Case No 559/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

WASFIE VAN DER FORT Appellant

and

THE STATE Respondent

CORAM: HOEXTER, MILNE, JJA et KRIEGLER, AJA

HEARD: 11 March 1993

DELIVERED: 31 March 1993

J U D G M E N T

HOEXTER, JA

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HOEXTER, JA

In the regional court at Wynberg the appellant was convicted on one count of rape and one count of indecent assault. For purposes of sentence the trial court took the convictions together. The appellant was sentenced to four years imprisonment, the operation of two years of the sentence being conditionally suspended for five years. The appellant noted an appeal against his sentence alone. His appeal was dismissed by the Cape of Good Hope Provincial Division. Thereupon the appellant applied to the court a quo for leave to appeal against its judgment. Leave to appeal was refused, but the appellant was granted bail pending a petition by him to this court. The petition addressed to the Chief Justice sought leave to appeal against sentence only. This court nevertheless granted the appellant leave to appeal against both his conviction and sentence.

The sexual acts in respect whereof the appellant was charged were committed on 31 March 1990. The appellant, an apprentice welder, was then eighteen years old. The complainant was a schoolgirl aged fifteen. She was a virgin.

The appellant was arrested on 1 April 1990. On the following day he appeared at a summary trial in the regional court when the charges were put to him. The appellant, who was unrepresented, pleaded guilty to the charge of indecent assault but not guilty to the charge of rape. The magistrate remarked upon the fact that the appellant had been arrested on the preceding day, and he inquired whether the appellant was ready to proceed with the case. The appellant replied in the affirmative.

Thereupon the magistrate questioned the appellant with reference to the alleged facts of the case in order to ascertain whether he admitted the allegations in the charge

to which he had pleaded guilty. From the appellant's answers it appeared that, after having had sex with the complainant, he had further, but with her consent, put his penis into her mouth. The magistrate was not satisfied that the appellant admitted the allegations in the charge of indecent assault and in terms of sec 113 of Act 51 of 1977 ("the Act") he recorded a plea of not guilty on that charge. Pursuant to sec 115 of the Act the magistrate than asked the appellant whether he wished to indicate the basis of his defence to the charge of rape. The appellant stated his willingness to do so and proceeded to explain that the sexual intercourse had taken place with the complainant's consent.

The charge sheet stated the age of the complainant as fourteen years. The magistrate therefore explained to the appellant what the competent verdicts were in the case of sexual offences involving a complainant

under the age of sixteen years. Thereafter the magistrate determined the conditions of bail and the trial was postponed to 9 May 1990.

When the trial was resumed on 9 May 1990 the appellant was represented by Mr Sonday who is an attorney. The attorney proceeded to inform the court that in respect of both counts the appellant wished to admit that there had been no consent on the part of the complainant; and that in respect of each count the appellant wished to alter his plea to one of guilty. This was confirmed by the appellant. The State elected to lead no evidence. It closed its case and asked for convictions as charged. No evidence was led on behalf of the appellant, and his attorney made no address to the court on the merits. The trial court then delivered a judgment on the merits of the case. Having accurately summarised the antecedent proceedings before him the regional magistrate concluded by

saying that on both counts he was satisfied that the appellant admitted all the allegations in the charges against him; and accordingly he convicted him as charged on both counts.

The State proved no previous convictions against the appellant. Bail was extended and by consent the trial was then postponed to 16 September 1990 in order that the report of a probation officer might be obtained. When on the latter date the trial was resumed the State called Mr T J Damons ("Damons"), a probation officer in the Department of Health Services and Welfare. Damons read out and handed in a report dated 25 September 1990 which he had prepared on the appellant and his circumstances. Damons was questioned by the magistrate and cross-examined by the attorney. The attorney then called the appellant to testify in mitigation of sentence.

The appellant gave his date of birth as 23 July

1971. He had therefore already turned nineteen when he testified. The appellant was an unsatisfactory witness. A reading of the record shows that he shilly-shallied throughout his evidence; and that when he was questioned by the prosecutor or the magistrate he showed a marked disinclination to answer simple questions. Dealing with the events in question the appellant said that he and the complainant had indulged in petting. Then, in response to a question by the attorney, came the following twist in the tale:

> "Het sy [the complainant] daarteen gestry?---Die eerste keer maar agter daai toe het sy nie weer nie.
>
> Het sy nie weer nie. U se sy het aanvanklik geweier, maar het later ingestem?---Ja."

During his cross-examination the appellant said that he had regretted what had happened. This statement he amplified by saying that he felt sorry for the complainant, and:-

"Ek voel amper soos ek nou haar lewe opgemors het, dat die gebeur het nou."

Thereupon took place the following exchange between the magistrate and the appellant:-

"HOF: Nou moet ons net een puntjie duidelikheid op kry. Toe jy na die hof kom, se jy vir my dit was met toestemming gewees, die seks. Later toe jy regsverteenwoordig word, toe word vir my gese dit was sonder toestemming gewees. En nou uit die proefbeampteverslag wil nou weer blyk of toestemming hiervoor gegee word, want julle het mekaar geliefkoos en toe gaan julle na die kamer toe en julle het seks. Wat is die werklikheid? ---Sy het my toestemming gegee.

Wat bedoel u toestemming? --- (Geen antwoord)

Want die een omblik het u hierdie weergawe gegee, dan gee u weer daardie weergawe en aan die proefbeampte gee u weer 'n weergawe - nou lyk dit my kan u nie u gedagtes opmaak wat is wat nie? --- (Geen antwoord)

Hmmm? Dit is mos nie 'n moeilike vraag nie?---

(Geen antwoord)."

In the hope of obtaining greater clarity on the issue the attorney then re-examined the appellant.

Therefrom emerged, inter alia, the following:-

"MNR SONDAY: Maar inderdaad, toe gemeenskap plaasgevind het, het sy geskree en daarteen gestry? --- Wat ek seks met haar het, toe skree sy die eerste keer, wat ek nou ....

Toe skree sy? --- Ja.

Skree sy dat dit nie moet plaasvind nie? --- Nie

moet plaasvind nie - dat dit seer gewees het."

The appellant was then further questioned by the magistrate whose mounting perplexity it is not difficult to understand. I quote two excerpts from the appellant's evidence at this stage of the proceedings:-

"So was daar toestemming of was daar nie toestemming nie? --- Daar was toestemming.

Nou waarvoor is jy jammer? --- (Geen antwoord)"

and again:

"Maar hoekom het jy vir jou prokureur en vir my gese daar was nie toestemming nie? --- (Geen antwoord)

Hmmm? Laat ons hoor. --- Ek weet nou nie wat om te se nie, meneer."

When the appellant left the witness stand the

magistrate inquired of the attorney whether the defence wished to apply for a variation of the appellant's plea of guilty. At the suggestion of the magistrate an adjournment was then taken to enable the defence to consider its position. Upon the resumption of the proceedings the attorney made the following statement to the court:-

> "MNR SONDAY: Edelagbare, voortsetting van die saak. Na konsultasie met die beskuldigde, Edelagbare - deeglike konsultasie, is daar besluit dat die pleit gaan staan, Edelagbare. Waar hy eintlik praat van toestemming, bedoel hy dan toestemming tot liefkosing en dit is nie toestemming tot verkragting nie, Edelagbare. Edelagbare, ek vra net om die beskuldigde weer te herroep vir een of twee vragies, Edelagbare, wat betref die misdaad. Edelagbare, beskuldigde is tweetalig, maar hy verstaan Engels beter."

The further evidence by the appellant was brief and did not touch again upon the issue of consent. It dealt with matters such as the duration of the sexual intercourse, the extent of the complainant's screams; and

the regret experienced by the appellant at the fact that the incident had ended up in court.

Further in mitigation of sentence the attorney then called in turn as witnesses the appellant's mother, sister and father. The State itself called the complainant's mother. By consent two documents were handed in by the prosecutor as exhibits "C" and "D" respectively. Exh "C" is a report on an examination in a case of alleged rape. It was completed and signed on 31 March 1990 by a district surgeon and it certified that at 5.30 pm he had examined the complainant. The record indicates that exh "C" was received by the trial court on the basis that the defence admitted "die korrektheid van die vorm." Exh "D" is a note signed on 24 September 1990 by a psychiatric sister at Groote Schuur Hospital. It certifies that the complainant had been treated in the Psychiatry Out-Patients section of the hospital.

Both in the court a quo and before us the appellant was represented by Mr Mahomed while Mr Downer appeared for the State. In the court a quo counsel for the appellant had prepared for the assistance of that court typewritten heads of argument running to 22 pages. This document concludes with a submission that the court quo:-

> ".... for reasons set out hereinbefore .... will uphold the appeal and sentence the appellant afresh by imposing a wholly suspended sentence or alternatively, periodical imprisonment and cuts or further in the alternative community service which would bring home to the appellant the error of his ways."

Before the hearing of the appeal this court requested counsel on both sides to furnish supplementary heads of argument in regard to certain issues in the case. We are indebted to counsel for the industry shown by them in this connection.

Mr Downer in his argument on behalf of the State took the preliminary point that the leave purportedly

granted by this court to the appellant to appeal against his conviction had not been validly granted, and that we therefore lacked jurisdiction to entertain an appeal against the conviction. The objection is well-founded. Having regard to the provisions of sec 21 (4) (b) of the Supreme Court Act, 59 of 1959, an appeal lay in the instant case against the judgment of the court a quo only with leave of the court a quo or, where such leave had been refused, with leave of this court. In terms of sec 21(2) of Act 59 of 1959 the leave of the appellate division referred to in sec 20(4) may be granted by this court on application made to it as therein provided. A petition to this court could only have been lodged against the refusal of leave by the court a quo.. The appellant sought from the court a quo only leave to appeal against his sentence. Upon the refusal of such leave by the court a quo the appellant could not properly have applied to this court for

leave to appeal against his conviction. Indeed, the appellant did not attempt to do so. The petition which he addressed to the Chief Justice sought only leave to appeal against his sentence. Cf S v Cassidy 1978(1) SA 687(A).

It follows that no appeal against the appellant's conviction is before us. Having regard to the evidence on record, however, I mention in passing that even if an appeal against the conviction had been properly noted and prosecuted it would have had no prospects of success. It is true that when he testified in mitigation the appellant from time to time either alleged or insinuated that the complainant had willingly submitted to his actions. The fact of the matter is that the appellant was not a credible witness. Such was his mendacity that, save where his evidence is supported by acceptable external evidence, no reliance whatever can be placed on what he said. What acceptable external evidence there is militates against any

notion that the complainant consented. At one stage of the appellant's evidence his attorney elicited from him that the complainant screamed from pain. That part of the appellant's account, at least, is rendered probable by the objective medical evidence which was admitted by consent. The district surgeon who examined the complainant after the appellant had had intercourse with her, found that the complainant's genitalia were very tender, swollen and bruised; and that her perineum was torn and bleeding. The district surgeon recorded as his opinion:-

> "Physical signs consistent with alleged forced sexual intercourse."

What points almost irresistibly to the absence of consent, however, is the manner in which the defence was conducted after the appellant secured legal representation. The appellant's first appearance in court was on 2 April 1990. Thereafter there was an interval of five weeks before the appellant again appeared in court. It does not appear from

the record at what stage the appellant engaged the services of his attorney, but having regard to the gravity of the crime of rape, it is reasonable to assume that the attorney consulted with the appellant before the proceedings resumed on 9 May 1990. At the outset the attorney informed the court that there had been no consent on the part of the complainant; and that the appellant wished to plead guilty on both counts. This was confirmed by the appellant. When at an advanced stage in the proceedings in the trial court there was further wavering and vacillation on the part of the appellant the magistrate adjourned the court to enable the defence to reconsider its position in regard to the pleas of guilty earlier recorded by the magistrate; and, if necessary, to make an appropriate application for a variation of the pleas. When the trial was resumed the attorney informed the magistrate that after thorough consultation with his client the defence had decided that

the pleas of guilty should stand.

I turn to the propriety or otherwise of the sentence imposed by the trial court. At the trial the personal circumstances of the appellant were carefully explored. The appellant has a stable family background. At school he passed the eighth standard. He has never displayed aggressive or other anti-social tendencies. He is in fixed employment and he is a youthful first offender. All these factors were present to the mind of the magistrate and were weighed by him in his consideration of an appropriate sentence.

A point much argued by Mr Mohamed was based on the questioning of the probation officer by the magistrate. Damons concluded his report by expressing the opinion that the appellant was an offender susceptible of rehabilitation within society, and that in his case a suspended sentence of imprisonment would have the necessary

deterrent effect. Accordingly Damons recommended the imposition of a heavy but suspended sentence of imprisonment. While Damons was testifying the magistrate pointed out to him that while his report dealt with the interests of the appellant, other factors were also proper for the consideration of a court weighing an appropriate sentence. In this connection it is necessary to quote the following excerpt from the record:-

> "[HOF] Daar is drie dinge wat die Hof moet in aanmerking neem - dit is die beskuldigde - die het u nou behoorlik op ingegaan; die tweede is die misdaad en derdens, die belange van die gemeenskap, waar die belange van die klaagster eintlik om draai. - - - Ja.
>
> Sy verlang gevangenisstraf - dit is wat sy voel haar belange gaan beskerm. Die misdaad is 'n misdaad waarvoor die doodstraf opgele kan word. As u daardie twee aspekte in oorweging neem, wat is u aanbeveling dan? - - - Dan moet my aanbeveling eintlik wees dat die man gevangenisstraf opgele word, u Edele."

Mr Mahomed submitted that in so questioning Damons, and in eliciting from him a recommendation

which differed from his original recommendation, the magistrate had acted unfairly and irregularly. The argument appears to me to be unsound. The magistrate had, I think, a perfect right to examine and test the probation officer's recommendation. Indeed, it was his duty to do so. It may be that in questioning Damons (who no doubt viewed the problem primarily from the angle of his own discipline) the magistrate was a trifle brusque. But his questions were relevant and their logical force appears to have become apparent to Damons.

A further argument advanced on behalf of the appellant was that even in the absence of any misdirection on the part of the magistrate the sentence imposed was so startlingly inappropriate and severe that it should be set aside. I disagree. Having regard to the full circumstances of the case, and in particular the nature of the rape involved, the sentence does not appear to me to be

in any way excessive or disproportionate. The complainant was a young schoolgirl and a virgin. She sustained painful physical injuries to her private parts as a result of the sexual assault upon her, and in addition she suffered psychological harm. The latter necessitated medication prescribed by a psychiatrist. Mr Mahomed pointed out that the complainant's mother had expressed the hope that the appellant might be spared a prison sentence. Such compassion reflects well upon her, but neither her sentiments on the subject nor those of the complainant (who made clear to Damons that she regarded imprisonment as the appropriate punishment for the appellant's offences) seem to me to be of any assistance in considering whether the magistrate exercised his discretion properly in regard to sentence. He had to take into account what he conceived to be the broad interests of society rather than the private views of the complainant herself or those of her

immediate family.

In their supplementary heads of argument counsel also dealt with the question whether a sentence of correctional supervision in terms of sec 276(1) of the Act might be substituted by this court for the sentence imposed by the magistrate. For the reasons which follow that question must be answered in the negative. The trial court passed sentence on the appellant on 26 September 1990, and that sentence was confirmed by the court a quo on 10 June 1991. In the Wynberg magisterial district paragraphs (h) and (i) of sec 276(1) of the Act came into operation only on 20 March 1992. The option of correctional supervision as a possible sentence was therefore open at the relevant time neither to the trial court nor the court a quo. When legislation providing for new penalties which moderate and mitigate punishment is passed after the date of sentence by the trial court, an

appeal court which sets aside as inappropriate the trial court's sentence is entitled to take into account such new and less harsh penalties; and to impose sentence afresh in the light of them. However, where the sentence imposed by the trial court is an appropriate sentence (having regard to the punishment options then available to the court) the appeal court is not at large to impose afresh a sentence in terms of the supervening amended legislation. See Proku-reur-Generaal Noord-Kaap v Hart 1990(1) SA 49(A), For the reasons already mentioned in this judgment no grounds have ' been shown for disturbing the sentence imposed by the trial court.

In his supplementary heads counsel for the appellant conceived a further argument which was developed at very considerable length. Pointing to the fact that before the appellant was called upon to plead to the charges on 2 April 1990 the regional magistrate had not

informed him of his right to legal representation, Mr Mahomed urged upon us that in consequence thereof the whole ensuing trial was palpably and grossly unfair. Despite the rather terse notice of appeal upon which the appeal to the court a quo was based, so it was contended, this failure of justice in the trial proceedings should have been apparent to the court a quo. By narrowly confining its attention to the notice of appeal the court a quo overlooked this fatal flaw and failed to exercise its judicial powers of review. Had it properly exercised such powers, so the argument proceeded, the court a quo would summarily have quashed the proceedings in the trial court as irregular and not in accordance with justice. Accordingly, so it was said, the court a quo had fallen into_ error - an error which this court should correct by quashing the appellant's conviction and sentence.

This argument cannot be sustained. I leave

aside (a) the question whether it is open to the appellant to raise this argument at all when the issue of sentence is the only one properly before us and (b) the problem that this court lacks inherent powers of review. The argument in any case bears no relation to the true facts of the case The appellant was not an unsophisticated illiterate. The upshot of the plea proceedings on 2 April 1990, when he was admittedly not represented and not apprised of his rights in that regard, was that pleas of not guilty were entered upon the record; and the trial was adjourned for some five weeks. In the result the appellant suffered no prejudice whatsoever at the plea stage and thereafter. He had ample time in which to seek legal advice and to obtain legal representation. At the outset of the trial proceedings he was in fact represented by an attorney; and he remained so represented until the end of the trial. The record reflects not the slightest indication that the proceedings

were not in accordance with justice.

The appeal is dismissed.

G G HOEXTER, JA Milne,

JA) Concur

Kriegler, AJA)