G.P.-S.117539—1954-5—5,000.

154/1957
U.D.J 445.

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

(APPELLATE DIVISION).
AFDELING).

159/1957

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

JACOBUS JOHANNES VISAGIE
Appellant.

versus/teen

THE QUEEN
Respondent.

Appellant's Attorney
Prokureur van Appellant

Respondent's Attorney
Prokureur van Respondent

Appellant's Advocate D.H.T. Hannah
Advokaat van Appellant

Respondent's Advocate P. Thirion
Advokaat van Respondent

(Leave NPD) *Set down for hearing on:* Tuesday, 4th March, 1958.
Op die rol geplaas vir verhoor op: 9.45-12.50; 2.15-4. CAV.
2.5.7.9.11 (2)

Alexander
for REGISTRAR
4/3/58

JUDGMENT: Monday, 24th MARCH 1958

Conviction & Sentence set aside and in substitution thereof the Appellant is found guilty of a contravention of Act 23/1957 and sentenced to 4 (four) months I.C.L.

Coram: Schreiner, deBeer, Malan, Reynolds (Acting) et Price (Acting) J.J.A.

Alexander
for REGISTRAR
24/3/58

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the Matter between :-

JACOBUS JOHANNES VISAGIE Appellant

and

R E G I N A Respondent

Coram:Schreiner,de Beer,Malan,JJ.A.,Reynolds et ~~van Blerk~~ Price AJJA

Heard:4th March, 1958. Delivered: 24 - 3 - 58

J U D G M E N T

SCHREINER J.A. :- I have read the judgment of MALAN J.A. and agree with him that there is no good reason to dissent from the trial court's conclusion that the appellant had connection with the complainant on the evening in question. But in my view there is as little reason to depart from the trial court's conclusion that this was a case of rape and not merely of a contravention of the Immorality Act.

It must, of course, be borne in mind that we sit as a court of appeal and not as a trial court. Where there has been no irregularity and the trial court's treatment of the case has not been shown to have

been/.....

been unsatisfactory the appellant fails unless he convinces this Court that the decision was wrong.

Counsel for the appellant criticised one part of the judgment of CANEY J., on the ground that there was in effect a misdirection, though he advanced a number of arguments in support of his submission that the conclusion reached was wrong. Detective Sergeant Bester, who interviewed the appellant at about 10 p.m., or about three and a half hours after the alleged offence, said that the appellant told him that he went with the complainant to the corner where Craig's boarding house is situated and that she then suddenly ran away, that he entered the boarding house and stayed there for a while and that he then went home, arriving there at about 7.15 p.m. In his judgment CANEY J. mentioned the fact that the appellant had not said to Bester that the time of his leaving the Campbells', taken in conjunction with the time of arrival at Craig's boarding house, made it impossible for him to have committed the crime. "The comment is," said CANEY J.,"that he did "not say then and there to Detective Sergeant Bester what he "has told us, namely that, according to him, it was not pos- "sible for this crime to have been committed." It was submitted on behalf of the appellant that the trial Court misdirected itself, since the appellant did not tell the court that it

was not possible for the crime to have been committed by him. In my view the suggestion that there was a misdirection is unfounded. It is quite clear that the appellant in his evidence was making out the case that owing to the time of his arrival at Craig's boarding house, which he fixed at before 6.30 p.m. because that time was announced on the wireless after he had gone into the house, it was not possible for him to have committed the crime. The Campbells had already, in their evidence, fixed the time of his departure from their place at 6 p.m. or a little later, and the distance between the two places was over a mile. The fact that the appellant did not use the words "it was not possible for me to have "committed the crime" is not material, for that was undoubtedly an important part of his defence. I do not regard the fact that the appellant did not at once say to Bester that the times made the charge of rape preposterous as an important point against him, but there was no misdirection.

So far as I can see there was no other ground for holding that the trial court misdirected itself or committed any error in its treatment of the facts or in its approach to the questions which it had to consider and decide. There is, accordingly, no reason why full weight should not be given to its findings on credibility.

CANEY J. said of the complainant, "She "appeared to us to be a simple, country girl, not a brazen "hussy. She gave her evidence in a straightforward manner, "she was not confused, she did not appear to be hedging. She "was subjected to a searching cross-examination and we also "examined her with the object of testing, as far as we could, "the truth of her story, and we came to the conclusion that "she was speaking the truth." I do not propose to refer in detail to the criticisms of her evidence that appear in the judgment of MALAN J.A. So far as I can judge the weightiest of these criticisms were advanced at the trial and were carefully considered and disposed of by the trial court. Nothing has in my view been advanced which should lead this Court to the conclusion that the trial court was wrong in accepting her evidence.

Some reference should, I think, be made to an argument based on a statement in the affidavit of the Assistant Government Pathologist that a stain on the complainant's vest which gave a positive reaction for spermatozoa appeared to be an old stain. I am not satisfied that such a statement falls within the provisions of section 239 (4) of the Criminal Procedure Act, 1955. The certificate of the official in question, following substantially the

language of the sub-section, reads: "I ascertained the fol-"lowing results by means of an examination requiring skill in "Biology." It is not clear to me that this certificate was intended to cover the statement as to the appearance of the stain, in relation to its age. If it was so intended it seems not unlikely that it was erroneous, for I have difficulty in seeing how the appearance of a stain can require biological skill for the determination of its apparent age. If the apparent age did not fall within the class of facts mentioned in the sub-section it could not be proved by affidavit. It may be, however, that its admissibility in the appellant's favour could be supported on the lines of the rule in Rex v. Valachia (1945 A.D.826). In any event its probative force could not be great, since the official gave no oral evidence and did not explain what he meant by "old". The trial court was thus fully justified in rejecting the statement in favour of the contrary evidence given by the complainant and her sister, which received indirect support from that of the district surgeon.

On the specific question of consent there was, in addition to the evidence of the complainant

herself/.....

herself, the fact that she complained to Sikoshi who was the first person whom she met after the incident in the shanty. Sikoshi's evidence was accepted by the trial court. When he met the complainant she was crying and /which he could/ tears,/see/ in the light of the street lamps, were running down her cheeks. Sikoshi said she said that she had been "bambaed" by a European. Various shades of meaning of "bamba" were given by the interpreter, such as committing a wrong on or with a person. The European, she said, had thrown her down and done this to her. He said that she had told him that the European throatened to strike her with a revolver if she did not yield. He was definite that she used the word "revolver". The complainant said that the appellant threatened to shoot her if she cried out. She said that the appellant used the word "shoot" and did not say what he would shoot her with. Though she was not asked the specific question it may be assumed that she would have denied mentioning a revolver to Sikoshi. This difference in their evidence was considered by the trial court and I see no reason to disagree with its conclusion that the differences between their accounts of the complainant, including this particular difference, do not, materially at least, detract from the value of the complaint or of the Crown evidence.

Then/.....

Then there is the important fact that the complainant went to the Campbells' house and arrived there at about 7 p.m. in tears, excited and more or less hysterical. I cannot reconcile this with any reasonably possible reconstruction of the facts that would be consistent with consent on the complainant's part. Such a reconstruction would in the nature of the case have to be built up without any positive evidence to support it. Despite the warning against speculation given in Rex v. Ndhlovu (1945 A.D. 369 at page 386), I accept, in the appellant's favour, the gloss that I ventured to put upon it in Rex v. Dhlumayo (1948 (2) 677 at page 694). In the present case it would not be right to expect the appellant, who denied that he had intercourse with the complainant, to produce supporting evidence more or less directly related to the possibility that connection was by consent. The general circumstances must be considered to see whether there was a reasonable possibility i.e. one the existence of which could reasonably be inferred from the evidence.

So approaching the matter, and with the advantage of having before me the suggestions made in the judgment of my brother MALAN, I can only record my

very/.....

very clear impression that the possibility that the appellant and the complainant had connection by consent is not a reasonable one. This was not a case in which the parties were disturbed in the act of having connection or shortly afterwards, while they were still together. She met Sikoshi more than four hundred yards from the shanty and she could not have imagined that he might have seen her and the appellant together. If she had consented to intercourse it would be natural for her to stay with the appellant and not antagonise him by a false charge of rape. So best would she get support for any child that might be born, while receiving her emoluments from the employment which she had selected for herself. If it is to be supposed that her distress in the presence of Sikoshi and of the Campbells was simulated she would, one assumes, have had enough sense to keep on good terms with the appellant. It seems to me, however, to be utterly improbable that she did pretend to be in distress, forcing tears out of her eyes in the process.

As I have said, I regard her return to the Campbells' as important circumstantial evidence going to show her state of mind. She spoke to Mrs.Campbell but no evidence was tendered by the Crown as to what she said. Presumably the Crown was uncertain whether the

evidence/.....

evidence would be admissible in view of the fact that she had already complained to Sikoshi. It may be that the Crown could have led the evidence (see Rex v. Wilbourne, 12 C.A.R. 280). But what she did round about the time of the alleged assault was clearly admissible to prove her state of mind at the time, which was in issue. And only what seem to me to be far-fetched and remote possibilities can explain her going to the Campbell's in obvious distress, if her state of mind was that of a girl who had just consented to intercourse with the appellant.

In my view there is no reason for interfering with the decision of the trial court and I would dismiss the appeal.

22. 5. 58

Record

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between :

JACOBUS JOHANNES VISAGIE. ..... APPELLANT.

and

REGINA. ..... RESPONDENT.

Coram ; Schreiner, De Beer, Malan, JJ.A. , Reynolds et Price, A.JJ.A.

HEARD : March 4th, 1958. Delivered. 24-3-58

JUDGMENT.

MALAN, J.A.

The appellant was tried before Caney, J., and assessors, at the Circuit Court at Vryheid, on a charge of the rape of a native girl sixteen years of age. He was unanimously found guilty and sentenced to undergo compulsory labour for five years and to receive four strokes.

The scene of the occurrence testified to in the Court below is laid in the village of Vryheid and the undisputed

facts are / . . . .

facts are that on the 17th of April, 1957, the appellant was seeking a domestic servant as he and his wife, to whom he had been married about a month earlier, had decided to leave the boarding house where they were staying at the time and to establish their own home. The complainant was unemployed and was recommended to the appellant by a Mr. and Mrs. Campbell who resided at the corner of Park and Afrikaner Sts. A meeting was arranged and took place between the complainant and the appellant at 5 o'clock that afternoon at which she was engaged by him. It was further agreed that the complainant should be at the Campbells' house at 6 o'clock that evening where she would be met by him and conducted to the place of employment. It thus happened that the appellant, accompanied by the complainant, left the Campbells' house with the object of proceeding to the appellant's boarding house.

As a sharp conflict of evidence occurs at this stage it will be convenient first to state the complainant's version of the subsequent events. She states that upon their departure from the Campbells' house they kept to the streets until they reached a sports ground which

according to / . . . . .

according to the plan was a distance of about 1100 to 1200 yards from the Campbells' house. At his request they passed throught a gate and entered a shed. Immediately after entry he he told her to wait as he wished to urinate. He went out and upon his return caught hold of her wrist and told her to lift up her dressed. She refused. He thereupon took out his penis, pulled off his overcoat, spread it on the ground with his left hand while retaining his hold of her with his right hand, pushed her over backwards, lifted up her dresses and had intercourse with her.

After the appellant had completed his purpose she took a suitcase which she had brought with her and escaped with the object of reporting the matter to her sister. On her way she met the native witness Shikoshi to whom she made a complaint. At her request the latter accompanied her. On the way to her sister they passed the house of the Campbells to whom she made a report. She thereupon went to her sister who lived a short distance away. Her sister examined her and the matter was reported to the police who arrested the appellant at his boarding house at 10 o'clock that night.

The appellant's story is that after having left the Campbells' house he and the complainant walked along in the

direction of / . . . .

direction of his boarding house. On the way they passed Craig's boarding house where the appellant had boarded previously and where some of his friends still resided. He entered the boardi.g house after he had told complainant to wait for hir outside. He stayed inside for some time and when he came out he found that she had left. -hereupon he proceeded home and remained there until he was arrested by the police at 10 o' clock that evening.

In view of this evidence of the appellant it will be necessary to examine the evidence of the complanant in some detail. The Court a quo determined the questions in the following order : -

(1) Did somebody have intercourse with the complainant that evening ?.

(2) was the appellant that person ?.

(3) If the appellant was the person, did intercourse take place against the will of the complainant ?.

The evidence is overwhelming that the complainant had intercourse with some person within the previous twenty-four hours but before I consider whether or not the appellant was that person, I propose to deal with the question whether the complainant(s evidence, considered in the light of the general probabilities and of the evidence other than that of the

appellant is / . . . .

appellant is sufficiently reliable to warrant the conclusion beyond reasonable doubt that intercourse took place against her will.

This course suggests itself as more convenient in view of the fact that there is little or no extraneous corroboration of her story of what took place in the shed and in investigating this aspedt I shall assume that the appellant had intercourse with her as alleged.

The conduct of the complainant from the time when she left the street to enter the sports ground until she left again after intercourse had taken place is of vital, even decisive importance and her story will be analysed in order to determine whether her evidence that intercourse took place against her will should be believed.

The first question is, at what stage did the complainant become aware of the appellant's intention to have intercourse with her ?. Her evidence in this connection was not consistent throughout and I quote the following extract verbatim :-

" Was there any doubt in your mind before he took his " coat off what his intention was ?. I suggest to you, you knew " what was going to happen to you when he took his penis out " and told you to pull up your dress ? . . No, I did not know " what was about to happen to me.

" Were you not desperately afraid ? Did you not shout, "scream, resist ? . . Yes, I did have fear when he had hold of " my wrist.

" Why didn't you shout then ? , , Oh I just trembled.

" I say again to you, why did you not shout out ? . . . "It did not occur to me that he would commit a criminal act on "me, because he merely had hold of me.

" And when he pulled his penis out and told you to lift "up your dress, did that not make you think that a criminal act "was about to be committed ? Yes, I then gave it a thought " that he was then about to Violate me ".

Whether or not this evidence is acceptable is bound up with the question whether she was in actual fact so innocent and so ignorant of sexual matters that she did not realise at an earlier stage what the appellant' s intentions were. It is common knowledge that the average native girl of sixteen years of age is far more mature and much more conversant with sexual matters than the average European girl of the same age. The complainant was, moreover, brought up on a farm and it is in the highest degree probable that she frequently witnessed animals having intercourse. Such a degree of innocence is, therefore, unusual if not suprising.

In addition to her upbringing there is evidence of an old

posterior / . .

posterior tear of the hymen which affords strong prima facie proof of actual previous sexual experience of some kind. There is the further fact that the pathologist found an old stain on her vest which reacted positively to the test for spermatazoa. It is said that there is a conflict on this point between the evidence of the district surgeon and the report of the pathologist, the district surgeon having described what he saw as a fresh discharge. The probability is that they were not necessarily referring to the same stain. In any event the district surgeon admits that he did not examine the stains which he saw very closely whereas the pathologist knew the purpose for which the results of his examination would be used and it is hardly likely that he would have erred either in his test or in describing it as an "old" stain. If he had not intended to exclude the possibility of its having any connection with the case under investigation he would not have dismissed the matter in so casual a manner and the use of brackets would seem to indicate that in his opinion the point was irrelevant to the case under investigation. There is no innocent explanation of the presence of the spermatazoa on her vest and in testing her profession of innocence it cannot be entirely overlooked. I find myself in disagreement with the finding of the Court below that the pathologist's evidence is not sufficiently definite on the point.

Her statement / . . ..

Her statement, that she did not know that the emission of semen meant is wholly unacceptable. Her description of the "sticky mess" between her legs after the alleged intercourse and her previous experience disprove any such ignorance. The fact that she urinated upon the instructions of the appellant is also not without significance. Her admission that she knew that it was a crime to have intercourse with a European is hardly in keeping with her avowal of innocence and, moreover, establishes that she is deliberate in her untruthfulness.

I have come to the conclusion that her evidence on this point must be rejected as it is obvious that she must have become aware of his intentions at a much earlier stage. Even if it were to be assumed that there was no familiar talk between them on the way to the sports ground the mere fact that she was asked to leave the street and enter the sports ground must have made her apprehensive and when she was taken into the shed and asked to wait while he urinated apprehension must have been transformed into agonising fear.

However, it seems much more probable that familiar talk between them had taken place and immoral suggestions made to her before they had reached the sportsground. The mere fact of his informing her of his intention to perform so intimate an act suggest greater familiarity between them than she was prepared

to concede /

to concede.
Her confused evidence in regard to the stage at which she became aware of the appellant's intentions, may well be attributable to the fact that in truth she knew upon entering the sports ground what awaited her.

If there had been not previous familiar talk and if he had intended to take her by suprise and rape her his conduct was incredibly strange. The fact that he left her alone in the shed shows that he must have been tolerably sure of her willingness and her conduct in not taking advantage of his absence to effect her escape but remaining inactive supports the view that she was a consenting party. His forethought in spreading the overcoat is most unusual conduct in a ravisher.

Her conduct appears to have been completely submissive up to this stage and no restraint of any description seemed called for. Upon re-entereing the shed the appellant is alleged nevertheless to have seized her by the wrist and to have held it in a vice-like grip and to have proceeded clumsily to divest himself of his overcoat, first shedding one sleeve and then the other, while retaining such a firm grip upon her wrist as to cause weals to form. Why he could not have removed his overcoat before he re-entered the shed is not clear and her suggestion, that he ~~xxxxx~~ spread his overcoat on the floor with his left hand while holding her with his right hand , is al-

most / . .

is almost fantastic as he could have taken off his coat and spread it on the floor without holding her. Any attempt on her part to escape could have been frustrated with the greatest ease. In addition she is contradicted by the district surgeon as to the presence of weals or any marks whatsoever on her wrists.

Her story as set out above contains improbabilities but her evidence as to what she did when she realised that she was about to be outraged is extraordinary. In the examination-in-chief, after having dealt with the spreading of the overcoat she continued as follows : -

" He then "bamba'ed" me,
" he then pushed me backwards, the upper part of my body, He
"then got on top of me.
" Yes ? . .I made an attempt to cry out, and he said
" he would shoot me if I cried out. He then lifted up my dresses
" and inserted his penis into me (indicating the region of her private parts).

It appears from this extract of the evidence that the attempt to cry out and the threat to shoot occurred when the appellant was lying on top of her and was about to have intercourse. She had apparently completed her evidence in respect of compulsion and the use of violence because thereafter she proceeded merely

to state that the appellant achieved his purpose and to narrate what occurred later that evening. Up to that stage evidence of active opposition by her was slender and her conduct was as consistent with exhibition of ordinary feminine modesty as with the desire to offer determined resistance.

Counsel for the Crown at a later stage, however, reverted to the circumstances immediately antecedent to the intercourse, presumably in order to fortify a case which obviously contained inherent improbabilities and weaknesses and he unfortunately fell into the error of eliciting most material evidence by putting his questions in leading form.

The following extract from the record shows the improper manner in which this evidence was introduced. : -

" When the accused threw you on the ground, did you
" try to close your legs, when he pressed you backwards ?.
"he pushed me backwards.
" What did you think he wanted to do ?. . I realised he was
" about to do me in, that he would throttle me (indicating with her hand over her throat).
" The question I wanted to ask you, did you close your legs ?.
" I had my legs closed all along with my feet together.
" You said the accused put his male organ into you ?
". . . Yes.

" How did /

" How did he succeed in doing that while your legs were closed ?.

"... He opened my legs with his left hand.

" Did he use his hand to open your legs ?. . . No, he opened " my legs with his knee.

" Did you try to shout for help ? . . Yes.

" Did you shout ?. . Yes, I did make that attempt.

" Actually I did call out, then the accused said he would shoot me if I cry out.

Not a word had previously been said about the forcible opening of her legs and, although the complainant had earlier merely said that she had attempted to cry out, when the question whether she had cried out was put to her in leading form she replied that she actually did cry out. The manner in which this evidence was placed on record was improper and most prejudicial to the appellant and in view of the general unsatisfactory nature of the complainant's evidence deserves little or no consideration. Her evidence that she shouted is contradictory and unsatisfactory. Her original story that she attempted to shout but was deterred by his threat to shoot later became " moaning" and finally developed into the statement that she had called out very loudly and could have been heard by the people living in the houses opposite. I reject her statement that she either

shouted / .

shouted or attempted to shout and it follows from this that her evidence that the appellant threatened to shoot her was a figment of her imagination.

She stated, however, that although she desisted from her attempt to shout she struggled by attempting to push him off and by wriggling her body. According to her the struggle was so vigorous that in the course of the operation they moved off the overcoat and that marks of the struggle were visible at the time of the inspection. The latter statement is in conflict with Dexter's evidence.

In addition, there is a strong probability that, if a struggle had taken place, signs of blood or discharge would have been found on the appellants' overcoat or clothing but the circumstances do not suggest that stains may have existed and that they may have been removed before the clothing was examined by Dexter. It is, moreover, in the highest degree probable that if he had intercourse without her consent or acquiescence and a struggle had ensued, tell-tale blood stains or some signs of a discharge would have been found. The possibility that he could have removed the marks of discharge is slender and as bloodstains can presumably be removed only by the use of some chemical detergent it is most improbable that the appellant could have had the means to do so at this disposal.

The /..

The complainant's evidence as to what she saw in the shed is an additional reason for regarding her testimony with the greatest circumspection, if not with grave suspicion. It must be borne in mind that it was a dark night with the sky overcast and there is no evidence that there was artificial light which illuminated the interior or the vicinity of the shed. Thus her evidence that she actually saw the appellant's penis and that it was in a state of erection is not true and her evidence that the sight of his organ caused her to expectorate in disgust is pure invention. If her evidence is correct that she was so fear stricken that it did not occur to her to scream, it is hardly likely that she would have had the presence of mind to show revulsion of feeling in that manner.

Moreover, it is improbable that, in her state of distress and emotion, sufficient spittle would have been produced to enable her to show her disgust in that way in three successive efforts. It is said that corroboration for her statement is to be found in Bester's evidence, who stated that when he inspected the inside of the shed in the company of the complainant at about 8.30. that night he found three moist places, which he said, was spittle. It will be dangerous to accept this evidence at its face value. It may have been discharge from the complainant or Bester may have been mistaken in thinking it was

spittle /

spittle. It was found in a public place and some person other than complainant may have taken shelter from the rain and have been responsible for its presence. Lastly, no mention thereof was made by her to Bester before it was discovered and, if I am correct in the view that other portions of the Complaiant's evidence are deliberately untrue she is quite capable of fabricating this evidence as well, as a ready basis was afforded by the discovery of the moist places.

Further her evidence is in conflict with that of Bester on the following points : -

1. She states that the ground inside the shed was soft and wet and that she found mud on her dress which she removed. Bester stated that the ground was hard and dry and that rain did no penetrate beyond the entrance to the shed.

2. Her evidence that there were marks of a struggle inside the shed is contradicted by Bester who stated unequivocally that there were no such marks. It is worthy of note that whenever the complainant goes into particulars which go beyond the narrow limits of her early evidence she embellishes her simple original story in a manner which casts grave doubt and suspicion upon her bona fides and her evidence that semen was visible on her thighs when she was examined by the doctor is contradicted by him.

The next question which arises is in how far these unsatisfactory features in her evidence are affected by her conduct after the intercourse. According to her story she met Shikoshi within a few hundred yards of the scene of the alleged crime and made a complainat to him. She was then crying and in a distressed state and she requested him to accompany her. They proceeded in the direction of the place where her sister lived and on the way they passed the Campbells' place of residence where she entered and made a report to Mr. & Mrs. Campbell. She was still distressed. Thereafter she made a report to her sister who examined her and found semen on her thighs. She is supported in this evidence by these witnesses.

Strong reliance has been placed upon the report to the Campbells and Counsel for the appellant was at a loss to give any acceptable explanation which could minimise the effect of her having made this report. While it is undoubtedly a strong feature against the appellant it is by no means decisive. It appears to me to strike the appellant rather on the question whether or not he had intercourse with her than whether or not such intercourse amounted to rape. If, for reasons which are set out hereafter, the complainant had determined to extricate herself from the predicament in which she found herself by having had intercourse with the appellant voluntarily the fact

that / .

that she made the report to the Campbells loses much of its force. Such a report would obviously add very considerably to the weight of he story of rape in that it was made to persons who knew that she had left accompanied by the appellant shortly before the commission of the alleged assault. In any event, she had to pass the house of the Campbells' on the way to her sister's place of residence which was in very close proximity thereto. It may be assumed that she was distressed and that her distress was genuine but it may also be argued that if her distress had been extreme, as might have been expected in the case of rape, she would have gone direct to her sister to unburden herself of her calamitous experience.

I now come to the question whether the complainant may have had a motive for making a false accusation against the appellant. It is a matter of common knowledge that fear of discovery of the commission of the sexual act, even if voluntary, and of the consequences of the act itself, stirs in a woman a natural instinct of self-preservation and a very strong temptation to exculpate herself. The incentive to convert voluntary intercourse into rape is obviously very strong and may even be irresistable. The act of intercourse will in all probability have caused the complainant considerable pain and this fact coupled with a guilty conscience may have led

her /

led her to a full realisation of the seriousness of her conduct and of the dangers attendant upon an act to which she may thoughtlessly and upon impulse, have become a party.

A very powerful motive for blaming the appellant thus existed and she may have been prompted to do so by fear of ,

(a) pregnancy with the possibliity of the birth of a half-caste child of which possiblity she may have been warned, or which may have been brought home to her more forcibly, by his insistence that she should urinate ;

(b) a continuation of this relationship with the appellant if she were to take service with him.

(c) discovery of the fact that she had, had intercourse with a European which she knew was a criminal offence ;

(d) Discovery of her condition by her sister and/or her mother either of whom might have examined her.

In addition it is most improbable that the appellant would have raped the complainant in the circumstances. It was a moral certainty that, if raped, she would have laid a charge against him and it must have been present to his mind that the Campbells were aware of his association with the complainant and of their departure in each other's company very shortly before the commission of the crime. The place chosen for the attack was situated at a very short distance from the place where they had last been seen together and lay in the direction in which they had been seen to proceed / . . .

proceed.

There is the further fact that the appellant was on the way home to his wife who was expecting him and to whom he had been married only about a month previously. Whatever risks he might have considered reasonable if the complainant had consented, it is inconceivable that he would have courted almost certain disaster by imposing his will upon her. It may be said, however, that he may have been overcome by an irresistable impulse and overpowering passion which made him insensible to reason and that in this irrational condition he committed the crime. The answer is that the conduct of both the appellant and the complainant negatives any such conclusion.

If the views expressed above are correct it follows that the evidence of the complainant that she was raped cannot be sustained and the only question which remains is whether the appellant should be acquitted altogether or whether he should be found guilty of having had intercourse with a native female.

The Court a quo analysed the evidence of an alibi very fully and rejected it in toto, holding that, although the possibility might exist that the appellant was at Craig's boarding house at some time that evening, he was not there at the time at which, according to the complainant, he had intercourse with her.

While fully appreciating the force of this reasoning I am

never / . .

nevertheless of the opinion that the acceptability of this finding depends almost entirely upon the accuracy of the recollections of the witnesses both for the Crown and for the defence in regard to the time when the various incidents are alleged to have occurred. It is notorious that even the most honest and conscientious witnesses frequently give very positive estimates of time which are found to be at complete variance with actual fact and although the points of time were testified to by the witnesses with every appearance of precision and self-assurance the probability remains that at best they could only have been approximations. It would be unsafe to rely with confidence upon the infallibility of their recollections especially when the interval between the date of the alleged intercourse and the date of their testimony in Court is borne in mind. An error in placing an occurrence even a quarter-of-an-hour earlier or later may throw the respective contentions for the Crown and for the appellant completely out of gear and any such discrepancy may well be made more serious by reason of the distance between the points referred to in the evidence.

While on the one hand it is possible for the appellant to have reached Craig's boarding house more or less at the time stated by his witnesses, it is equally possible that he may have /

have proceeded straight to Craig's boarding house and to have arrived there within the time limits set by them. The same remarks apply to the complainant's departure from and return to the Campbells' house.

According to the plan the distance from the corner of Park and Afrikaner streets, if the nearest route along the streets were followed, is approximately 2,100 yards and the time in which this distance can be covered may lie within such wide limits that the contentions both for the Crown and for the appellant may readily be fitted into the picture. The fact of the matter is that the speed at which the appellant and the complainant proceeded is, at best, mere guess-work and the time factor should not be regarded as affording ideal material for the solution of the problem.

I am satisfied that at some time that evening and within the time limits testified to by the appellant and his witnesses he was at Craig's boarding house but this evidence does not exclude the possibility that he may have gone there after intercourse had taken place. On the other hand the Crown has failed to satisfy me positively that he was not there at the time when he is alleged to have had intercourse with the complainant.

If therefore the time factor were the sole test of his

guilt or innocence the appellant would, in my opinion, be entitled to his acquittal but there are other circumstances which must be considered before such a conclusion can be reached and the existance of additional facts throwing light upon the point must be probed.

It must be accepted that some person had intercourse with the complainant more or less at the time stated by her and the enquiry seems to be narrowed down to a choice between the appellant and Shikoshi as they were the only persons who are known to have been in her company more or less at that time. The first point which arises in this connection is the reason why the complainant should have decamped if the appellant's evidence of her desertion is true. There is the admitted fact that she was out of employment and it seems highly improbable that, after she had been engaged by the appellant,,she would have left him without good cause. Her explanation, that it was the conduct of the appellant which caused her to leave him, prima facie rests upon reasonable and firm grounds and does not lose its cogency even if she had consented to the intercourse because ample ground for her departure still existed.

Against this we have the possibility that Shikoshi may fortuitously have passed Craig's establishment while/he was waiting for the appellant , that he may have induced her to accompany him and that on the way they may have entered the sports ground and have had intercourse. Such a possibility is very remote and does not merit more than passing notice because apart from its inherent improbability, it furnishes no explanation for her determination not to take employment which had been accepted. It is equally improbable that her decision was prompted by an agreement to accompany Shikoshi and have intercourse with him.

There is nothing in the evidence to suggest that there had been previous undue familiarity between her and Shikoshi

and it is almost incredible that intercourse would have been decided upon at Craig's boarding house. If he had persuaded her to leave with the object of having intercourse they would have proceeded leisurely to enable him to adopt measures in order to prepare her and to make her more susceptible to his overtures. In order to bring such a possibility even very approximately within the time limits of the evidence of the Campbells it would postulate an immediate decision to desert, very fast walking, and hurried intercourse.

It further involves the proposition that after intercourse she and Shikoshi had on the spur of the moment conspired to implicate the appellant in order to divert suspicion from him and to account for her condition and the desertion. Such a theory presupposes a degree of ingenuity and intelligence not lightly to be assumed in natives of that type.

The Court a quo was impressed with Shikoshi notwithstanding the fact that he showed signs of considerable discomfort and embarrassment in the witness-box. His additions to the terms of the complaint to him and his introduction of the use of a revolver are points of criticism but in spite thereof the Court below accepted his evidence and the finding on this aspect cannot be disturbed. The conduct of Shikoshi in accompanying her to the Campbells' house and to her sister and his presence there while the reports were being made clearly justify the inference that he was not the person responsible.

I have not lost sight of the fact that no stains were found on the appellant's clothing but if the complainant had co-operated with him and care had been exercised, the soiling of his clothing could have been avoided. The fact that the doctor failed to find signs of his having had intercourse is not of very much significance.

While / . . . .

While the fact that the appellant was on his way home may have deterred him from raping the complainant, the point has not the same force when the question of intercourse by consent is under consideration. It is a matter which gives considerable food for thought but it is outweighed by the other circumstances referred to above.

The argument that a very strong motive existed for accusing the appellant of having raped her virtually disappears if the intercourse had been voluntary. A false accusation was fraught with very considerable risk as it must have been obvious to her that we had witnesses at Craig's boarding house who could summarily have disposed of her story by proving that at the time he was supposed to have intercourse with her he was in their company. He was a stranger to her and his reputation in the village may have been such as to make a charge of this nature fantastic. She was out of employment and he had been of service to her in engaging her.

It may be added that it is curious that he did not mention to his wife that he had employed a girl and that she had run away.

I have come to the conclusion that the appellant should be found guilty of intercourse with a native female, a competent verdict on a charge of rape.

The conviction / . . .

The conviction of rape and the sentenced imposed in the Court below are set aside and in substitution thereof the appellant is found guilty of a contravention of Act 23 of 1957 and the sentence is imprisonment with compulsory labour for four months.

(De Beer, J.A. Reynolds Et Price, A.JJ.A. Concurred).

ON RESUMING AT 11 A.M. ON 10.8.1957,

J U D G M E N T.

CANEY, J.: We are agreed on our verdict in this case. In the first place the onus is, of course, on the Crown to prove the commission of the crime and that the accused is the guilty party. It is for the Crown to prove beyond a reasonable doubt that the accused had sexual intercourse with the complainant and that this was without her consent. If there be reasonable doubt of either of these elements, the charge of rape is not established. However, the doubt must be a reasonable doubt not a fantastic one, not such a one as a weak person, unprepared to face fats, might conjure up for himself. In addition, being a cse involving a sexual offence, we have approached it in the full realisation of the need to exercise extreme care, of the need to scrutinise the evidence carefully and be assued in our minds that the complainant is not making a false charge. We appreciate the risks that are inherent in a case of this nature, and we have warned ourselves against falling into any error, so far as it is humanly possible. If we conclude that the complainant had a sexual experience on the occasion in question, we must guard ourselves, and have guarded ourselves, against being misled by her falsely charging the accused from some ulterior motive - to shield herself or someone else, to gain reward for herself or to obtain notoriety, or whatever it may be. Again, we must not be deterred from a realistic approach to the question by allowing ourselves to imagine a wicked motive on the part of the complainant.

There are three questions to be considered. The first is: did some man have intercourse with the complainant on the evening of the 17th April? The second question is, if the answer to that is in the affirmative, was it the accused? Thirdly, if the answer to that is in the affirmative, was this without her consent? Has that been established by the Crown.

As to the first question, we are satisfied that the answer is in the affirmative. Her evidence is of her having had intercourse on the evening in question in the tin shanty, as it has been termed, in the sports field, and her evidence is corroborated on this particular point by the evidence of the doctor who found a fresh tear in her hymen. In addition to that there were stains on her vest which she was using as a petticoat. She says, and her sister says, they were fresh stains, damp. The doctor saw these marks; they were sufficient to induce him to send the garment to the pathologist. The pathologist's report indicates that he observed some areas of discolouration on the garment. He ringed around one only and cut off a piece for examination, and that piece gave a positive result on examination, but he added: "This sain appeared an old stain" when he reported a positive result for spermatozoa. It is the positive evidence of conplainant and of her sister that the stains were fresh that evening, and the doctor was sufficiently concerned about them to feel they merited examination. The pathologist is not positive that the one stain he examined was an old stain, and he has not been called to give evidence to substantiate how old he supposed it to be. We are of the opinion

that there were fresh stains on this garment that night, and these, along with the doctor's evidence of a fresh tear in her hymen, corroborate her in her evidence that some man had had intercourse with her that evening. In addition, Detective Sergeant Bester, on visiting the scene that same evening, found moist places which could very well be the result of spit, and the complainant says that she had spat during the course of the incident in question, out of disgust. The fact that these moist places were found that very same evening goes to support her that an incident of this nature had occurred that evening. It is submitted, halfheartedly, on her behalf that when the detective sergeant saw the most spots she seized this opportunity to use them in support of her case, but she would need to be a very quick-witted young woman to seize on such an opportunity.

In addition, there is the fact of her weeping and almost hysterical condition, as Mr. Campbell described it, when she arrived at the Campbells' house. The boy, Shikoshi, Mrs. Campbell, Mr. Campbell and complainant's sister also spoke of her upset condition that evening. If this was feigned to build up a case founded on an earlier tear that day in her hymen, or on a previous day, it was amazingly conceived and carried out, without any apparent cause, for there is no reason to suppose, as Mr. Talbot suggested, that her mother was liekly to be examining her in the near future. She was away from home and now living and working in town, and it does not seem likely that there was any real possibility of her being called upon to explain

her condition to anyone. Indeed, part of his case was that it would be surprising if a girl of her age and circumstances was still a vergin. So, on the first question, we are satisfied that the answer is in the affirmative. Some man did have intercourse with the complainant on the evening of the 17th April in the tin shanty on the sports field.

Then I come to the second question: was it the accused? Now, it is common cause that the accused engaged the services of the complainant at the Campbells' premises late that afternoon, and the evidence of Mr. and Mrs. Campbell is that the accused and the complainant left their premises between 6 p.m. and 6.10 p.m. and that she, the complainant, returned to their premises between 6.45 p.m. and 7 p.m. The accused says that he left with her from the Campbells' place about 6.10 to 6.15 p.m.

Now, before coming to consider the evidence for the Crown in relation to what happened, I propose to consider and discuss the defence case, because if the defence case is sound, if it appears to be genuine and holds together, then the accused could not be guilty. The defence case is that at any such time at which this offence could have been committed, after the girl left the Campbells and before she arrived back there, he was at Craig's Boarding House and therefore could not hav been the man. He says that he left the Campbells, as I have indicated, at about 6.10 p.m. or 6.15 p.m., and that he was on his way home, taking the girl with the object of her being employed by his wife; he passed Craig's Boarding House where he had at one time been

a lodger, saw light in the window, and decided on a sudden to make a call at this place with a view to inquiring of Mrs. Maritz, who was in a pregnant condition. He decided to inquire about her condition because, he said, he and his wife had an interest in her, and he said he entered Craig's Boarding House, of which Mrs. Maritz was the proprietress, some time well before 6.30 p.m. because he recollected the radio time signal at 6.30 p.m.: so he left the Campbells, called in at Craig's Boarding House and did not, according to him, go to the sports field, and from Craig's Boarding House went home, where he arrived at about 7.15 p.m., finding his wife and his landlady and his supper waiting for him. And he says that when he went into Craig's Boarding House he left the complainant outside and told her to wait for him and when he came out she had gone; he looked around for her but was unable to find her. It is suggested by the defence that she very likely, while he was inside, met some male acquaintance with whom she had gone off, and had had intercourse. That, of course, is not for the defence to establish, but it is a suggestion. It may tend to support the defence case: here was the opportunity for her to have had intercourse with someone else. The accused had left her outside Craig's Boarding House, she was not there when he came out and he does not know what became of her. Anyway, he says he did not, indeed coult not have had intercourse with her because of the time factor in the case.

Now, it seems that leaving the Campbells, it would take something less than fifteen minutes walk to reach

the shanty on the sports field - something between ten and fifteen minutes, but perhaps nearer fifteen minutes if one were not hastening overmuch - and it seems that similarly to leave the shanty and get back to Campbells would take a similar period of time. It also seems that to walk from the shanty to Craig's Boarding House would take about ten minutes. Now, in the first place, there are important points of criticism of the accused's evidence in relation to this matter of his calling at Craig's Boarding House. He said that he entered the grounds and went through to Miss Nel's room, the sister of Mrs. Maritz, a young woman whom he had known in the past, and that he remained there with others in her room. I shall discuss later in greater detail who were present and the circumstances. Before leaving he had tea, which Miss Nel made, and he arrived home at 7.15 p.m.

The first point of criticism of this evidence is that it seems highly improbable that a man who had been married only a month, as had the accused, should have delayed to get home, should have dawdled at Craig's Boarding House chatting with Miss Nel and Mrs. Maritz, and drinking tea - he had already had tea at the Campbells - when his own suppertime was past and his newly wed wife was waiting for him. It seems strange conduct indeed.

Then, secondly, he said that the purpose of his visit at Craig's Boarding House was to inquire about Mrs. Maritz' condition because she was pregnant; he and his wife were interested in her. Yet his wife says he did not tell her anything about Mrs. Maritz' condition

when he got home. Indeed, she seemed not to be interested in her. She had heard rumours about her condition, but it did not seem to concern her very much. In addition, he did not even tell his wife he had been to Craig's Boarding House; he told her he had been with friends. And he did not tell his wife he had engaged a servant girl that very afternoon, who had run away. They had discussed employing a servant because at the end of the month they hoped to have a home of their own. Here he had engaged a girl and she had run away, and apparently, from what his wife says, it did not seem to him that he should mention it to his wife. Why? Was it because the association with this servant girl had become a guilty one and he preferred not to disclose his association with her? It might, of course, be mentioned later; the Campbells might mention it, and then the answer could be given: "She ran away" and it was then a matter of no concern. But if no one mentioned it, he had not admitted any association with her. These aspects do, in our opinion, amount to a serious series of points of criticism of his case in this regard.

Mr. Talbot suggested the real reason for his going to Craig's Boarding House and not telling his wife about it was some lingering past association with Miss Nel. There is no evidence to suggest that and I do not know that we should assume these things. If it were so, it would have been easy for the accused to have said so.

He called certain witnesses for the purpose of showing he did call at Craig's Boarding House and spent so much time there that he could not have been the

guilty party. He called Mrs. Lamprecht. She shared a bedroom with Miss Nel at this boarding house. She said she put through a telephone call that evening in relation to her younger son who had not come back yet from camp, and that is why she remembered the accused calling there that evening. The telephone call was timed for 6.45 p.m. but did not get through until shortly after 7 p.m.; she went into supper at six and came out at 6.10 p.m.; and as she passed along the passage she saw the accused in the pantry, talking to Mrs. Maritz at 6.10 p.m. or shortly after 6.10 p.m. She also speaks of his coming into her bedroom occupied by her and Miss Nel. In relation to her evidence that she saw him speaking to Mrs. Maritz in the pantry shortly after 6.10 p.m., in the first place he himself says he left Campbells at about 6.10 p.m. - he says 6.10 p.m. to 6.15 p.m. In the second place, he says he did not enter the pantry or any other room at Craig's Boarding House than the room occupied by Miss Nel and Mrs. Lamprecht, so that Mrs. Lamprecht's evidence of having seen him in the pantry very shortly after 6.10 p.m. has no value whatsoever, if there is any value in his evidence. He does not claim to have been in the pantry.

I pause to say in this regard, of course Mrs. Lamprecht is not necessarily a liar. She may have seen a man wearing a peak cap such as bus drivers, of which the accused was one, do wear, and she may have assumed that it was the accused. But at the very least she was mistaken. That evidence is of no avail to the defence. Then she goes on to say that the accused came into the bedroom with Miss Nel and Mr. Rabie, and as I understood,

the three of them came in together and joined her in the bedroom. This was before her call came through; how close to her call coming through is not clear. It does not necessarily mean that it was close, immediately on 7 o'clock, but she did give the impression that it was not as early as fifteen or twenty minutes beyond 6 o'clock, rather much later than that.

In any event, she says these three people came into her room. The accused - and in this Miss Nel corroborates him - says that he entered the room, finding the others in the room. He says he entered from the back, came along the passage, knocked at Miss Nel's door and entered, and there were Mrs. Lamprecht, Miss Nel and Mr. Rabie; so there is a point of contradiction there.

Then Miss Nel was called. I think I should say at this point that she did not impress us favourably. She appeared to be partisan in favour of the accused and to be seeking to go out of her way to assist him. She said he arrived in her bedroom at 6.15 p.m. or 6.20 p.m., and she said that he stood in the door and later sat on his haunches. Mrs. Lamprecht said he did not sit on a chair because his working clothes were dirty and he sat on the floor. Anyway, Miss Nel says they chatted and then afterwards Mrs. Maritz came into the room. She conceded that Mrs. Maritz had come in just for a moment, said "Hullo" and went away. The accused, on the other hand, said Mrs. Maritz came in, stayed a while and chatted to him. This is a further point of contradiction.

Now, it is the case that later that evening when

Detective Sergeant Bester came to the accused and told him why, namely that a native girl had laid a charge against him and asked if he knew anything about it, he said to Detective Sergeant Bester: "Yes, I did engage one" - there is a conflict between him and Detective Sergeant Bester about what he said as to the circumstances of her departure - but he did tell Detective Sergeant Bester that he had been to Craig's Boarding House. He says he told Detective Sergeant Bester that he went to Craig's Boarding House and when he arrived there the complainant ran away and that was the last he had seen of her. I will discuss that aspect later, but the point at the moment for consideration is this: that he did not say to Detective Sergeant Bester: "Oh, this is nonsense, I left with this girl from Campbells and went to Craig's Boarding House, I left Campbells at 6.10 p.m. and was at Craig's Boarding House before 6.30 p.m." The story he was telling Detective Sergeant Bester was not one to indicate that the charge was unfounded, that there had been no opportunity for anything untoward or the commission of any such crime; only was it an admission that he had been in the company of a native girl but she had run away and he had seen no more of her. The comment is that he did not say then and there to Detective Sergeant Bester what he has told us, namely that, according to him, it was not possible for this crime to have been committed by him. It is not unlikely that he did call at Craig's Boarding House, but the evidence, as I have indicated, does not hold together, does not satisfy us that he went direct from Campbells to Craig's Boarding House, and that he was

there for the length of time that he would have us believe. Not only has he not satisfied us, but that is not a reasonable possibility on the evidence as put forward. He has not produced such evidence as would merit the conclusion that there may perhaps be something in this. On the contrary, the evidence breaks down, so that it does not leave us in a state of mind - a doubtful state of mind - that perhaps there is something in this and that he should have the benefit of it. On the contrary it leaves us satisfied that this,what has been termed an alibi, is unfounded. We conclude that he was not at Craig's Boarding House in the circumstances and for the length of time that he says. If he did go there, as seems quite possible, it was very much closer to 7 o'clock, probably at about the same time that the complainant was arriving back at the Campbell's house, and there was consequently sufficient time for him first, before going to Craig's Boarding House, to have committed the crime. Whether he went to Craig's Boarding House for the purpose of creating an alibi is a question which crosses one's mind. It may be; one cannot answer that until one has considered the evidence for the Crown. On that aspect of the case, consequently, we are satisfied that it was possible for the accused to be the guilty party.

Now I come to examine the evidence for the Crown. Firstly I should state our impression of the complainant. She appeared to us to be a simple, country girl, not a brazen hussy. She gave her evidence in a straightforward manner, she was not confused, she did not appear to be hedging. She was subjected to a searching

cross-edamination and we also examined her with the object of testing, as far as we could, the truth of her story, and we came to the conclusion that she was speaking the truth. Mr. Talbot criticised her evidence in a number of respects; he drew attention to a number of small points of criticism and he suggested their cumulative effect showed her to be completely unreliable. But what were these points of criticism? In the first case he said that if her story was true of how the accused took her to the shanty, she had opportunity to run away at the time she said he went to urinate; and also opportunity to injure him; she could shouted and screamed to attract attention; why did she not do these things? At the end when he told her to urinate and she first demurred and then went off to do so, she returned to pick up her suitcase; whey return to pick up her suitcase when she could run away and leave it, asked Mr. Talbot. We do not these are valid points of criticism, bearing in mind the circumstances. Here we have a young woman, no more than a young, simple girl from the country. If her evidence was truthful, she was there with a fullgrown man, her employer, newly engaged by him, a European in a lonely spot, at night. She was at his mercy - she, an inferior, at the mercy of a master, a person commanding and in authority, and, according to her, he threatened to shoot her. He may not have meant to do so but it was sufficient to overawe her. He grasps her wrists, forces her over backwards on to the coat he had shed. What could she do, if one puts oneself as far as possible in her position? If she fought back or screamed, what help

could she get? She was held firmly in his grasp and he was a European, her employer and a person in authority. She said: "I was afraid to strike a European". That has the ring of truth. But, said Mr. Talbot, she said there was a mark on her wrist where he had gripped it, but the doctor did not see it; how was that if she was speaking the truth? Again, one must look at the matter subjectively. To her that was a sore spot, to the doctor nothing to observe. Mr. Talbot asks: Why not point it out to him? But it was not an open wound. What was there to point out? But to her it was sore. Moreover, hours had elapsed between the incident and her going to the doctor. Then again, the doctor did not see semen on her thigh; she said she felt it. From the sports ground she had walked to the Campbells, from there to her sister, from there to the police, she had been taken by the police in the van to the sports field, she had walked across the field, then back in the van to the police station and she saw the doctor at about 11 o'clock. There seems to us every opportunity for the semen, this sticky mess which she said was on her thigh, to have rubbed off and been absorbed in sweat, or dried. It does not necessarily follow, it seems to us, there should have been something there to be apparent to the doctor.

The other point of criticism Mr. Talbot raised was in relation to the nature of the floor. Detective Sergeant Bester said it was a hard floor and she at one point in her evidence was asked whether it was a beaten floor or not, and she said it was not and gave the impression it was a soft floor, but I do not think it

follows from that she meant a soft, sandy floor. She said she saw her footmarks. She may have thought she saw them. Detective Sergeant Bester did not see any footmarks. At night, looking with a torch, one may think one sees marks which appear like footmarks. She gave the impression that either sand or mud - a little only - got on her clothes. She showed how she flicked it off near her shoulder. The shanty is under a roof but one side is open and she said it had been raining heavily that late afternoon and evening - the rain had beaten in to some extent. Detective Sergeant Bester agreed that on the open side of the building the rain had entered to some extent. It may have been possible that a little mud or something got on her clothes, or that she thought it was there. It is not possible to brand her a liar because of that. She flicked, in the course of her evidence, in such a fashion as one would expect a person to do who had been prone; one would probably brush one's clothing whether or not one knew that any sand or dust had got on. One would do it as a precaution in the normal way, with the object of ridding oneself of it.

Then she was much criticised for her description and demonstration of how the accused shed his coat - the dust coat. She indicated that, holding her wrist with one hand, he slipped his other arm out of the sleeve and then, holding her wrist with his other hand, he slipped his other arm out of the sleeve. We thought her demonstration was a realistic one. Mr. Talbot thought it was fantastic. It appeared to us to be just how one would shed a garment if one's one hand was

engaged in holding something. In relation to this, we do not consider that there is anything fantastic in her evidence or demonstration, nor any reason to suppose from these that she is not truthful and reliable. And it occurs to us, if she were concocting a case, it would have been a perfectly simple matter for her to have said, when the accused returned from urinating, as she said he was doing before committing this crime, that he came with his coat off, that he had removed it; or when he entered the shanty he removed it before approaching her. It would have been, if she was an untruthful witness and concocting a story, a very easy story to have told. But she told this other story which Mr. Talbot criticises but which to us appears not to merit his criticism.

Those, I think, are the main points of criticism raised by Mr. Talbot, and I think I have indicated that we did not find them valid points of criticism but unfounded. We find that the fact of her return to the Campbells' house is an important and valuable piece of corroboration of her evidence. Why should she return to the Campbells' house if it were not that the man with whom the Campbells had put her in touch was the man who had committed the crime on her that night? - unless we must conjure up a deep laid plan by this simple girl from the country to pin this on the accused, for no real reason which appears. This is not a case of a man and woman being caught in the act and the woman having to pretend to a rape in order to save her honour. This does not come within the many types of cases in which one can readily suppose that a woman

might, in her own interests, tell a false story. Here this girl quite spontaneously goes back to the Campbells' at whose premises she had come in contact with the accused. It is a very strong piece of evidence that= he was the man who had done this to her. She was not obliged to make a report to anybody. If she had an affair with a lover, what had it to do with the Campbells? She had not to report to her sister who never examined her before; she was away from her mother; why go to the Campbells if not for the reason that this was the man?

The defence did suggest the possibility of some other man, some lover, perhaps Sikoshi, who was employed in the same place in which the complainant and her sister had formerly been employed, the place which they had left but a few days before. She met this man after she had left the sports field and made to him what is usually termed a complaint. Is it perhaps the truth that she had a love affair with him that evening and they concocted this story to pin it on to the accused? Why should they? There was no obligation upon either of them to account to anybody, they had not been caught in the act, and, of more importance perhaps, when it was put to this witness Sikoshi, had he had a love affair with this girl, he was patently honest when he denied it. He had shown signs of nervousness in the witness box in the earlier part of his evidence, for what reason one does not know, but he settled down and gave his evidence straightforwardly. When this was put to him, I observed him, and the learned assessors also did so. I made a point of

the Campbells. He made mention of a revolver, whereas there is no suggestion that the accused had a revolver or that the complainant saw any revolver. It may well be a perfectly simple thing for a native, indeed for any witness, to assume, when a European threatens to shoot, as he may well have been told by the complainant, that this involves a revolver. We do not think that the differences between her evidence and his evidence as to the terms of the complaint in any way detract from its value or the value of the Crown evidence.

Mr. Talbot emphasised that the accused's clothing was unstained, showed no marks suggesting a crime on his part. It was handed to the detective sergeant that same evening and there appeared to be no reason to send it to the pathologist. Here, if the complainant's story was true, was a married man having an affair with a girl on his way home. It is a certainty that a married man in those circumstances would take every possible step to ensure that on arrival home his clothing would be free of stains or marks which would arouse the suspicions of his wife. The fact that the accused's clothing was free of stains does not, in all the circumstances of the case and in the light of the complainant's evidence and other features to which I have referred, have that value for which Mr. Talbot contended.

There is one other aspect to which I must go back. I mentioned earlier that there was a difference between the evidence of Detective Sergeant Bester and that of the accused as to what the accused told the

detective about the departure of the girl that evening. The accused says he told Detective Sergeant Bester the same as he told us, that when he came out of Craig's Boarding House the girl was not to be found, and of course, if that were the truth, it would lay open the implication that she had very likely, or at any rate very possibly, met some male acquaintance and gone off with him, and hence a sexual affair between them. But that is not what Detective Sergeant Bester says the accused told him that night. Detective Sergeant Bester says the accused told him that the girl ran away when they arrived at Craig's Boarding House. He was accounting for the cessation of any association between him and the girl. He had engaged the girl in the afternoon, and he was bringing her home; he called at Craig's Boarding House and when he arrived there she ran away. That is quite a different story from what he is telling now. We accept Detective Sergeant Bester's evidence. This is not a case of the sergeant being mistaken as to what the accused had said. His recollection of it is in accordance with the explanation likely to be given by the accused at the time. He was not at that time setting up an alibi, he was merely accounting for the departure of the girl, the cessation of his association. Today he is more concerned with two things: the one, to establish the alibi, and the other, to show that there was opportunity for the girl to have had a sexual affair with somebody else. If we accept Detective Sergeant Bester's evidence, as we do, then the accused is untruthful, he has changed his story. That means that he is a liar.

We were not impressed with the accused as a witness. He hedged about times and his evidence in relation to Craig's Boarding House was not true, other than that he in all probability did call there after the commission of this crime, and, we infer, with the purpose of creating an alibi, to support which it may have occurred to him to call ostensibly to inquire about Mrs. Maritz. The fact is that we accept the Crown evidence and we find consequently that the answer to the second question is also in the affirmative. It was the accused who had sexual intercourse with the complainant on the evening of the 17th April.

I come now to the third question: has the Crown established that the intercourse was without the consent of the complainant? I have already indicated the position the complainant was in; she was not in a position effectively to oppose the accused by force, she could do no more than express objection; she was dominated by a superior, how could she strike a European? How could she effectively oppose him when he pressed his will upon her? She could only submit. He had no reason to suppose that she was a consenting party. We accept her evidence that he did say he would shoot her if she cired out or shouted, and that was sufficient to influence a girl such as she is, whether or not he really meant it, for she was not to know he did not. She was a young girl in the company of this man,much her senior, a man who was in a position of master and, furthermore, a European. We come to the conclusion that the Crown has established the answer to this question in the affirmative. The accused did have inter-

course with her without her consent, and the consequence is we find the accused guilty of the crime of rape, as charged.

MR. TALBOT having addressed the Court in mitigation of sentence -

SENTENCE.

CANEY, J.: The responsibility for the sentence is mine alone. The Court has found you guilty of rape. That, in the eyes of the law, is a very serious crime. In the circumstances of the present case there is till greater seriosuness attaching to it because you were in the position of a master towards this girl, and in addition you, a European, committed this upon a native girl. As you know and as we all know, in this country intercourse between white and non-white is anathema. Parliament for that alone has provided heavy sentence. On the other hand, you are a young man. I take that into account in your favour and in this I agree with your counsel that this was not a planned affair. You were walking along at night with this girl, here was this ground and the desire overtook you and you yielded to it on impulse. In addition there has been no lasting damage to the girl. In the circumstances of her way of life she will not suffer materially, either physically or mentally. I have to send you to prison. Parliament has also laid it down that I am obliged to impose corporal punishment, whether I wish to do so or not.

The sentence is one of 5 (five) years' imprisonment with conpulsory labour and a whipping of 4(four) strokes with the cane.
