

IN THE HIGH COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL DIVISION)CASE NO:

A35/2007

DATE:

1 FEBRUARY 2008

5 In the matter between:

SHAHEEM ISMAIL

Appellant

and

THE STATE

Respondent

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J U D G M E N T

LOUW, J:

[1] The appellant, who was represented throughout by an
15 attorney, appeared in the Regional Court, Wynberg, on
one count of indecently assaulting an 18 year old by the
name of Aneesha Hendricks on 9 July 2001.

[2] At the commencement of the trial on 18 February 2003,
20 some 18 months after the event, the appellant pleaded
not guilty and elected to make no statement in
explanation of his plea. After the trial, which lasted a
considerable time and was postponed on a number of
occasions the appellant was found guilty as charged on

27 January 2005. On 6 April 2006 he was sentenced to a fine of R5 000 or 12 months' imprisonment, as well as a further 18 months of correctional supervision in terms of the provisions of section 276(1)(h) of Act 51 of 1977. The appellant appeals with the leave of the Court *a quo* against his conviction only.

[3] The appellant is married to the complainant's sister and at the time of the alleged incident the appellant lived in a separate cottage on the same premises in Athlone where the complainant lived with her older brother and her mother in the main house. The complainant's parents were divorced some two years earlier and her father lived elsewhere.

[4] The complainant testified that she and the domestic worker employed by the family, Ms Lea Cornyn, were at home on the day in question. Her mother was away on holiday in Malaysia and her brother was at work. The appellant, who conducted a security business from his home, was in the cottage. His wife was at work and also not at home. According to the complainant and Ms Cornyn at approximately 10am that morning the appellant phoned through to the main house to ask Ms Cornyn, to iron his pants. He also asked that the complainant bring

him some coffee and toast for breakfast. The complainant proceeded to prepare the breakfast and she then took the breakfast to the appellant in the cottage.

5 [5] There is a dispute in regard as to whether or not the appellant asked that the complainant bring the breakfast. According to his evidence he asked Ms Cornyn to bring the breakfast but that the complainant then, of her own accord, took it upon herself to bring the breakfast to him.

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[6] The complainant's evidence is that when she entered the bedroom dressed in tracksuit pants and top, the appellant was lying on the bed dressed only in shorts. She says that she put the breakfast down next to the bed and when 15 she wanted to leave the appellant grabbed hold of her and pulled her onto the bed. She shouted, objected and tried to break free but the appellant held her down and started kissing her neck and breast. He put his one hand down the front of her tracksuit pants and put a finger into her vagina, moving it about. She continued to struggle 20 and shout and the appellant eventually let her go. She immediately returned to the main house and upon being asked by Ms Cornyn what was wrong, she told her what had happened to her in the appellant's room.

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[7] Ms Cornyn, who also testified, confirmed this evidence. According to her, she saw that the complainant was terrified, that her hair was in a state of disarray, that she was confused, cried and held on to Ms Cornyn. Ms Cornyn described her state as being "vreesbevange". Ms Cornyn then told her to calm down and took her to the bathroom to have a shower. When the complainant undressed and took off her panties to take the shower, Ms Cornyn saw that there was blood on this piece of clothing. Ms Cornyn says that she then proceeded to wash the panties and after the shower she gave the complainant some sugar water and told her to lie down.

[8] Apart from telling Ms Cornyn what had happened, the complainant initially told no one else. When her brother came home from work in the late afternoon she told him what had happened. His reaction, according to her, was that she should go to the police. Her sister also came home from work and the complainant also told her what had happened. Her sister said that she should not tell anyone because she (the sister) was going to leave (separate from) the appellant. In the result the complainant did not initially lay a complaint with the police. It is true that in evidence she said that she did lay a complaint with the police that very day, later she

said the next day, but it is clear that she only laid the complaint some four days later on 13 July 2001 when she made a statement at the Athlone police station.

5 [9] The matter was referred from Athlone to the Philippi police station where Sergeant Sunday took over as investigating officer. He arranged for the complainant to be seen by the district surgeon, Dr Traut, the next Monday on 15 July 2001. The complainant was cross-
10 examined about this delay in laying a complaint with the police. She explained the delay by stating that her sister first said that she would leave the appellant and later when she did not do so, requested that she should not lay a complaint because it would embarrass her.

15 [10] The complainant was seen by Dr Traut, as I have said, on 16 July 2001. Dr Traut found two healed tears of her hymen. He concluded that a blunt instrument, such as for instance a human finger, must have passed through the hymen to cause the injuries. These tears would take
20 some six to 12 days to heal and consequently the injuries which he saw could have been inflicted at any time before that period. The doctor could not say whether the tears were caused with or without the consent of the
25 complainant.

[11] On the evening of the incident there was a meeting at the family home in Athlone at which members of both families were present. Ms Cornyn was also present. She says that when confronted with what the complainant had said, the appellant said that nothing had happened save that he had played with the complainant and that his hand had slipped. This version of the conversation was denied by the appellant. However, it is common cause that there was such a meeting and that it was a heated and acrimonious affair at which the appellant's parents were also present at one stage. What this meeting clearly demonstrates, in my view, is that the complainant did make a complaint to the family against the appellant that day as she and Ms Cornyn testified.

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[12] The complainant testified that the appellant had previously made verbal sexual advances to her which she considered to be inappropriate. He said, according to her, that he wanted to have sex with her. However, she explains taking his breakfast to him that morning by the fact that she had thought that he had stopped doing this and she consequently had no problems with taking the breakfast to his room.

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[13] The appellant gave a different version of the events. He said that he and the complainant were like a brother and sister. He used to live in the main house in close proximity to the complainant and they got on very well with one another. There was no problem between the two of them. Once he got married to the complainant's sister about six months before the incident things, according to him, changed. He detected animosity towards him from the complainant's family. He stated that he refused to allow the complainant's brother the use of his motor vehicles which he said further contributed to tension between the appellant and the complainant's brother.

15 [14] The appellant also spent a long time in his evidence
testifying to what he considered to be the complainant's
history of emotional and irrational behaviour. He
testified that he suspected that the complainant abused
drugs. This is in contrast to the statement put in cross-
20 examination to the complainant that the cross-examiner's
instructions were that she used "hard drugs".

[15] It is common cause that the complainant suffered an
emotional breakdown about two years before the incident
25 when she must have been 16 years old at the time her

parents got divorced. At the time she made an attempt to commit suicide. However, the evidence of both the complainant and Ms Cornyn, who knew her well since she was a young child as Ms Cornyn had been a domestic worker in that house for approximately 20 years, was that she had recovered emotionally before the incident.

[16] Regarding the events of the day in question, the appellant testified that he asked Ms Cornyn to bring him some breakfast to his quarters but that it was the complainant who brought it to his room, dressed in shorts and a top. According to the appellant, the complainant joined him in watching television in his room for some time, before she went back to the main house. The appellant's evidence was that the visit was uneventful and that he soon afterwards went to the main house to take a shower. There he saw the complainant and Ms Cornyn. They were talking to one another and there was no problem whatsoever.

[17] He thereafter left for work and returned at about 1pm. He found the complainant in his quarters, blow-drying her hair. He spoke to her and there was no problem between the two of them. He then again left for work and returned at about 5pm. Soon afterwards his wife came home and

she went into the main house and came back after a while and told him that he is alleged to have "fingered" the complainant. The appellant says that he did not take this allegation seriously and in fact thought that the complainant was making a joke.

[18] He then received a work-related call and went out to attend thereto. When he came back to the house later that evening, he was confronted in the main house by the complainant's family about the complaint made by the complainant. The husband of the complainant's cousin, one Hanslo, "wanted to pull a firearm" he testified. According to the appellant it was "hectic, everyone was shouting". His response, so he testified, was that the complainant should be seen by a doctor to determine whether there was any truth in the allegation made by her.

[19] According to the appellant, he had a fall-out with the complainant's brother the next Friday, 13 July 2001, and it was after this fall-out that the complainant went and laid a charge against him at the police station in Athlone. The appellant therefore ascribes the laying of the charge against him to be the result of the animosity of the complainant's brother towards him.

[20] Mr Booth, on behalf of the appellant, pointed out that the Court is dealing, as one is often confronted with in these kind of cases, with two mutually destructive versions. He submitted that the magistrate erred in accepting the evidence of the complainant, who was a single witness, as to what occurred between them. The magistrate was alive to this and found corroboration for the complainant's version in the state in which she was when she first spoke to Ms Cornyn soon after the incident.

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[21] Mr Booth submitted that the magistrate did not properly consider the complainant's emotional state of mind seen against the background of her history of emotional disturbance. He submitted that this could account the fact that she would have laid a false charge, and that Ms Cornyn could have incorrectly interpreted the complainant's emotional state and that what she observed was not in fact corroboration for the complainant's version that she had been sexually assaulted by the appellant.

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[22] The problem, in my view, with this submission is that it is in conflict with the appellant's version that there was nothing for the complainant to get upset about and that in fact she was not upset at all when she left his presence

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that morning; nor was she upset when, on his version, which is denied by the complainant and Ms Cornyn, he saw her and Ms Cornyn shortly after she had left him when he went to take a shower. He described what he saw then and according to him the complainant and Ms Cornyn were sitting there talking "like carry on like normal, normal, normal morning". The complainant was also not upset, on this version which is disputed, later during the day when he returned at lunch time

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[23] On his version, for some unknown reason the complainant and Ms Cornyn therefore concocted a story about what happened that morning. This story included not only what had happened between the appellant and the complainant, but also their version of the emotional state of the complainant and the blood on the complainant's underclothes. Some time during the course of the afternoon the complainant and Ms Cornyn must, on the appellant's version, have decided to falsely accuse the appellant of sexual assault. That the complainant did so when the family came home is common cause: it was reported to the appellant's wife and a heated family meeting ensued. What precipitated this false complaint does not appear from the evidence at all.

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[24] The alleged unhappiness caused by his marriage to the complainant's sister and the withdrawal of the motor vehicle use had existed, on his version, for some time. The fact that the complaint was laid with the police only on 13 July, as I pointed out earlier four days after the event, is fully explained by the complainant. Her sister first said that she would leave the appellant and later when she did not, she asked her not to lay the charges. As we know the complainant eventually did lay the charge. According to Ms Cornyn, the complainant finally went to the police because she was not believed by the appellant's family and she wanted to tell someone who, as she put it, "would believe her".

15 [25] The magistrate in his judgment states that he was impressed by the complainant and Ms Cornyn as witnesses. There is nothing in the record to say that this impression is unjustified. In contrast, a perusal of the appellant's evidence shows him to be an unsatisfactory opportunistic witness.

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[26] The issue of whether the State has proved it case and how this enquiry should be approached has been the subject of many decisions of our courts. In S v V 2000(1) SACR 453 (SCA) at 455a-c it is put as follows:

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"It is trite that there is no obligation upon an accused person where the State bears the *onus* to convince the Court. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false.

It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true, but whether one subjectively believes him is not the test".

As pointed out in many judgments of this Court and other courts, the test is whether there is a reasonable possibility that the accused's evidence may be true.

[27] In my view, the magistrate's acceptance of Ms Cornyn's evidence cannot be disturbed. Support for the credibility of the complainant and her version is to be found in the fact that she complained to Ms Cornyn about the appellant's conduct towards her immediately after leaving his presence. The complaint is not corroboration of her version of what happened, but it is consistent with her evidence that she had been sexually assaulted. It is,

therefore, a matter which goes to credibility. Corroboration for the complainant's version of the events which are in dispute, namely as to what happened in the appellant's room is to be found in the emotional state the complainant was in when she was first seen immediately after she returned from the appellant's quarters by Ms Cornyn. Further corroboration for her version is to be found in the blood on her underclothes. These facts corroborate the complainant's version because it makes her version more probable and is incompatible with the appellant's version. The doctor's evidence is also compatible with the complainant's evidence.

[28] According to the appellant there was no reason whatsoever for the complainant to be in the emotional state in which Ms Cornyn saw her. In fact, his version is that she was not in such a state at all. In my view, this is highly improbable because at that time of the morning there would have been no reason, but for the sexual attack, for the complainant to react in the emotional way in which Ms Cornyn testified to. On the appellant's version, the complainant and Ms Cornyn must have decided some time during the afternoon to concoct a false story and then fabricate the whole incident, including the complainant's emotional reaction and the

blood on her underclothes. This, in my view, is improbable and far-fetched. It is clear from the reading of the record as a whole that the appellant was a poor witness. His version is inconsistent with what was put in cross-examination and suffers from an internal conflict.

[29] In his heads of argument Mr Booth further submitted that an inference adverse to the State should be drawn from the fact that the complainant's brother and Hanslo were not called. First, reasons were given as to why these witnesses were not available to give evidence and, secondly, on the evidence it is unlikely that they would have contradicted the complainant. They were not present when the incident happened and they were clearly very upset with what the appellant was alleged to have done. There can, in my view, be no inference that they, if they were called, they would have contradicted the evidence of the complainant and that they were, for that reason not called.

[30] In my view, the magistrate was quite correct having regard to all the evidence, to reject the appellant's version as not reasonably possibly true. The weight and quality of the evidence of the complainant and Ms Cornyn was of such a nature that the appellant's innocent

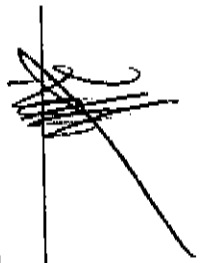
version can safely be rejected. The evidence establishes beyond reasonable doubt that the complainant was sexually assaulted by the appellant in the manner described by her. That conclusion is, in my view, inescapable.

[31] In the result the appeal must, in my view, be dismissed and the conviction and sentence must be confirmed.

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BRUSSER, AJ: I agree.

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BRUSSER, AJ

LOUW, J: It is so ordered.

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LOUW, J