83/1959

G.P.-S.1568732—1956-7—9,000. S. U.D.J. 445.

83/59

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

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

REGINALD P. MOORGAS
Appellant.

versus/teen

THE QUEEN.
Respondent.

Appellant's Attorney —
Prokureur van Appellant

Respondent's Attorney
Prokureur van Respondent

Appellant's Advocate A. Mendelow
Advokaat van Appellant

Respondent's Advocate S. A. Visser
Advokaat van Respondent

(Leave N P D) *Set down for hearing on:* Thursday, 12th November, 1959.
Op die rol geplaas vir verhoor op:

(B)

3.79

Coram: de Beer, Ogilvie Thompson et Botha

C. A. V.

Postea: Monday 7th December, 1959

Appeal succeeds. Conviction and sentence set aside.

W. P. van Rensburg
Rep.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

REGINALD PARASURAMEN MOORGAS ..... Appellant

versus

REGINA ..... Respondent.

Coram: De Beer, Ogilvie Thompson JJ.A et Botha A.J.A.

Heard: 12th November, 1959. Delivered: 7/12/59.

J U D G M E N T

DE BEER J.A.:

The appellant, an Indian Constable in the South African Police, stationed at Clairwood Police Station, appeared before the Durban Regional Court on a charge of indecent assault. It appears that on the evening of the 22nd June, 1958 the appellant was on duty at the station as Charge Office Sergeant when Native Detective Sergeant Caleb Sithole arrived there at about 9 p.m. with two native detainees, a woman Christina Malinga and a male Joel Ngidi, against whom he preferred a charge of theft. Ngidi who was under the influence of liquor became boisterous and abusive; he was immediately removed to the cells where he

was ...../2

was locked up. After certain particulars about the woman had been elicited and reduced to writing she also was removed to the cells and the subsequent events in which she figured as the complainant, resulted in the conviction of the appellant and the imposition of a sentence of six months imprisonment with compulsory labour. An appeal against the conviction and sentence to the Natal Provincial Division was dismissed and the matter now comes up before us, leave to appeal having been granted by the Provincial Division.

The charge which the appellant had to face in the Regional Court was to the effect that he on the evening in question "did wrongfully and unlawfully, indecently and lasciviously assault Christina Malinga by lifting up her dresses; pulling down her bloomers; placing his penis between her legs and emitting semen".

The evidence of the complainant and the appellant [illegible] clashed from the commencement of their testimony. The complainant states that after the appellant completed his notes he instructed her to collect a sanitary pail and place it in her cell: he proceeded to guide her to the spot where she expected to find the pail but [illegible] instead she

found ...../3

found herself in a passage leading to the lavatory and there were no pails there. Instead he approached her, informed her that he "likes her" and suggested intercourse. She refused whereupon he caught hold of her by the shoulders, kissed her, pressed her back against the wall and committed the offence as outlined in the charge. She struggled but, having an incapacitated right hand which had been injured in a fracas with another woman, she could not stave him off. She called out for help and the appellant attempted to pacify her with the offer of some tobacco. She continued shouting and an Indian Constable Baba came to the appellant's assistance in placing her in the cell. She struggled violently and refused to go to the cells demanding to see a doctor and a European sergeant as she desired to lay a charge against the appellant. About this time Sergeant Sithole returned and found the complainant struggling with the appellant and Baba at or near point "E" appearing on the plan: when Sithole heard the expression "you can't rape me like this - I want to make a report to a European sergeant " - he ordered the men to release her. She pointed out the appellant as the man who had assaulted her and she was excited and crying.

The ...../4

The appellant denied the assault adding that she was being taken to the cells by force as she had attempted to escape. Sithole phoned up his chief, Detective Sergeant Kruger, and reported the matter. Sergeant Kruger arrived there as did the Station Commander Coetzee who came in consequence of a phone call from the appellant.

The appellant's version in brief is to the ~~[illegible]~~ effect that as he and constable Baba were taking the complainant to the cells the telephone rang in the charge office and Baba returned there to attend to it. He then instructed the complainant to take up a sanitary pail for use in the cell: she pointed out that as such a pail was likely to be offensive she sought permission to use a lavatory situate in the yard instead. The appellant gave his permission and directed her to the lavatory: she ignored his directions, he followed and informed her she was going in the wrong direction and when she simply ignored him again and continued walking he realized that she was attempting to escape. He grabbed her and called for help. Constables Baba and Ramiah Madramutho came to his assistance and whilst they were removing the struggling woman to the cells Sergeant Sithole

arrived ..../5

arrived and phoned up Detective Sergeant Kruger whilst the appellant phoned up the Station Commander Sergeant Coetzee. These European sergeants took the appellant into another room where they examined his clothing and his body.

From the judgment of the Regional Magistrate it appears that he fully realized that offences of a sexual nature "required special treatment" - per Watermeyer C.J. in R. v. W. (1949 (3) S.A. 780) and it was from that angle that he approached the problem. Mr. Mendelow in an arresting argument however contended that what the trial Court considered to be features corroborative of the complainant's evidence, ~~failed to comply with the test in that those features~~ were not wholly inconsistent with the possible innocence of the appellant. I shall deal with this contention at a later stage but in passing would stress that in view of the conclusion arrived at by us, I find it unnecessary to deal with the evidence ~~in~~ in detail as all material points were fully canvassed in the course of argument.

In justifying the expression that cases of a sexual nature require special treatment the Chief Justice in R. v. W. (supra) stated "that charges of the kind ~~that~~ are

generally difficult to disprove, and that various considerations may lead to their being falsely laid". In this connection SCHREINER J.A. stated in R. v. Rautenbach (1949 (1) S.A. 135 at p.143) that:- "Experience shows that especially in cases of sexual assault the impression made by the complainant on the jury or other trier of fact is likely to be a major factor in the decision. It is a class of case in which, under the English practice, it is the duty of the judge to warn the jury of the danger of convicting upon the uncorroborated evidence of the complainant (Halsbury (Vol.9, sec.314); Rex v. Freebody (25 C.A.R. 69)). Although I have found no full discussion of the matter in any South African decision, judges do generally, and in my view properly, direct juries on the same lines (cf. Papla v. Rex (1946 N.P.D. 309) and Rex v. M. (1947 (4) S.A.L.R. 489)). It is not only the risk of conscious fabrication that must be ~~guard~~ guarded against; there is also the danger that a frightened woman, especially if inclined to hysteria, may imagine that things have happened which did not happen at all".

To return then to the contention so strenuously advanced by Mr. Mendelow that there ~~must be~~ ought to have been corroboration and

that ...../7

that on a proper analysis of the so-called circumstantial features, it will be found that they were either not corroborative features at all, or they were not wholly inconsistent with the appellant's possible innocence. I am not satisfied that counsel did not overstress this aspect for, as pointed out by DAVIS A.J.A. in R. v. de Villiers (1944 A.D. 493 at pp. 508/9) :-

> "The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence."

However/.....8.

However that may be, in sexual cases the salutory rule has emerged that the Crown usually proffers corroboration which in sexual cases takes the form of evidence describing the scene of the assault, whether signs of a struggle were found, whether on examination by a doctor any injuries were found, whether her clothing was torn, whether she exhibited signs of distress, whether she reported the assault at the first available opportunity and the like. In many cases where the new technique of the raptor is applied, namely to terrorize the woman into complete submission with some lethal weapon, most of this type of evidence would necessarily be negative and the application of the cautionary rule as indicated by WATERMEYER C.J. in R. v. W. (supra at p.780) becomes even more imperative: but corroboration is not essential.

The main features relied on by the Crown as tending to prove that the complainant was a truthful witness were that when Sithole returned he found the appellant and Baba struggling with her in an attempt to force her into the cells whilst she was shouting "You can't rape me like this.

I want to see a European; I want to make a report to a European". In reply to these two points Counsel urged that, if as contended, this was a trumped up charge, she would not necessarily have simulated distress and called out for help and that in the circumstances it takes the case no further.It was also urged that the complainant, a highly urbanised type who dresses well, wears high heeled shoes, smokes and drinks, may indeed have been distressed because the appellant followed her to the lavatory and, when he caught hold of her, treated her pretty roughly in dragging her back and attempting to force her into the cells.

Then on an examination of the person and clothes of the appellant, that portion of his penis exposed on retraction of his foreskin was found to be wet and the inside of his fly bore white stains which appeared to be fresh seminal stains. These stains the magistrate in his judgment described as being wet. The stains were pointed out to the appellant who proffered the explanation that the stain on his fly was the result of intercourse he had had with his wife at 1p.m.prior to coming on duty:the point of his penis was wet with urinary residue as he had been to urinate shortly before the examination.The white stains on the fly

of.... .../10.

of his trousers, an absorbent material, could hardly still have been wet at 9 p.m. - some eight hours later. To this time factor the mind of the Regional Magistrate was specially directed. In evidence Sergeant Coetzee was asked whether the stains were fresh and he replied "Well, they were white and they appeared to be quite fresh. The front part of the accused's penis was <u>also wet</u>". The italics are mine. At the conclusion of the appellant's evidence the following questions were put by the Court and elicited the following replies.

> " Do you agree that if when the police saw those semen stains, assuming they were wet, they could not have been caused nine hours previously? --- Yes.
> Do you agree with that? --- Yes."

This aspect figures prominently in the finding and if unassailable constitutes most damning evidence against the appellant. The reply given by Sergeant Coetzee implies that the record was incorrect where he states that the "stains were white and his penis was also wet." It suggests that the word "white" was mistakenly used for "wet". With a view to clarifying the position the Registrar on the Court's instruction verified the position and it appears that the word used by Sergeant

Coetzee ...../11

Coetzee was white and not wet and this point which would have been virtually conclusive against the appellant simply vanishes into thin air. Also no medical evidence was produced to show that the wetness on the appellant's penis was not merely urinary residue; although the appellant's trousers ~~xx~~ were removed, again there is no evidence to guide the Court on the question whether the "fresh stains" may not in fact have been eight hours old.

It was stressed by the Crown that the appellant was an untruthful witness as evinced by the following. He stated on oath that when Sithole handed over the complainant to him in the charge office he was warned to be"careful - she is a very dangerous person". This was flatly contradicted by Sithole who states that he had told the appellant not to allow anyone ~~not~~ to interfere with the complainant, and, under cross-examination, explained that he did so because on a previous occasion a conviction had been quashed because some member of the police had interfered with the investigation. This denial and statement by Sithole was accepted by the Regional Magistrate and I find no reason to differ. It may be noted that the attorney appearing for the appellant

put ..../12

put it to Sthole that he had admitted in the presence of the Station Commander to stating that "the complainant was a dangerous character". When Sithole denied this it was stated that the Station Commander would be recalled to contradict him. This did not materialize and I think Sithole disposed of the matter by remarking that any such statement would be untrue because the complainant was unknown to him. The appellant's evidence was also stated to be untruthful when he stated that the complainant was dragged to the cell because she had attempted to escape, well knowing that it would have been impossible for her to scale the six foot high wall surrounding the station yard. Also the appellant had been untruthful when, through his attorney, he suggested that the complainant was in fact intoxicated. The false evidence given by the appellant on these points are undoubtedly factors to be considered in weighing up the evidence as a whole, but our attention was once more directed to the dicta appearing in R. v. Nel (1937 C.P.D. 327 at p.330) and R. v. du Plessis (1944 A.D. 314 at p. 323) where DAVIS A.J.A. stated :- "And I would point out the danger, in such a case as this, of allowing what is at

the ..../14

the most a makeweight, such as the untruthfulness of the accused, to loom too large and to take the place of other essential evidence". And this is especially the case where the accused is under arrest or where he realizes that he is under suspicion; although in a case such as the present more weight could be attached to untruths emanating from an accused where he is a constable of thirteen years standing.

Further when Special Matron Coetzee examined the complainant the latter was instructed to place her palm on her private parts and when withdrawn the palm was seen to be damp. It may well have been semen but in that case one would have expected to see seminal stains on the bloomers which were readjusted immediately after the alleged assault. Once again there is no medical evidence in support of the suggestion that the dampness was due to semen and no examination of the bloomers was conducted.

But in addition to all the surprising hiatuses in the Crown case there are the following factors to be considered. The story that a constable should, within the precincts of the station yard and within 25 yards of the telephone to which Baba was attending, attempt to rape a woman simply does

not ..../14

not sound probable - the more so when there were at least two other constables at the charge office and when it could reasonably be expected that Sergeant Sithole who was out investigating on a motor cycle could return at any time to store the motor cycle. Then also the fact that the appellant who was in charge of the station should leave his post for an unlimited time with the object of raping a woman is strange indeed. The resistance offered by the woman must also carry considerable weight. She was by no means a weakling: it took two constables to drag her to the cells and yet she managed, in spite of her injured ~~hand~~ right hand, to break away and make her way to the charge office. Yet she wishes the Court to believe that the appellant, whose height was about the same as hers, took her by the shoulders, pressed her against a wall and whilst she was in a standing position, he managed to lift her dress and petticoat, pull down her bloomers, insert his penis between her thighs and keep moving until he ejaculated. She had sufficient strength to break away from the two constables. Surely she could have been able to push down her dress or take hold of her bloomers and pull them up and thereby prevent the assault; or she

could ..../15

could have merely leant forward or pushed the appellant away with her left hand. She states that she "resisted most violently". No marks or bruises appear on her body; no article of clothing was torn. [redacted] I do not propose referring to the discrepancies in her evidence or such matters as the failure to call Baba as a witness or to any of the other questions raised, as, to my mind the Trial Court should, on what has been set out, have entertained a reasonable doubt about the guilt of the appellant and the appeal thus succeeds with the result that the conviction and sentence are set aside.

E.M. de Beer.

(Signed) E.M. DE BEER.

OGILVIE THOMPSON J.A.)
BOTHA A.J.A. } concur.