

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, GRAHAMSTOWN**

**CASE NO: CA&R35/13  
DATE HEARD: 7/10/2014  
DATE DELIVERED: 10/10/14  
NOT REPORTABLE**

In the matter between:

**HENDERSON DRAGHOENDER**

**APPELLANT**

**and**

**THE STATE**

**RESPONDENT**

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**Appeal against conviction – rape – appeal against factual findings – no  
misdirection on part of magistrate – appeal dismissed.**

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**JUDGMENT**

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**PLASKET J**

[1] The appellant was convicted in the Regional Court, Somerset East of rape. He was sentenced to eight years imprisonment. Leave to appeal was refused by the magistrate. Leave to appeal against conviction only was, however, granted on petition.

[2] The complainant testified that, on the morning of 24 December 2009, the appellant grabbed her from behind when she was tending to ostrich chicks in a barn on the farm where she lived and worked and then proceeded to rape her.

[3] The appellant's version is that he and the complainant had had consensual sex in the early hours of 24 December 2009 in his house after a heavy drinking session. He also claimed to have been involved at the time in a secret relationship with the complainant. Later during the morning at the barn he and the complainant had kissed and she had refused to have sexual intercourse with him before she suddenly began to cry, and said that she was going to have him arrested for raping her.

[4] The issue that has to be determined is whether the magistrate was correct in accepting the evidence of the complainant, a single witness, and rejecting the evidence of appellant. This amounts to an argument that the magistrate erred on the facts. The approach to how appeal courts deal with appeals against a trial court's factual findings is well known. In *R v Dhlumayo & another*<sup>1</sup> Davis AJA stated:

'8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.

9. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

11. The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.

12. An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.'

[5] In *S v Francis*<sup>2</sup> Smalberger JA summarised the position set out in *Dhlumayo*, stating that: (a) an appeal court's powers of interference are limited; (b) in the 'absence of any misdirection the trial Court's conclusion', including its acceptance of

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<sup>1</sup> *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 706.

<sup>2</sup> *S v Francis* 1991 (1) SACR 198 (A) at 204c-e.

the evidence of an accomplice, 'is presumed to be correct'; and (c) in order to succeed, an appellant is required to convince the appeal court 'on adequate grounds' that the trial court was wrong in accepting the evidence that it did and that 'a reasonable doubt will not suffice to justify interference with its findings'.

[6] The magistrate was alive to the fact that the complainant was a single witness whose evidence had to be approached with caution. He said of the complainant that she was 'quite a good witness' in that, although she was not an excellent witness as argued by the State or an extremely poor witness as argued by the defence, she had 'stuck to her evidence that the accused raped her in the barn'. In this finding, I do not believe the magistrate can be faulted. Generally speaking, the complainant's evidence seems to have been satisfactory, although she is open to criticism in some respects.

[7] The magistrate then looked for safeguards as to the reliability of her evidence. He found them in the following: (a) the report that she made at the first reasonable opportunity which showed consistency, which in turn strengthened her credibility; (b) that when the complainant made the report she was, according to the witness to whom she made the report, 'wild and appeared to be shocked'; (c) the evidence of the doctor who examined the complainant whose findings were consistent with her version; (d) evidence given by the investigating officer that the appellant admitted to having had sexual intercourse with the complainant in the barn; (e) that the complainant knew the appellant was HIV-positive, a fact that made it unlikely that she would have consented to sexual intercourse with him, especially without a condom.

[8] The magistrate made favourable credibility findings in respect of the witnesses who gave the corroborating evidence set out above. Again, I can see no misdirection in him doing so. As he pointed out, it was highly improbable that the investigating officer, in taking a statement from the appellant, would have recorded incorrectly his admission that he had had sexual intercourse with the complainant in the barn and that the doctor was a 'credible independent expert witness'. He also accepted the person to whom the report had been made as being 'quite a good witness'.

[9] As against this evidence, the magistrate found that the appellant's evidence was not reasonably possibly true. His reasons were that (a) it was highly improbable that the complainant would have consented to unprotected sexual intercourse with him, as the appellant had alleged, because of his HIV-positive status, of which she was aware; (b) if, as he had alleged, they were engaged in a secret relationship, it was highly unlikely that she would lay a false charge of rape against him because that would be the surest way of the relationship being brought into the open – and to the knowledge of her partner and of her sister, the partner of the appellant; and (c) it was also highly improbable and did not make sense that, if she and the appellant were involved in a secret affair as he alleged, she would 'suddenly one day just decide to say he raped her', there being no reason for her to act in this strange way.

[10] I have set out the magistrate's reasoning in some detail. From it I can see no misdirection insofar as his factual findings are concerned. That being so, there is no basis upon which this court may interfere with his findings and the appeal cannot succeed.

[11] In the result, the appeal is dismissed.

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C Plasket

Judge of the High Court

I agree.

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J Roberson

Judge of the High Court

## APPEARANCES

Appellant: H McCallum of the Grahamstown Justice Centre

Respondent: D Els of the office of the Director of Public Prosecutions, Grahamstown