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Case No 30/1985

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

KURT BALHUBER Appellant

and

THE STATE Respondent

CORAM: BOTHA, VAN HEERDEN et JACOBS JJA

HEARD: 18 AUGUST 1986

DELIVERED: 25 SEPTEMBER 1986

JUDGMENT

/BOTHA JA

BOTHA JA:-

The appellant was convicted in a Regional Court of rape and sentenced to 6 years' imprisonment. He appealed against his conviction and sentence to the Transvaal Provincial Division, which (per SPOELSTRA J, KUPER AJ concurring) dismissed the appeal against the conviction, but reduced the sentence to one of 4 years' imprisonment, of which half was suspended on certain conditions. The appellant was granted leave by the Provincial Division to prosecute a further appeal to this Court against his conviction and his sentence.

The scene of the alleged offence was a flat in Hillbrow, Johannesburg. The complainant in the case lived there, on her own. At the time she was a young woman of 22 years. She was unmarried, but she had had a child. At the time of the alleged offence she had a steady relationship with a male friend, with whom she consorted on intimate terms. She is a German immigrant

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to this country. So is the appellant. He was at the time 24 years old and unmarried. His defence against the charge brought against him by the complainant was that she had consented to intercourse.

The complainant's account of the events on the night in question, as first given by her in evidence, can be summarised as follows. She went to a night-club near her flat at midnight, in the company of some German friends of hers. She was standing at the bar when the appellant, whom she did not know, approached her and began a conversation. Inter alia he told her how lonely he was, that he had problems with girls in this country, and that girls did not seem to like him. She was apparently sympathetic and told him that there must be a reason for that. After a while, however, she became bored. As it was about half past twelve and as she had to go to work the next morning, she decided to leave. The appellant offered to accompany her home,

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but she told him that that would be stupid, because she lived only two blocks away. He nevertheless insisted on walking with her. When they arrived at her flat, he said that he wanted to continue their conversation. She replied that he could come up to her flat for one cup of coffee, but that he would have to go after that. In the flat, he talked about problems he had with his family. After a while she went to the toilet, and when she came back he tried to hug her. She told him to stop it and that he must go. He then told her that he had nowhere to go. She said to him that he could sleep in "that other bed" - there were two beds in her flat, one near the toilet and one near the window, and apparently she pointed to the one near the toilet. Having said that, she went into the toilet, undressed, and put on her pyjamas, consisting of a top and pants. When she returned to the room, he was lying on the bed near the window ("my bed", she said). He was naked. She told

/him ...

him to leave. He became angry and accused her of being "just like all those other girls, no one likes him", whereupon she told him that it was no wonder no one liked him. He then ripped off her pyjama pants. She wanted to scream, but he started to strangle her and told her that if she did not stop screaming at once, he was going to kill her right there. She then kept quiet. At this point her evidence reads as follows:

> "Then he raped me and then he made me touch his penis and he made me masturbate with myself, he made me do oral sex, he hit me in the face when I did not want to do it ..... He actually got more cross because he did not get any reaction."

She wanted to get up but he assaulted her by hitting her back onto the bed, and he said she was not going anywhere. She told him that she was just going to put off the lights, whereupon he let her go. She went into the toilet and got dressed. She peeped through the door and saw that his eyes were closed. She left the flat, ran

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up the street, and hailed a taxi, which took her to the Hillbrow police station. She told two policemen at the desk of the charge office that she wanted to make a statement. They took her to Sergeant Smith, to whom she made a statement.

That, then, is the gist of the complainant's evidence, as it was given at first. I shall refer later to other details of what she said, particularly under cross-examination.

The policeman to whom she spoke first at the police station was Constable Kent. He testified that she arrived at the police station at about 6 o'clock in the morning. She was in a state of shock. She tried to tell him what had happened, but he could not understand what she was saying. She was too upset to talk. He called his colleague, Constable Vermooten. (Vermooten passed away before the trial.) The complainant spoke to Vermooten, who told Kent to take her to the detectives.

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He took her to Detective-Sergeant Smith. She told Smith that she had been raped. Having obtained the address of her flat, Kent and other policemen went there. The time was about 06h15 or 06h20. In the flat they found the appellant in the bed, fast asleep. According to Kent there was only one bed in the flat. The appellant was woken up. He was dressed only in his underpants. He was asked whose flat it was, whereupon he replied that it was his flat. Kent looked around in the flat and found only women's clothing, except for a pair of trousers lying on the floor. When the appellant was told to get dressed, he put on a pair of denim trousers, but he managed to do so only with difficulty. On being questioned about the men's trousers on the floor, the appellant denied that they were his. Kent took those trousers along to the police station when the appellant was taken there. It then transpired that the denim trousers that the appellant had put on, were in

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fact the complainant's. Kent said that when they arrived back at the police station, the complainant was still in a state of shock. When she saw the appellant, she again burst into tears.

Detective-Sergeant Smith testified that when the complainant was brought to him from the charge office, he noticed that she was in a state of severe shock. She told him that she had been raped, but she was too shocked to speak properly. He offered her a cigarette in order to calm her. She then made a proper report to him, whereupon he despatched Kent and Vermooten to her flat to arrest the appellant. He then took down a statement from her, and afterwards he took her to the district surgeon to be examined. The district surgeon was not called by the State. (I shall refer to this aspect of the case again at a later stage.)

The appellant's evidence was brief, both in chief and under cross-examination. He said that he

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went to the night-club at about 12 o'clock. He had something to drink, then saw the complainant and went to her. She was also drinking. They entered into a conversation. He knew her. In fact, some months before they had had intercourse with each other after he had met her in the bar of a club or an hotel. As to the conversation on this night, he could not remember what he and the complainant spoke about, because he had had too much to drink. After about an hour the two of them went to her flat, she having invited him to have a cup of coffee there. In the flat they talked for a while and then they started kissing each other. She went into the bathroom to put on her night-clothes. He undressed himself and lay down on the bed. She came from the bathroom and joined him in bed. Then they had sex together, "normal sex", and they both enjoyed it. They had full intercourse. Afterwards, he fell asleep. Later (he could not say

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how much later) she woke him and told him to get up and get out of her flat, because he was too drunk. He objected, saying: "First of all we slept together and now you want to throw me out." He was angered by her conduct because she had said, "in a very mean sort of way, 'Get out of my flat.'" He wanted to continue sleeping. She then slapped him, and he retaliated by slapping her. He fell asleep again, and was woken up when the police came. He denied that he had forced the complainant to have sex with him, that he had torn her pyjama pants off, that he had choked her, and that he had threatened to kill her. There were no problems between the two of them until after the act of intercourse. He offered no explanation for the fact that she objected to his being drunk afterwards, while she had not done so before. He could not give an explanation for the fact that she had gone into the bathroom to put on her pyjamas prior to having intercourse. He

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said that, because of his drunken condition, he could not recall the events quite clearly before he became annoyed with her, when she wanted to chase him out of her flat, but that he could remember clearly what happened after that.

After the appellant had testified, Detective-Sergeant Smith was re-called and asked about the appellant's condition when he was brought to the police station. Smith said that the appellant smelt of liquor and that he noticed that he was under the influence of liquor, although the appellant carried on a normal conversation with him.

The Magistrate in his judgment discussed the evidence in the case from two points of view: the credibility of the two main witnesses, and the probabilities flowing from their evidence. Having summarised the evidence, he commenced his discussion of it by remarking that the most important question to be decided

was the question of credibility. He proceeded to pass some remarks of a general nature about the assessment of witnesses' credibility and their demeanour and conduct in the witness-stand, and then turned his attention to one particular criticism which had been levelled against the complainant by the attorney who had defended the appellant. That criticism was, with reference to the fact that the complainant was crying from time to time as she gave her evidence, that she "was able to turn on tears at will". The Magistrate found this "allegation" to be "completely unfounded". He dealt with it at some length, mentioning inter alia that the complainant had started to cry in her evidence in chief, and observing that it was "extremely significant and also important" that the "state" in which she was, became "intensified" when she testified about the appellant's attempt to force her to commit what the Magistrate referred to as "the unnatural sexual acts" with him (these are the acts

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mentioned in the excerpt of the complainant's evidence that I quoted above; I shall refer to them as the unusual sexual acts). The Magistrate then expressed the very firm conclusion that, having seen and heard the complainant, there was no doubt whatsoever in his mind that she was "genuinely, extremely disturbed" when she gave her evidence and that her crying in court was not due to play-acting. Having disposed of that criticism of the complainant, the Magistrate proceeded to state that there were "the important probabilities of the matter" which had to be dealt with, and to express the view that "these probabilities ..... favour the complainant's version being true to such an extent and to such a degree that there can in my view be no doubt whatsoever that her evidence is in fact true". The probabilities, the Magistrate said, could best be dealt with by having regard to the appellant's version of what had happened; by pointing to the "extreme improbability" of his version

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being true, the Magistrate considered, the probabilities of the complainant's version being true would become apparent. Before I record the Magistrate's particular findings in regard to the probabilities, it will be convenient to mention that at a later stage in his judgment he reverted to the complainant's evidence and her credibility in the context of her behaviour on the night in question. He said that one was dealing in this case with a woman who was living, not in Victorian times, but during the period of the liberation of women; that it would be extremely unfair to measure the present-day women's behaviour and attitudes with the yardstick used by courts of 100 years ago; and that this could not be over-emphasised in dealing with the question of credibility and the question of probability. Having expatiated on that topic, he concluded that although it might have been unwise for the complainant to invite the appellant to her flat after a chance encounter, it

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was not the unusual and exceptional behaviour which it might have appeared to be if it were measured by the incorrect yardstick, and that to attempt to explain her behaviour in any other way would be to lose sight of the actualities. I pause here to say that although the Magistrate did not explicitly say so, it is a fair assumption that, apart from a consideration of the probabilities, the complainant impressed him as being a credible witness. As far as the appellant is concerned, the Magistrate did not comment on his demeanour or the impression made by him as a witness. His evidence was rejected, and rejected emphatically, solely on the basis of the improbabilities which were found to be inherent in his version of the events. An analysis of the Magistrate's judgment shows that there were three features of the appellant's evidence on which he relied for rejecting it. The first was his evidence that the complainant went into the bathroom to change into her pyjamas prior

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to having sex with him. In this regard the Magistrate posed the rhetorical question: "Why this false modesty?" He said that such conduct was improbable and that the appellant's version did not ring true. The second feature was the appellant's evidence that after he had fallen asleep, the complainant "for no rhyme or reason" became annoyed at his drunkenness and tried to bundle him out of her flat. The Magistrate said that this was unnatural behaviour, it did not ring true, it was so improbable, so extremely unlikely that there could be only one inference and that was that this in fact was not what had happened; the appellant's version accordingly had to be rejected as being false beyond reasonable doubt. The third feature was that the appellant's evidence furnished no explanation for the fact that the complainant would have wanted to leave the flat in the early hours of the morning in order to have the appellant

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arrested by the police. The Magistrate said that the suggestion that the complainant's conduct was attributable to the mere fact that the appellant was drunk was nonsensical. He referred in this connection to the police evidence - which he accepted - that when the complainant arrived at the police station she was "in a shocked emotional state". This, he found, was obviously true, and having regard to his earlier finding that her emotional condition in court was genuine and not simulated, he said that he had no reason to doubt that her condition when she came to the police station was also a genuine condition. The only possible explanation, he reasoned, was that some traumatic experience must have taken place to cause this. It was ridiculous to suggest that this was caused by the appellant's drunkenness and unwillingness to leave her flat. So, the Magistrate concluded, it could only have been caused by the appellant's assault and rape of the complainant.

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On appeal to the Provincial Division it was argued on behalf of the appellant that the complainant's evidence was unsatisfactory in a number of respects. SPOELSTRA J in his judgment dealt with these criticisms of the complainant's evidence and, although he said that her evidence on what ensued after the appellant's assault on her had commenced, was "not very coherent", found that the criticisms were not material and did not carry any real weight. The basis upon which the appeal against the conviction to the Court a quo was dismissed appears from the following passage in the judgment of SPOELSTRA J:

> "All these criticisms, whether individually or jointly, do not impress me as grounds upon which the complainant's evidence must be rejected or doubted. The version of the appellant is in my view inherently improbable and could not be accepted. It was rightly rejected by the magistrate."

Having now completed my survey of what this appeal is about, I think I should say at once what, in

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my judgment, will be decisive of the outcome of it. It is the application to the particular facts of this case of the cautionary rule which is generally applied in our criminal practice to cases of sexual assault.

With regard to the cautionary rule in general, there are three decisions of this Court to which reference must be made. In R v Rautenbach 1949 (1) S A 135 (A) SCHREINER JA said the following (at 143):

> "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 ..... 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 ..... It is not only the risk of conscious fabrication that must be 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. It would of course be wrong to

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exaggerate the risks of a false accusation in such cases ....."

In R v W 1949 (3) S A 772 (A) at 780 and 781 WATERMEYER CJ said the following:

"..... I am satisfied that in criminal cases of the kind now in question the true rule does not insist that there must be corroboration of the complainant's evidence before the accused can be legally convicted. In rape cases, for instance, the established and proper practice is not to require that the complainant's evidence be corroborated before a conviction is competent. But what is required is that the trier of fact should have clearly in mind that these cases of sexual assaults require special treatment, that charges of the kind are generally difficult to disprove, and that various considerations may lead to their being falsely laid. Some of these considerations are mentioned in Rex v Rautenbach (1949 (1) S A L R 135 at p 143), but there are others which are more obviously applicable to a case like the present one. Where pregnancy has supervened and in that way it has become necessary for the girl to explain her condition, she may be tempted to shield some young friend who is the actual wrongdoer and to implicate someone of relatively sound financial standing who may be better able than the actual father of the child about to be born to provide it with maintenance. The position is not materially different from that created

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> by the cautionary rule applicable in the case of accomplices which was recently dealt with by this Court in Rex v Ncanana (1948 (4) S A L R 399). Although the nature of the special risk in sexual cases differs in certain respects from that involved in cases where the Crown relies on accomplice evidence, what was said in Ncanana's case at pp 405/6 is applicable, mutatis mutandis, in cases of the present kind.
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> No doubt, applying what was said in Ncanana's case (loc cit), it is permissible for a court to convict in these sexual cases even where there is no corroboration of the complainant and even where the accused has given evidence and has not been proved to be a lying witness. But that is only the position where the court is fully appreciative of the risks involved and where the merits of the complainant and the demerits of the accused as witnesses are beyond question."

In the above two cases the defence of the accused was a denial of the alleged assault. In the next case, R v D and Others 1951 (4) S A 450 (A), the defence against a charge of rape was one of consent. SCHREINER J A applied the cautionary rule to that situation. With reference to a direction to the jury by the trial Judge in that case (BROOME JP) that

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> "..... the law provides that no man can be convicted of a sexual offence on a woman unless there is some corroboration of the woman's story.",

SCHREINER JA remarked as follows (at 456-7):

> "As appears from R v W, supra at p 780, this statement as a generalisation goes somewhat too far in favour of persons accused of sexual offences. But as applied to the circumstances of this case, and particularly in view of the possibility, pointed out by BROOME JP, that the complainant, whether consciously or unconsciously, had exaggerated the number and severity of the blows that she received, the learned Judge was on safe ground in directing the jury that there should be no conviction in the absence of corroboration."

In the cases cited above some examples are given of the risks against which the cautionary rule is designed to guard. In that connection, and with a view to what is to be said later in this judgment concerning the possible motives of a complainant in this type of case for laying a false charge, I would refer also to the following passages in the judgment of LEWIS AJA in R v J 1966 (1) S A 88 (S R, A D) at 92 A-D:

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" In the case of all females alleging sexual assaults, the need for similar caution, in the absence of corroboration, flows from the fact that such charges are easily laid and difficult for the accused to disprove, and a multiplicity of motives may exist for their being falsely laid. This has been recognised since time immemorial, and a classic example of such a false charge can be found in the Biblical story of Potiphar's wife and Joseph.

Apart from the danger of maliciously false charges, it is also recognised that, even with adults, one may encounter cases of unfounded allegations of sexual assault which owe their origin to flights of fancy .....

The main purpose, therefore, of applying the cautionary rule in cases involving young children and in sexual cases generally, where the commission of the offence itself is not established by corroborative evidence, is to guard against the danger of invention."

Against this background I now turn to a consideration of the manner in which the Magistrate sought to apply the cautionary rule in this case. At the outset of his discussion of the evidence, when, as I have said above, he referred to "the most important question" of credibility, he stated that "in this regard the State

is at an extreme disadvantage because of various safeguards that we have in our legal system relating to cases such as this". He then mentioned that the complainant was a single witness and that she was the complainant in a sexual matter, and said that there were cautionary rules applicable to witnesses of this nature. He went on to say that he was not going to "deal with" those rules at all, because they were well known, but he emphasised that he was bearing the rules in mind and that he was applying them fully to the question of the credibility of the witnesses and the "acceptability of the evidence in the case or otherwise". From the rest of his judgment it appears that he on two further occasions referred to this topic, mentioning the care which one had to exercise in dealing with the question of credibility in cases such as this and emphasising the cautionary rules which had to be applied to the complainant.

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On reading the Magistrate's judgment one is reminded of what was said by BOTHA JA in S v Avon Bottle Store (Pty) Ltd and Others 1963 (2) S A 389 (A) at 393-4, in a case relating to accomplice evidence:

> "It appears from the magistrate's reasons for judgment that, while considering the evidence of Mrs Field and other accomplices who testified on behalf of the State, he persistently warned himself expressly of the special danger of convicting on accomplice evidence. That was neither necessary nor sufficient. What is necessary is that the judicial officer, who is also the trier of fact, should demonstrate by his treatment of the evidence of an accomplice that he has in fact heeded the warning."

Following that approach in the present case, the point of departure is to examine the Magistrate's manner of treatment of the evidence of the complainant, for it is obvious that the proper application of the cautionary rule in this case required her evidence to be subjected to close and careful scrutiny. The Magistrate, however, did not undertake such an exercise. That he did not, appears from a perusal of the complainant's evidence

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on the record and from a comparison of that evidence with the way in which the Magistrate dealt with it in his judgment, as summarised earlier. As to the latter, it will have been noticed that the Magistrate discussed two possible points of criticism of the complainant only: her emotional display and crying in the witness-stand, and her evidence that she invited the appellant to her flat for coffee. As to her evidence on the record, an analysis of it reveals a number of unsatisfactory features. It is to a consideration of these that I now turn.

The complainant's description of the sequence of events from the commencement of the assault on her, as given in her evidence in chief, underwent a radical change when she testified under cross-examination. In chief, she gave the sequence of the appellant's acts as follows: he tore off her pants; he strangled her and threatened to kill her; he raped her; he wanted her

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to perform the unusual sexual acts with him; when she did not submit, he became more cross and hit her; and after that she went to the bathroom under the pretext of putting out the light. Under cross-examination, the sequence became as follows: he got up from the bed and hit her; (it is not clear in this account when he tore off her pants - she said at one stage that he tore off her pyjama top as well, but later changed that and said that he made her take it off); he strangled her; he pushed her back onto the bed; he hit her and threatened her; he sat on her belly with his legs astride of her; he wanted her to do the unusual sexual acts with him; when she did not submit, he slapped her; he then had intercourse with her; and after that she went to the bathroom. Now when a woman has gone through the harrowing experience of being raped and she is called upon to relate the exact sequence of events, common sense and fairness demand that due allowance be made for imperfect

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recollection of details. But in this case there appears to me to be considerable doubt whether such a charitable explanation can account for the way in which the complainant transposed the act of intercourse and the unusual sexual acts in the two versions of the events which she gave in her evidence. After all, the Magistrate noticed an intensification of her emotional distress when she testified in chief about the unusual sexual acts to which the appellant had wanted her to submit. If she had had a strong feeling of revulsion about that episode, I find it somewhat difficult to understand why she would not have remembered whether that was the last thing to have happened to her prior to her going to the bathroom and leaving the flat, or whether the act of intercourse had intervened. At the very least, the ring of truth which that part of her evidence might have had, seems to be dimmed by the contradiction in regard to it which appears from her two versions, and it lets in the thought,

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however tentative at this stage, that the episode might not have happened at all, or that she may have been a willing party to it (I shall return to this aspect of the matter later). My feeling of disquiet about this part of her evidence is heightened by two apparently almost chance remarks that she made in the course of her evidence. First, when she was asked how many times the appellant had had intercourse with her, she replied: "I do not know". Secondly, she was asked whether, while the appellant was lying on top of her, he just had his hands at his sides, to which she responded: "He tried to get an erection for himself, because after the intercourse he did not have an erection". Neither of these answers was investigated any further; they were simply left in the air. I do not understand them; they do not seem to fit in with either of her versions of the events; and they suggest that her evidence was not a full and reliable account of what had really happened.

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In cross-examination the complainant gave details of what happened after her emergence from the bathroom in her pyjamas and before the commencement of the assault on her. She said that she went up to the bed where the appellant was lying and sat down on it. She explained her conduct as follows:

> "..... I went and I sat down and I said to him 'it does not work like that, now you must go - I said to you you can sleep in that other bed, but if you do it the way like you think, if you think you can do it like that, just make it and anything, then I must ask you to leave'. And then I just sat down to tell him that."

When questioned as to why she sat down on the very bed where the appellant was lying, she replied:

> "That was my bed where I was sitting on."

A little later in her evidence she said:

> "As I walked up to the bed he got up so I sat down and I said 'please go'."

I consider this evidence of the complainant to be highly

improbable. The distinction drawn by the Magistrate between Victorian times and the present period of the liberation of women, to which I referred earlier, can properly be used to prevent an adverse inference being drawn against the complainant from having invited the appellant in for coffee, but it cannot adequately explain her conduct to which I have just referred. I do not accept that a liberated woman is either insensitive, or reckless, or stupid. The complainant, on her evidence, had no sexual interest at all in the appellant; she had shortly before rebuffed him when he tried to hug her; she must have known that he was sexually attracted to her; she had told him he could stay if he slept in the other bed; yet, she then without more ado changes into her pyjamas, and when she finds him lying naked on her bed, she sits down on it in order to explain nicely to him that he should leave. In my judgment this evidence of the complainant casts a shadow of doubt

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over the credibility of her entire version of the events.

Another important feature of the complainant's evidence relates to the time factor. Initially, she had no difficulty in saying that she had gone to the club at midnight and that she and the appellant left it at about half past twelve. When she was asked at what time she fetched a taxi to go to the police station, she at first replied that it was after 1 or 2 o'clock, but then corrected herself and said it was later, although she could not give the time. Under cross-examination she said that when she and the appellant left the club, it must have been after 2 o'clock. She said also that when she asked the appellant in the flat to leave and he said he had nowhere to go, it was shortly before 3 o'clock. She could not remember at what time she went to the police station. (We know from the police evidence that she arrived there at about 6 in the

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morning.) Thereafter her evidence as to times became vague. The importance of this part of her evidence does not lie, however, in the fact that she was uncertain, contradictory, or vague; it lies in the fact that she was unable, on her own evidence, to account for a period of at least 3 hours preceding the time of her visit to the police station. I should add that she was given the opportunity to explain the time lapse, but did not do so; she never suggested that the appellant's assault on her took so long that it could explain why she arrived at the police station only at 6 o'clock; she simply maintained that she did not fall asleep after intercourse. And the reason why her inability to explain the time lapse is important, is, of course, that it lends considerable support to the appellant's evidence, which does furnish an explanation for the time lapse, namely that he fell asleep and was only woken up later by the complainant.

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The complainant was emphatic in her evidence that the appellant was not drunk; he was "walking straight" and his speech was "allright"; she also said under cross-examination that he was sober. In my assessment of her evidence, there is a real danger that she was deliberately exaggerating the appellant's alleged state of sobriety, in view of the evidence of Smith as to his condition when he arrived at the police station, as referred to earlier. As to her own condition, the complainant said that she was sober and that her head was clear; but when she was asked how much she had had to drink, she replied: "I had exactly 5 gin and tonic". In her case I consider that she was probably more under the influence of liquor than she was prepared to admit.

Other unsatisfactory features of a minor nature can be found in the complainant's evidence. For instance, she contradicted herself as to the reason given

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by the appellant for the fact that he had nowhere to go; and she contradicted the policeman, Kent, as to what clothing she was wearing when she arrived at the police station. I do not propose to enter into such details. The matters discussed above are, in my view, sufficient to justify the conclusion that the complainant's evidence was unsatisfactory in material respects.

The Magistrate did not in his judgment advert to any of the aspects of the complainant's evidence discussed above. Nor did he deal with what I consider to be two weaknesses in the manner in which the State presented its case against the appellant. The first relates to its failure to call the district surgeon who examined the complainant. The tenor of her evidence under cross-examination was that she had told the doctor at the time of the examination that the appellant had tried to strangle her, and that she thought that the doctor had found the marks of that assault on her throat.

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The prosecutor declined a request by the appellant's attorney to make available the doctor's report for the purposes of cross-examination and intimated that questions as to what the complainant had told the doctor should be put to the latter. Yet, when the State case was closed, shortly thereafter, the prosecutor told the Magistrate that the doctor would not be available for a couple of weeks and that the State would not call him, since it wished to avoid a delay in the completion of the case. It is clear that evidence by the doctor of the presence of throttle marks on the complainant's throat would have constituted strong corroboration of the complainant. In the circumstances the failure to call him must reflect adversely on the State case. The second point relates to the complainant's torn pyjama pants. The complainant was asked by the prosecutor what had happened to the torn pants, and the reply was that she had thrown them away. The matter was not

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investigated any further. Yet, on the complainant's evidence, those pants must have been on or next to the bed when she left the flat to go to the police. According to the evidence of Kent, he had a close look around in the flat when he came there, taking note of the clothing that was lying around. One would have expected him to find the pants, if they were there. They would have afforded corroboration for the complainant. No attempt was made to explain why Kent did not see the pants, nor why, if the complainant had mentioned them to the police, she was not asked to produce them. The State's failure to clear up this point also reflects adversely on its case.

Turning to the appellant's evidence, it was mentioned earlier that the Magistrate did not comment on the impression made by him as a witness. His cross-examination was cursory. Kent's evidence that the appellant had told him that it was his flat and that he

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had put on the complainant's denim trousers instead of his own, was not put to the appellant at all. In the circumstances it would be unfair to use that evidence against the appellant. Ex facie the record there is no reason to think that the manner in which he gave his evidence was in any way unsatisfactory.

With regard to the improbabilities found by the Magistrate in the appellant's evidence, as mentioned earlier, the first one can be disposed of briefly. It will be recalled that the Magistrate regarded it as improbable that the complainant would have gone into the bathroom to change into her pyjamas prior to having voluntary intercourse with the appellant. I do not share this view. It postulates a kind of norm in sexual behaviour, whereby the complainant could apparently have been expected, had she consented to intercourse, to shed her clothes in front of the appellant and to get into bed naked. I can see no warrant for thus stereotyping

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the ways of a woman preparing for sexual intercourse.

The other two improbabilities in the appellant's evidence, upon which the Magistrate relied so strongly for rejecting it, stand on a different footing; and they require the most careful consideration. The first, it will be remembered, was that the complainant would have woken up the appellant and tried to chase him out of her bed and her flat, without any apparent reason, according to the appellant's own evidence; and the second, that she would then, following upon a tiff and a reciprocal slapping, have gone off to the police station to lay a false charge of rape against him, while evincing signs of severe emotional distress. It is clear, indeed, that the appellant's own evidence does not purport to provide any explanation for the complainant's conduct in the two respects mentioned. Taking his evidence at face value, therefore, her conduct was inexplicable and strange; and to that extent his version of the events was undoubtedly

improbable. The crucial question is whether the improbabilities in his version are of sufficient weight to warrant the rejection of his evidence as false beyond reasonable doubt.

For the purposes of considering this question it is necessary to revert to the cautionary rule that calls for application in this case, since an assessment of the improbabilities in the appellant's version must perforce involve at the same time an assessment of the possibility that the complainant's charge against him was false. Reference was made earlier to decisions in this Court from which it appears that the cautionary rule is based on the risk of false charges being laid in cases of this nature, and in which examples were given of possible motives for invention on the part of a complainant. The factual situations dealt with in those cases are not really on a par with the facts in this case, nor are the examples given there apposite in the present case. In

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my view there can be no doubt, however, that the risk of a false accusation is present in the circumstances of this case, even though the motive for it may not be readily apparent. There is a wide variety of possible motives for invention and the laying of false charges in cases of sexual assault. The complexity of such motives and the difficulty of perceiving them lie at the very foundation of the cautionary rule. This is well illustrated by Glanville Williams in his lucid treatment of this topic, which is to be found in The Proof of Guilt (3rd ed) at 158-178. (For a reference to this work I am indebted to Hoffman and Zeffert, S A Law of Evidence, 3rd ed, at 456 note 6.) The learned author says the following at 158-9:

> "On a charge of rape and similar offences it is the practice to instruct the jury that it is unsafe to convict on the uncorroborated evidence of the alleged victim. The rule applies to a charge of indecent assault, or any sexual offence, including an unnatural offence between males. There is a sound

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reason for it, because these cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed. Of these various possibilities, the most subtle are those connected with mental complexes. Wigmore, who recites a number of instances where women have brought false sexual charges against men, explains one of the motivations as follows:

> 'The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex-incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.'"

At 161 Professor Williams quotes the following extracts from Wigmore:

> "In the light of modern psychology, this technical rule of corroboration seems but a crude and childish measure, if it be relied upon as an adequate means for determining the credibility of the complaining witness in such charges. The problem of estimating the

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> veracity of feminine testimony in complaints against masculine offenders is baffling enough to the experienced psychologist. This . . . rule is unfortunate in that it tends to produce reliance upon a rule of thumb. Better to inculcate the resort to expert scientific analysis of the particular witness's mentality, as the true measure of enlightenment. . . . No judge should ever let a sex-offence charge go to the jury unless the female complainant's social history and mental make-up have been examined and testified to by a qualified physician."

The learned author proceeds to show that it would be difficult in practice to give effect to Wigmore's proposals, and concludes as follows (at 162):

> "Improvements that may be made in testing the evidence of female complainants are a matter for the future. In the meantime, the rule requiring the corroboration warning to be given retains its importance as almost the only way by which the peculiar dangers of sexual charges are reflected in the legal process."

In the present case, the Magistrate, as the trier of fact, should have warned himself of the inherent danger that the complainant, prompted by some hidden

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motive, might have preferred a false charge against the appellant. He has not demonstrated in his judgment that he did so. As has been pointed out, he placed great reliance on the improbability of the appellant's evidence relating to the complainant's prior conduct, when she - as the appellant alleged - without apparent cause demanded that he should get out of the bed and leave the flat. It seems to me that that conduct which the appellant ascribed to the complainant is closely allied to the fact that she thereafter charged him with rape. Indeed, there is a pointer in that direction to be found in the complainant's own evidence. When asked what she had told the first two policemen she came across at the police station, she replied: "I told the first two that I had just got raped and that they must please get that guy out of the flat if he is still there". To some extent that confirms the appellant's evidence that she had wanted him to get out of the flat. In any

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event, it seems to me that the prior conduct which the appellant ascribed to the complainant falls to be assessed on the same footing as the subsequent charge that she laid against him. The laying of a false charge, judged by objective standards, is an irrational act, but the intrinsic improbability of it is much attenuated in cases of sexual assault by the knowledge, gained from experience, that a variety of possible motives do induce complainants to act in that way. In the same manner the weight of the improbability attaching at face value to the complainant's alleged conduct in waking up the appellant and wanting to chase him out of her flat, is considerably lessened by a proper appreciation of the fact that irrational conduct is not uncommon in sexual matters. In the present case, a number of possible motives for the complainant to have acted as the appellant alleged she did, suggest themselves. She may have been overcome by shame, disgust or remorse (perhaps even alcoholic

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remorse) at the fact that she had consented to intercourse with the appellant; she may have been sexually frustrated because of the appellant's drunken state (he may not have realised that they did not both enjoy the act); she may have been filled with revulsion at the unusual sexual acts to which the appellant had wanted her to submit, whether or not she was a willing party to such acts (as distinct from the act of intercourse); or she may simply have become afraid, with the coming of the morning, that her male friend would arrive at the flat. It is true that these possibilities are speculative and that a court is not usually required to speculate on possibilities having no foundation in the evidence placed before it (c f S v Glegg 1973 (1) S A 34 (A) at 38 H), but if the appellant were telling the truth there was no way in which he could have offered any explanation in evidence for the complainant's conduct, and possibilities of the kind I have mentioned are inherently present in the cir-

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stances of a case such as the present. It is precisely because of the difficulty of discerning hidden motives that cases of this nature require special treatment. To quote again from Glanville Williams (at 160):

> "The distinctive reason for the warning in sexual cases is that experience shows that the complainant's evidence may be warped by psychological processes which are not evident to the eye of common sense. The danger of convicting on the evidence of an accomplice who is trying to minimise his own part in the affair is obvious even to an unintelligent person ..... In sexual cases, on the other hand, the danger is usually not obvious."

In my view, therefore, the improbability of the conduct ascribed to the complainant by the appellant was assessed much too highly by the Magistrate. Similarly, he attached too much weight to the fact that the complainant left the flat in the early hours of the morning to lay a charge of rape against the appellant. If the appellant had in fact slapped her in the course of a drunken tiff when she had wanted him to leave the

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flat, as he testified, there is a real danger that she went to the police in a fit of pique and vengeance, and, to get him out of her flat, falsely accused him of rape. On that basis, too, the police evidence that she was in a state of emotional distress and what appeared to the witnesses to be shock, loses much of the impact it might have had otherwise. If she had acted in rage, or even on the supposition that she merely had some hidden motive for falsely accusing the appellant, it is hardly to be expected that she would not have shown signs of anguish. In this regard I should make it clear that I do not doubt the correctness of the Magistrate's observation that the complainant's distress in the witness-stand was genuine, nor his inference that it was also genuine when she went to the police. But that her distress was genuine means only that it was not simulated. It would be extremely dangerous, in my opinion, to regard the complainant's genuine distress

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in this particular case as a sufficient safeguard in itself for accepting that she was telling the truth. Her distress might well have been induced by her private knowledge that her charge against the appellant was a false one. There are cases, of course, where evidence of a complainant's distress at the time of making a complaint may be a powerful factor in satisfying the cautionary rule. Glanville Williams gives a striking example of such a case (at 163):

> "..... it has been laid down that a trial judge must not instruct the jury that the prosecutrix's previous complaint is capable of corroborating her evidence given in the witness-box, because a witness cannot corroborate herself. The reason is only pseudo-logical, for it misses the whole point of the rule. Surely the jury should be entitled to take account of any evidence which is persuasive to show that the charge is not a fabrication. Now the circumstances of a complaint made by the prosecutrix shortly after the occurrence complained of may be most potent in this respect. If a young girl runs to her mother in overpowering distress, complaining of a sexual attack; if it is evident that she has been attacked, and

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> if she names the defendant as the culprit, a man with whom she is acquainted so that there is no possibility of a mistake on her part in identifying him, the risk of deliberate falsity in the charge - that she has spitefully substituted the name of the defendant for that of her real attacker - is surely negligible. Much greater risks of false evidence are accepted as part of the everyday course of the administration of justice."

(See also the passage in the judgment of LEWIS AJA in R v J supra at 93 G-H.) In my judgment, however, the present is not such a case. On the complainant's own evidence there was an unexplained time lapse of considerable duration from the commission of the act of intercourse until the making of the complaint. On the appellant's evidence, something happened in between which could have induced the laying of a false charge, as well as the signs of distress on the part of the complainant.

Counsel for the State referred us to the oft-quoted statement that "the exercise of caution should not

be allowed to displace the exercise of common sense" (see e g S v Snyman 1968 (2) S A 582 (A) at 585 G-H). Counsel's reliance on this statement appears to me to ignore the fact that the application of the cautionary rule in the circumstances of this case in itself rests on the exercise of common sense - a fact which I can only hope emerges clearly enough from what has been said in this judgment.

To sum up, then, in my judgment the Magistrate failed to apply the cautionary rule properly. He assessed the complainant's evidence too uncritically and he assessed the improbabilities in the appellant's evidence too highly. The Provincial Division fell into the same errors. The appellant's evidence, though improbable, could reasonably possibly be true.

The appeal is allowed. The conviction and sentence of the appellant are set aside.

A.S. BOTHA JA

VAN HEERDEN JA

CONCUR

JACOBS JA