. The gist of complainant's evidence was that she asked the appellant for a lift after a dance which they both attended. After off-loading two other people appellant went to his house and thereafter drove into the veld where he started to kiss the complainant. She resisted his attentions but was

sets of evidence. Furthermore

eaped. She was then taken by the appellant to her house where, after she had alighted from the car, she met her friend Mandie, i.e. Miss Mouton, who asked her what was going on and to whom she then told her story. From there they went to the police and then to the doctor.

evenntual

Miss Mouton said that she and two friends were standing inside the yard of the house of the complainant when she arrived in a vehicle. When she got out of the vehicle the witness could see that something was wrong because the complainant held her hand in front of her face and she could hear that she was crying. When asked what had happened the complainant just said "Mandie he raped me". The witness then

yoverpowered and

called one Jerome who said that they must go to the police. This person is Jerome Dunn, the boyfriend of the complainant. -.-..-.--- .-

Sergeant Isaaks testified that it was about 4 o'clock in the morning when he was summoned to the police station. There he met the complainant who informed him that she had been raped by the appellant. After the appellant was arrested he told the sergeant that he and the complainant started to cuddle and that they then had sex.

According to the appellant he and the complainant went to his house where they started to cuddle. At one stage the complainant said that she would remove her trousers. Thereafter they had sex. From there they drove into the veld where they sat smoking after which the appellant took her honie. When they arrived at complainant's home she said she saw her boyfriend, and she told the appellant to disappear. They agreed to meet again the next morning but on his arrival at her house she told him that she had charged him with rape. During cross-examination the appellant stated that he also had sexual intercourse with the complainant on a previous occasion. He further said that he believed that she laid a complaint because she was told to do so by her boyfriend.

It is common cause that after the appellant was released on bail, pending his appeal to the High Court, that he on an occasion was driving past the complainant when she stopped him. According to the appellant the complainant apologised to him for the fact that she had charged him with rape. The appellant thereupon requested her to

make a statement to the investigating officer wherein she should repeat what she had told him. She however, informed him that the officer did not want to see him, i.e. the appellant, on the streets. Eventually they agreed to go to appellant's legal practitioner, Mr. Damaseb. On a second visit to Mr. Damaseb's chambers she was questioned by the said legal practitioner. The questions, and complainant's answers, were recorded on tape and a transcript of this recording read as follows:

"PARTIES PRESENT:
Vernon Rittman
Rolene
Mr. Damaseb

DATE of interview/questioning was February, 4, 1998 at the Offices of Conradie ST. Damaseb at 2:30 pm.

DAMASEB: I only want to confirm that what you are telling me is true.

ROLENE: But I already told you the guy did not ask me, he forced me.

DAMASEB: Which guy?

ROLENE: The guy who was at the house. When I arrived at home there was a guy, and then I cried, and then my father arrived.

DAMASEB: Why did you cry?

ROLENE: I cried because I ... (unclear)

DAMASEB: Did you cry because you were raped or what?

ROLENE: I cried because we quarreled.

DAMASEB: Because you quarreled?

ROLENE: ... Unclear.

DAMASEB: So he did not rape you? He had your

permission?

ROLENE: I pulled down my pants myself.

DAMASEB: Why did you not tell the story this way in court?

ROLENE: Because the guy who asked me to make the case said I should not say that I pulled down my pants myself.

DAMASEB: Who is this guy?

ROLENE: Jerome Dunn.

DAMASEB: Are you willing to repeat this to the

investigation officer?

ROLENE: Yes.

DAMASEB: Are you sure?

ROLENE: ...Unclear.

DAMASEB: This is the only way, otherwise we don't have a case. Did Vernon force you to say the things you said to me?

ROLENE: No.

DAMASEB: He did not force you?

ROLENE: No.

DAMASEB: Because look, if he had forced you to come and say that you gave him permission that day. That will also not help him, it means you must be honest if he forced you, then he forced you. There is nothing I can do.

ROLENE: No he did not force me.

DAMASEB: Was he your boyfriend before this incident?

ROLENE: No.

DAMASEB: But did he have permission on that day?

ROLENE: ... Is unclear.

DAMASEB: Will you go and tell this to the investigation

officer?

ROLENE: ...Is unclear."

This transcript was attached to the appellant's affidavit when application was made for leave to appeal and to adduce new evidence. A reading thereof shows.a complete about face by the complainant from her .evidence given in the Regional Court at the trial of the appellant.

After obtaining this version from the complainant Damaseb advised her to approach the investigating officer in the rape case and to make a statement to him in which she should then repeat to him what she had told Damaseb. The complainant went to the Police station, Rehoboth, but she could not find the investigating officer. She repeated her story to a Sergeant Theron who, according to her evidence, informed her that she would go to jail if she persisted with her story. She then made a statement to an Inspector Nel in which she again retracted everything she had told Damaseb and in which she blamed the appellant for her predicament. This then led to the prosecution of the appellant on a charge of defeating/alternatively attempting to defeat, the course of Justice.

At this trial the complainant had to explain her conflicting versions. She stated that she saw that the appellant was out of prison and she heard that he was appealing against his conviction. She stopped him on this particular day because she

did not want to go back to court. At that stage she, however, had no intention of withdrawing the case. After informing the appellant that she did not want to go to court again he suggested that they should all go to his lawyer to solve the case. It was the appellant who later suggested to complainant that she should tell his lawyer that she was not raped by him, that she herself removed her trousers and that the

sexual intercourse took place at the house of the appellant. Furthermore he also told her to tell the lawyer that she did not want to lay a charge but that she was forced to do so by her boyfriend. She was also promised money by the appellant. That then was complainant's explanation for the statement she gave to Damaseb. Complainant further stated that on their first visit to Mr. Damaseb she did not know what she was supposed to say to him, and nothing was in fact said because Mr. Damaseb was in a hurry to go somewhere else. It was on their second visit to the lawyer that the appellant told her what to say.

This seems to me a most unlikely story. Apart from admitting that she was the one who took the initiative to stop the appellant and to talk to him she could not really explain why she did so. She herself said at one stage that she was not going to withdraw the case. If that was so then there is no other acceptable reason, and none was given by the complainant, why she initiated talks with the man who had raped her. It further seems to me that complainant realised that she could not say that she indeed suggested the withdrawal of the case because then the

whole prosecution could have fallen through and she could have been in hot water. It is also highly improbable that appellant would have made an appointment with his lawyer and took the complainant there without knowing what the complainant was prepared to say or do and that he could have known that the lawyer would not fully consult with them on that occasion because he was in a hurry to go somewhere else. In this regard the complainant's evidence is also not supported by Mr. Damaseb who testified on behalf of the State. Damaseb said that when he was first contacted by the appellant he was informed that the complainant wanted to withdraw the charges as she was forced by

her relatives to bring the charges. At the first meeting Damaseb testified that the complainant indicated to him that she wanted to Withdraw'the charges against the appellant. He then advised her that that was not possible because there was already a conviction. The legal practitioner told her that the only possible way in which she could help was to give evidence favourable to the appellant which could then be used in context with an appeal. Mr. Damaseb said that the complainant then got concerned because she did not want her boyfriend to know what she was doing.

Damaseb testified that on the first occasion that the complainant and appellant came to his office he only wanted to test the ground and did not go fully into the statement of the complainant. It was at the second visit to his office that a complete retraction of her evidence, given in court, was made by the complainant. She now stated that appellant had intercourse with her with her permission, that she herself removed her trousers and when they later got home her boyfriend, Jerome Dunn, was there, that she cried because the two of them had argued and that her father then came there and Dunn told her that she must lay a charge. Damaseb testified that he then advised the complainant, after warning her of the.possible consequences of the retraction of her previous evidence, to make a statement to the investigating officer.

The appellant, when he testified, denied that he had anything to do with complainant's change of heart and stated that she of her own approached him and willingly made the statement to his lawyer, Mr. Damaseb.

There can be no doubt that the different versions given by the complainant are mutually destructive.

The Supreme Court in the recent case of *S vK* 2000(4) BCLR 405, O'Linn, A]A, who wrote the judgment of the Court, stated that the cautionary rule in sexual cases has outlived its usefulness and that there were no convincing reasons for its continuation and further that Courts in Namibia should no longer apply it. However, the learned Judge, with reference to *Sv D,* 1992(1) CR 143 (Nm) and *S v Jackson,* 1998(1) CR, 470 (SCA) adapted the guideline laid down by Lord Taylor, Q, in R_v *Makanjuola, R v Easton,* 1995(3) AER 730 CA for Courts in England where in sexual assault cases the cautionary rule had been abrogated by legislation. At p. 419 H - I this guideline is formulated as follows in the decision in *SvK, supra:*

> "In some cases, it may be appropriate for the judge to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence, nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestion by cross-examining counsel.'

There is therefore no longer any cautionary rule which applies just because the complainant is a complainant in a sexual offence and his or her evidence must be considered and evaluated as the Court would consider the evidence of any

other witness.

In my opinion there is a sufficient evidential basis to find that the evidence of the complainant is unreliable. There can be no doubt that on the question whether sexual intercourse was consensual or against her will, the complainant is a single

witness. On no less than two occasions the complainant was willing to retract evidence previously given by her and to make a complete about face. To Damaseb" she in so many words admitted that she lied when she testified in Court and when she was threatened with a possible jail sentence she said that she lied to Damaseb and that what she testified in court was the truth and she blamed the Appellant for leading her astray. This postulates the very unlikely scenario that, if the complainant is to be believed she, together with her rapist, conspired at one stage to mislead the lawyer, the police and ultimately the court.

The complainant found herself between the devil and the deep blue sea and the only way in which she could extricate herself from her predicament was to blame the appellant. On the one hand she could face a possible charge of perjury if she persisted in her allegation that she lied in court. On the other hand, and if she should admit that she took part in a false scheme, she could have been faced with a possible charge of attempting to defeat the course of Justice. (See S v Mdakani 1964(3) SA 311 (T).)

It is common cause that the complainant gave two mutually destructive versions of what had happened on the night of 7 October 1995. Her attempt at a later trial to convince the

court that the first, and not the second version, was the truth can hardly count for anything especially in the light of the fact that no acceptable explanation was given by her why she decided to come forward with a second conflicting version. Her story that she did not want to go to court again loses any veracity which it may have had in that she then approached the appellant but at the same time testified in

the second trial that she had no intention to withdraw the case. Instead of asking Mr. Damaseb, with whom she was at times alone without the presence of the appellant, what the position was and if she would be required to go again to court as a result of appellant's appeal, she assured him, more than once, that she was not forced or influenced by the appellant to make her statement to him, but that she did so willingly. What upset her, according to Damaseb, was the fact that her boyfriend would now find out that she had changed her story, which, so it seems to me, supports her second statement that he influenced her to lay a charge against the appellant.

The Court *a quo,* when it heard argument and delivered judgment, did of course not have the advantage of considering the matter in the light of the new evidence. As was pointed out by the learned judge, who wrote the judgment, as regards the essential facts of the case not much was in dispute between the State and the defence except for the issue of consent, or lack of consent. In rejecting the evidence of the appellant the Court *a quo* also drew an adverse inference from the fact that the appellant did not canvas in cross-examination certain aspects of complainant's evidence. One such aspect found by the Court a *quo* as especially significant

was the allegation by complainant that intercourse took place in the veld whereas the appellant alleged that it was in his house. Also that appellant did not dispute this allegation when he was first confronted by Sergeant lzaaks who informed him that the intercourse was in the veld.

This issue must in my opinion be considered against the background of all the evidence. It seems that after the appellant had pleaded not guilty he was invited by the Regional Magistrate to disclose his defence. This invitation was extended to the appellant in terms of s. 115 of Act 51 of 1977. Appellant started to give a detailed account of what had happened on this particular evening. When he came to the part where he told complainant that he first had to go to his house the appellant was interrupted by the Regional Magistrate who said that he had already noticed that in his plea in the magistrate's court the appellant had said that he went to his house and there the complainant consented to intercourse. The appellant was then asked whether that was his defence and he agreed. Thereupon the Regional Magistrate told the State to proceed with their case. It seems however, that everything which was said by the appellant was not recorded because the Regional Magistrate at one stage put it to the complainant that the appellant, at the beginning of the trial, had explained that at his house they both entered, that they started to cuddle and that he then pressed her onto the bed. This was denied by the complainant. However, it shows at least that this version of the appellant was before Court and was not something which was lateron fabricated. Taking further into consideration that the appellant was a lay person and that his cross-examination of the complainant was quite

short and, to say the least, inept, an adverse inference cannot readily be drawn from his neglect to put this version to the complainant.

As far as Sergeant Izaaks' evidence is concerned the appellant did put it to him that intercourse took place at his house. (See p. 28 of the record.) What was held against the appellant by the Regional Magistrate and the Judge *a quo* was that he did

not deny it when Izaaks confronted him the first time and told him that intercourse took place in the car somewhere presumably in the veld. However, Izaaks testified that the appellant told him that he and the complainant started to cuddle and that one thing led to another. At that stage it may have seemed more important to the appellant to convey to the Sergeant that intercourse took place with consent rather than to dispute the location where it took place.

Concerning the probabilities the Court a *quo* rejected appellant's version that he and complainant made an appointment to meet again the next day after the night they had intercourse. It is common cause that the appellant indeed went to the house of the complainant the next day and that she then told him that she had laid a charge of rape. Although 1 must agree with the Court a *quo* that it is, on the evidence then before the Court, improbable that there was an agreement to continue the new found amorous relationship the next day, just to be met with a charge of rape, the fact is that we now know that complainant had told Damaseb that she herself did not want to lay a charge but that she was influenced by Jerome Dunn, her boyfriend, to lay the charge of rape. If that is taken into consideration it seems to me that the probabilities favour the appellant and that he indeed went the next day to the house of the complainant in the hope to continue the

relationship and that he would not have gone there if he had raped her the previous evening.

I have referred to the evidence of the appellant and the probabilities arising and inferences that can be drawn therefrom to show that there is nothing in his evidence, especially viewed in the light of the new evidence and the statement of the

complainant to Mr. Damaseb, that can assist the State in still securing a conviction. Under the circumstances the appeal must succeed.

In the result the following order is made:

> The appeal succeeds and the conviction and sentence are set aside.

STRYDOM, CJ.

I agree.

DUMBUTSHENA,A.J.A.

I agree.

O'LINN, A. J. A.

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