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G.P.-S.384-1952-3-10.000. U.D.J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAK.

ADRIAAN C.J. KRITZINGER
Appellant.

versus

THE QUEEN.
Respondent.

Appellant's Attorney / *Prokureur van Appellant* ..... *Respondent's Attorney* / *Prokureur van Respondent* .....

Appellant's Advocate / *Advokaat van Appelant* ..... *Respondent's Advocate* / *Advokaat van Respondent* .....

Set down for hearing on:— / *Op die rol geplaas vir verhoor op:*— .....

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:-

ADRIAAN CORNELIUS JACOBUS KRITZINGER
Appellant

and

REGINAM Respondent

Coram:- Van den Heever, Fagan, de Beer, Reynolds et Hall, JJ.A.

Heard:- 10th November, 1955. Delivered:- 28/11/1955.

VAN DEN HEEVER, J.A. J U D G M E N T .

In the Court of the Magistrate, Durban, appellant was convicted of contravening Section 1 of Act 5 of 1927 as amended in that during the period from the 1st of August, 1952, to the 30th December, 1953, and at or near Amanzimtoti or Isipingo in Durban District he being a European male did unlawfully on divers occasions have illicit carnal intercourse with one Caslinah Dube, a non-European female. An appeal to the Natal Provincial Division was unsuccessful and with leave of the Court a quo an appeal was brought to this Court.

But for the painstaking and well reasoned argument advanced before us by Mr. Beck, which opened up some fresh avenues of approach, it would have been unnecessary to

add to the clear and convincing reasons for dismissing the appeal to the Provincial Division stated in the judgment of Broome, J.P.

Counsel for appellant attacked the Magistrate's judgment mainly on the facts. The story told by the witnesses for the prosecution, he contended, was inherently improbable. The improbability was such, he maintained, that, considered ~~with~~ together with other features of the case said to be unsatisfactory, it should at least have raised a doubt in the mind of the Magistrate whether the guilt of appellant had been established. It becomes necessary, therefore, briefly to outline the facts.

Appellant is a middle-aged man who lives with a Mrs. Nel, whom because of a legal impediment he cannot marry, as husband and wife. From September, 1952, this couple lived successively at Darnell, Amanzimtoti, Isipingo and Ladysmith. Caslinah gives her age as 20. Her home is at Empangeni. During September, 1952, when appellant was still living at Darnell, Caslinah went to Stanger, where she had friends, to look for work. She was engaged as a servant by appellant and his "wife" - Mrs. Nel was generally known as Mrs. Kritzinger and I henceforth give her that courtesy title

for the sake of ~~xxxx xfxxx xhx~~ brevity. Caslinah slept in the bathroom.

Caslinah says that appellant as well as his wife solicited her to let appellant have sexual intercourse with her and used threats. She wanted to leave but her belongings were locked up and she had no money. She had no friends at Darnell. From then on appellant made her sleep in the diningroom in which he locked her up. About a month after this joint assault upon her virtue she was seduced by appellant. That was her first sexual experience and her aversion and fear changed to love. Thereafter they frequently had sexual intercourse and this continued when appellant moved to Amanzimtoti and later to Isipingo.

When the Kritzingers moved to Amanzimtoti they occupied a house consisting only of a bedroom and a kitchen and a couple by the name of Barkhuizen were their next-door neighbours. Later on they moved to Isipingo to a larger house which they shared with the Barkhuizen family. Throughout these migrations Caslinah accompanied them.

I adopt the words of the learned Judge President to give a precis of the evidence for the prosecution as to the domestic arrangements of these people.

4/ "According .....

"According to the complainant, the appellant treated her as a "second wife". The bedroom of the Amanzimtoti house contained two beds, one of them a double bed occupied by Mrs. Nel and the other a single bed occupied by the complainant. Appellant would share one or other with its permanent occupant. Mrs. Nel knew very well what was going on but did not object. Sleeping arrangements were more or less the same at Isipingo. Things went on in this way until the end of September, 1953, when complainant left appellant's employment. In October, 1953, she told appellant that she was pregnant and appellant took her to a native doctor in order to procure an abortion but the medicine she was given was ineffective. On 21st December, 1953, she reported to the police and the appellant was charged. The trial began in January, 1954, and ended in appellant's conviction in July, by which time complainant had given birth to a coloured child."

I would like to adopt another passage from the judgment of the learned Judge President. He said:-

"The native girl, who gave her age as twenty years, was not charged and was the main Crown witness. I shall refer to her as the complainant, though she was treated throughout the trial as an accomplice and at the conclusion of her evidence was granted an indemnity in terms of Section 282 of Act 31 of 1917."

The story told by Caslinah is indeed out of the ordinary. That a man's European concubine, with whom he is living as husband and wife, should further his cause in seducing a young native servant girl in their employment,

is startling. That the "wife" should acquiesce in her "husband" having sexual relations with her a native girl in her presence almost beggars credulity. But an allegation of fact is not incredible merely because it deviates from one's normal expectations. One knows that, especially in sexual behaviour, apparently normal persons develop strange eccentricities and perversities. Consequently the socalled inherent improbability of Caslinah's story does not weigh heavily with me. The Magistrate saw and heard these people. He was in a better position than a Court of Appeal to assess their social standing, their probable reactions and their moral fibre.

Upon closer examination the alleged inherent improbability of Caslinah's story depends upon three presumptive factors: the instinctive pudicity of human beings, the competitive possessiveness of a woman in respect of her mate and the social ascendency in South Africa of Europeans over Bantus. The first and second of these considerations would weigh little with a primitive girl reared in traditions of polygamy. The third would have little weight with a person in the ascendant group once the barriers are down. The conduct of appellant and his wife is to be judged in the light of these

6/ considerations.....

considerations.

There is much indirect corroboration of Caslinah's story. Mrs. Barkhuizen, whose evidence the Magistrate accepted, told of a remarkably intimate association between appellant, his reputed wife and Caslinah. They were always together. At Amanzimtoti the flat in which they lived had only two rooms and Caslinah did not sleep outside. She often saw Caslinah and appellant whispering together at the window of appellant's room. According to Mrs. Barkhuizen appellant and his wife treated Caslinah as a social equal. She attended their games of cards and took drives with them in their car. Appellant frequently offered her cigarettes and sometimes she would take a cigarette out of appellant's mouth and smoke it.

When the two couples migrated to Isipingo and shared a house it was arranged that Caslinah would provisionally sleep in this house until the accommodation outside could be repaired. Caslinah continued to sleep in the house for about a year in spite of Mrs. Barkhuizen's protests. Ultimately Mrs. Barkhuizen prevailed and Caslinah went to sleep in the garage. In regard to this Mrs. Barkhuizen's evidence is

supported by appellant himself who said in evidence:

> "On account of Mrs. Barkhuizen complainant went to sleep in the garage ..... After Mrs. Barkhuizen chased her out of the pantry, Mrs. Brown gave her a bed which she used from then on."

It was contended that Mrs. Barkhuizen's evidence was not to be believed; she had unsuccessfully practised her blandishments on appellant and consequently, a woman scorned, turned the vials of her wrath upon him in the shape of perjured evidence. Reading Mrs. Barkhuizen's evidence one is impressed by the fact that it is signally free from the kind of vindictive bias suggested. She had many opportunities if her evidence was perjured to damn the appellant. It was after the event and she could very well have been wise. The worst of her direct testimony was:

> "Ek het geen intieme gebeurtenis tussed beskuldigde en Caslinah gesien nie ..... Die ergste wat ek gesien het was dat hulle houding teenoor mekaar was nie soos die van 'n baas en bediende nie."

There was other evidence of intimacy which to my mind strongly corroborates Caslinah's story. According to Mrs. Nel's evidence Caslinah once - apparently in a fit of tantrums - threw away appellant's shaving water and

removed his razor from his hand. In doing so she cut his hand. Mrs. Nel called the police, who tried to handcuff Caslinah. Mrs. Nel rounded off this story by saying:

> "Accused and I decided that complainant should not be charged, but if there was more trouble she should be charged."

Mrs. Barkhuizen also testified to this incident. She says both appellant and Mrs. Nel were injured in the fracas but when the police arrived and attempted to handcuff Caslinah, appellant intervened and asked them to desist. There is support for this in appellant's evidence. He says:

> "Complainant was released by the police because she pleaded so nicely. She promised not to do anything like that again. Then the police asked what they should do. I said that if she did it again, I would bring her along."

That is the only reference in appellant's evidence to this important incident which goes to show that the case was either badly conducted or the evidence badly recorded.

Mrs. Barkhuizen testifies to another incident in which appellant protected Caslinah, who apparently had permitted herself another fit of the vapours. The incident is not clearly described in the evidence but apparently

Caslinah was on the war-path and threatened everybody. Appellant called the police and preferred a charge of ~~violence~~ "violence" against her, apparently at the instance of Mrs. Barkhuizen. Appellant intervened on Caslinah's behalf, Mrs.Barkhuizen withdrew the charge and Caslinah continued to hold down her job. A significant piece of evidence is Mrs. Barkhuizen's description of the denouement, which, I think, casts light on the social background of that little menage. She says:-

> "Ek het Caslinah se hand geneem as teken dat daar vrede tussen ons is. Beskuldigde het dit voorgestel."

It is common cause that Caslinah was of a volcanic temperament and allowed herself to take liberties which would ordinarily bring about the discharge of a native servant. It is clear that appellant protected her and she remained in his employment.

Caslinah says that when she realised that she was pregnant she told appellant. He, ~~procured~~ obtained the services of a witch doctor in order to procure an abortion. When the attempt failed appellant told her to go and look for other work. Thereupon she reported the matter to the police. She says: "I reported because accused deserted me and I was pregnant by him." It was from a native girl

that appellant first heard about the charge levied against him. Caslinah was no longer in his employ. He was now living at Ladysmith.

With full knowledge of this charge which would have revolted an innocent man appellant and his wife now take trouble to trace Caslinah. They find her in the location and with the permission of her "guardian" take her and all her belongings to the police station, for she had been persuaded to withdraw the charge. She and appellant tried to have the charge withdrawn, appellant informing the police that he was taking her back into his employ. Appellant was arrested instead.

Appellant and his "wife" gave explanations of their strange conduct which ~~was~~ were manifestly false. They were suddenly assailed by a sense of responsibility for Caslinah and wished to take her back to her home. Mrs. Nel's explanation was that she sought out Caslinah in order to recover a blanket that she had lent the girl. Her "husband" joined in this quest with full knowledge of the charge laid against him.

These admitted facts seem to me to

11/ be .....

be strong corroboration of Caslinah's story. I do not suggest that where a woman alleges that a man seduced her, his attempt to stop criminal or civil proceedings against him is necessarily corroboration of her story. Much will depend upon the circumstances of the case. In van der Berg v. Elzbeth, (3. S.C. 36) the defendant in an action for seduction offered a policeman a bribe to induce him to persuade the girl's father to withdraw the case. That was accepted as sufficient corroboration of the girl's story.

In the present case appellant's conduct was more consistent with that of an errant husband offering to take back a deserted wife than with the reactions of an innocent man towards a complaintant who had laid a grievously defamatory charge against him. If Mrs. Nel was convinced of appellant's innocence she would not have assisted him in trying to defeat the ends of justice. If she had reason to fear that he was guilty, her supinity and acquiescence go far to support Caslinah's story. The contention that the latter's story is inherently incredible is based on the assumption that the parties to this drama were possessed of finer feelings and susceptibilities and a

sense of social superiority. The atmosphere of the case shows that they were devoid of these. The Magistrate was fully aware of the extraordinary features of the case and the requirement in regard to corroboration. Nevertheless he considered that the Crown had proved appellant's guilt beyond a reasonable doubt.

It was contended that the Magistrate's approach to the case was wrong. In his reasons for judgment, after reminding himself that Caslinah's uncorroborated evidence could not support a conviction, he remarked:

> "The Court had to satisfy itself that the corroboration was such as to justify it in concluding that her evidence was reasonably true in its essential features."

That, of course, is not the degree of proof required in criminal cases. Upon reading the reasons for judgment as a whole, however, I am satisfied that the above excerpt was a thoughtless expression which did not reflect the Magistrate's actual approach. He repeatedly stated that the Crown had to prove its case beyond a reasonable doubt and it is clear from his line of reasoning that that was the basis upon which he arrived at his decision.

Caslinah testified that at one stage

appellant had offered to provide a home for her, that appellant had given £30 to her aunt, Maggie, and that the house in the course of construction had actually been pointed out to her by Maggie. Referring to Elgin Fireclays Ltd. v. Webb, (1947 (4) S.A. p. 744) and Galante v. Dickinson, (1950 S.A. p. 460) Mr. Beck contended that the fact that the prosecution had not called Maggie and Mr. Barkhuizen as witnesses justified an inference favourable to appellant's innocence.

Whether such an inference is justified will depend upon the circumstances of each case. The evidence is that Barkhuizen was away from home all day and slept soundly at night. We cannot assume that he could have given useful evidence. Caslinah's story about the promised home is hearsay. If she was misinformed by appellant and Maggie, that cannot reflect upon her credit. The Magistrate did not accept it as proved that such a promise had been made. In any event, I do not think an inference adverse to the Crown can be drawn from the fact that it failed to call witnesses from whom, it is suggested, evidence might have been elicited which is favourable to the prosecution, if because of the nature of

such postulated evidence, the witnesses are unlikely to confide in the prosecutor or to tell the truth. It is extremely unlikely that Maggie would have confessed to be living in as well as upon the proceeds; one may as justifiably hold it against the Crown that it failed to call the witch-doctor who according to Caslinah attempted to procure an abortion.

At the close of the case for the defence the Magistrate called Boshoff, a police constable who was alleged to have been present at the Charge Office when appellant and Caslinah attempted to have the charge withdrawn. This formed the basis of a ground of appeal in which it was said that the Court erred in regarding that Boshoff's evidence was essential to a just decision in the case and the Magistrate exceeded his powers under Section 247 of Act 31 of 1917 in that such evidence was not even apparently essential to ~~eeuhe~~ such a just decision.

The Magistrate's response to this ground of appeal was as follows:-

> "The Court had to apply its mind seriously to the question of credibility ..... The Court had no reasonable doubt, when it decided to call Boshoff. It was clear that he could provide

testimony which would prove conclusively whether Caslinah or accused was lying with regard to how they entered the police station, or whether there was any lapse of time between such entries. It proved accused was lying. Had it proved Caslinah ~~accused~~ was lying, then the Court might have had a reasonable doubt."

This, Mr. Beck contended, was an irregularity such as that which had vitiated the proceedings in Scheepers v. Rex, (1933 (2) P.H. H. 118). In that case an accused person was charged with assualt. The witnesses had been ordered out of Court. In cross-examination Z, a witness for the defence stated that he had not been in Court at any stage during the proceedings and that he was not there when B was giving evidence. At the close of the defence case the Magistrate himself called the detective in charge of the case to show, if he could, that Z was not telling the truth when he stated that he had not been in Court. The detective said in evidence that he had seen Z in Court at the time. The Magistrate believed the detective and came to the conclusion that Z's evidence as to what he had seen or heard at the time of the alleged assualt was to be disregarded because he had been untruthful about the fact that he had been in Court. The accused was convicted. On appeal de Waal, J.P. and Maritz, J.

16/ held .....

held that the Magistrate had no power to call the detective to give evidence in order that he might form an opinion with regard to Z's credibility on a point entirely irrelevant to the issue under investigation; the Court's power under Section 247 of Act 31 of 1917, to call a witness at any stage of the proceedings is confined to the calling of relevant and legal evidence. The appeal was upheld.

<u>Scheepers v. Rex</u> (supra) is distinguishable from the present case. In the present case the evidence of Boshoff was clearly admissible. Had the Crown called Boshoff during the case for the prosecution, there could have been no objection to his evidence being led. No objection can be taken to the stage at which this evidence was adduced or to the fact that the witness was called by the Magistrate, for both are covered by the provisions of Section 247. I think the true inwardness of the complaint is the use to which the Magistrate put that evidence indicating, presumably, the purpose for which he called the witness, namely to test the credibility of appellant and Caslinah in connection with facts which had no relevance other than in regard to credibility.

(~~As Phipson states (ON Evidence, 8th Ed.~~)

~~17/ p. 18~~ ....

That would be an overstatement. Boshoff gave evidence in regard to appellant's and Caslinah's visit to the Charge Office and their request that the charge against appellant be withdrawn. In doing so evidence was elicited as to the surrounding circumstances of the visit: whether the two entered separately or in each other's company, who spoke first, and so forth. Per se that evidence was admissible and the Magistrate was of course entitled to draw inferences as to credibility from admissible evidence. Whether evidence in regard to such unimportant circumstances, the recollection of which might well be obscured in the mind of an honest witness by the memory of an important central event, is a safe guide in assessing credibility, may be doubted. However, it is clear from the Magistrate's reasons that he did not use this additional evidence to assist him in coming to a conclusion as to appellant's guilt. His approach was this: "Had it proved Caslinah was lying, then the Court might have had a reasonable doubt."

In the circumstances it is unnecessary to inquire whether Scheepers v. Rex (supra) was correctly decided, for in that case the evidence elicited was made

the crux of the Magistrate's decision.

The appeal is dismissed.

J.H.S. Leeuw.

Fagan, J.A.
de Beer, J.A.
Reynolds, J.A.
Hall, J.A.
} concur.