Case No 70/96
/mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

ROLAND MEINERT APPELLANT

and

THE STATE RESPONDENT

CORAM: KUMLEBEN, HARMS et SCOTT JJA HEARD: 19 AUGUST 1996 DELIVERED: 26 AUGUST 1996

# J U D G M E N T

KUMLEBEN JA/..

KUMLEBEN JA:

The proceedings in this case have taken a somewhat unusual course.

The appellant stood trial on a charge of rape. He pleaded not guilty on the ground that the complainant had consented to having intercourse with him. He was found guilty as charged. Before sentence was passed the magistrate was asked to call for a report of a probation officer or a correctional official in order that correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act, 51 of 1977 could be considered. This request was refused as the magistrate did not regard this form of punishment to be a feasible option in the circumstances of this case. After the complainant had given evidence on the extent to which the rape had affected her, both physically and emotionally at the time and subsequently, a sentence of 7 years imprisonment was imposed, three years

of which were suspended.

An appeal to the Cape Provincial Division of the Supreme Court followed. The court (Van Deventer J and Griesel AJ) confirmed the conviction. It, however, set aside the sentence and remitted the case with a view to a correctional supervision order being substituted. At the further hearing a correctional officer handed in his report. He was examined on its contents and the manner in which any such order would be supervised. The magistrate, in the light of the complainant's evidence of how she had been affected by the rape, arranged for her to give further evidence in this regard. Having considered her testimony and reassessed the question of a proper sentence on all the facts, he again imposed his previous prison sentence. This was the subject of further appeal before Conradie and Hlophe JJ. The sentence was confirmed but leave was granted for a further appeal to this court against both the conviction and the sentence.

The evidence of the complainant was that she met the appellant at Nauty's Midnight Grill ("Nauty's") in Sea Point where she worked as a waitress. At about 12:30 am, after she had finished her work there but was still on the premises, a couple she knew introduced her to the appellant. The foursome chatted there for a while. She had one Hunters Gold, a brand of cider, and he was drinking beer. She decided to leave and take a taxi to meet her flat-mate, Natasha Otto, at another place of entertainment, the Comic Strip Night Club (the "Comic Strip"). The appellant said it was on his way home and offered to give her a lift there. She accepted. On arrival at the night club he suggested that he might join her for a drink and she agreed. Natasha was one of two bartenders there and the complainant and appellant joined them. They were there for about an hour during the course of which the complainant had two Springboks and the appellant about six Black Sambuccas. The ingredients of a

Springbok are peppermint liqueur and "Black Velvet". Those of a Black Sambucca are not stated and must be left to the imagination. At a certain stage the complainant wished to return to Nauty's where she had left her jacket. The appellant again offered to convey her. He was at this stage intoxicated to the extent that he fell over a chair as they left the Comic Strip. She suggested that she should drive and he agreed to let her. After retrieving her jacket at Nauty's, he invited her to come to his place for a cup of coffee. She declined. She drove the car to the flat where she lived and parked outside the building. He offered to come upstairs with her to check that everything was in order since the building was not well lit. When she opened the door he offered to inspect within the flat and entered it with her. She thanked him for being so polite and expected him to leave. Instead he grabbed her, twisted her arm behind her back, pushed her onto a bed, pulled down her "panties" and raped her. He did so by pulling her

shirt over her face and arms, holding his hand over her mouth and threatening to hurt her if she did not keep quiet and acquiesce. He had only removed his trousers. Afterwards, when he released her, she grabbed his car keys and rushed out with a view to driving his car to her friend at the Comic Strip. As she took off in his car he managed to jump in. Inside he grappled with her and interfered with her as she drove. He agreed to desist and take to her the Comic Strip if she allowed him to drive. She settled for that and he took her there. He dropped her off - literally, as she fell in the road - at a place called Browns next to the Comic Strip. His parting words to her were "keep your mouth shut, I've got influential friends". She was in a state of acute distress as a result of the rape. She attempted to note the registration number of the appellant's car as he left in haste but did not manage to do so. She entered the night club expecting to find her flat-mate Natasha and another acquaintance, Craig Quin, there but

they had already gone off duty. As she came from this night club she saw them entering the street from another public bar. (Both Craig Quin and Natasha gave evidence and confirmed that the complainant was distraught and crying when they met her.) On being question by them she said that she had been raped and promptly agreed to go with them to a police station. With the police they then went in search of the appellant that night but without success.

Apart from his denial that he had committed the offence, appellant's evidence differed from hers in a number of respects. While they were drinking at the Comic Strip with her seated next to him he said that she placed her leg over his. He was not certain whether she suggested that he should come upstairs or whether he offered to do so to check that all was well in her flat. There they both undressed and, as he put it, "we started getting intimate, and we had sex". When asked what happened after

they were finished he said:

> "Well it wasn't actually we were finished, but we sort of, we stopped, and I was just lying on the bed, and she suddenly said to me, 'Let's go back to the Comic Strip.' So I said to her, 'No', I didn't say no, I said, 'Why do you want to go back to the Comic Strip?' She didn't give me a, (sic) she just said she wants to go back to the Comic Strip. So I said to her, 'No, let's rather just stay here, let's just stay here.' So she said, no, she wants to go to the Comic Strip. So I said, 'Look, it's already late, I'm not going back to the Comic Strip, I'll take you back to Nauty's, because it's on my way home.' We got dressed and went down to the car again, I got, as I wanted to get into the car, she said to me she wants to drive, and I said, 'No, I'm, driving.' I got into the car, she got in next to me, down to the road, Main Road, along the road to Nauty's Moonlight Grill, where I stopped outside, she got out, there was no animosity, none at all, she got out and she walked towards the door of Nauty's and I went up the road home."

The trial court was aware of the need for a cautionary approach to the evidence of a complainant in a case of this nature. He found her to be a truthful witness. His acceptance of her evidence was principally based on reliable facts wholly inconsistent with her being a consenting party. Had that been the case, there can be no plausible reason for her leaving the flat

to go to the Comic Strip or for her being in such a state of genuine and acute distress when she reached her friends there. The fact that she said that she had been raped, went straight to a police station and searched for the appellant is further confirmation of her account of what took place. In his evidence the appellant agreed that she wanted to go to the Comic Strip but said that he was only prepared to drive her to Nauty's, which was on his way home. After he dropped her there, he drove off without waiting to see whether Nauty's was still open or whether she had gone in. Nauty's is 4 to 5 kilometres from Comic Strip. There is no conceivable reason why she should have wished to go to Nauty's in the early hours of the morning rather than the Comic Strip where she expected or hoped to see her flat-mate. When these difficulties in the way of his version were put to him in cross-examination he was obliged to frankly concede: "It doesn't make sense".

Mr Cloete, who appeared for the appellant, sought to explain her conduct and distress on the ground that a sexual encounter with consent might for her have proved disappointing: that for this reason she may have fabricated a rape. Such a possibility in the light of her and his subsequent conduct is wholly speculative and too remote for words. Counsel also drew attention to the fact that she was prepared to go on a drinking round with a stranger, accept a lift from him and allow him to enter her Gat. She explained that he was twice her age, they were 20 and 40 years old respectively, and that she regarded these offers as avuncular acts of courtesy. Even if - I stress if - one has some reservations about her evidence in this regard, I cannot see how they can relate to the issue whether once in the flat he proceeded to sexually assault her.

The conviction must stand.

As regards sentence, Mr Cloete in the first place based an

argument on the submission that Van Deventer J had instructed and ordered the magistrate to make a correctional supervision order provided only that the probation report did not preclude him from doing so. A preference for this form of punishment was keenly expressed in the judgment but such a construction of his remarks and order is in my view not warranted. It is implicit in the setting aside of any sentence and remittal to a magistrate that the magistrate is to exercise the discretion inherent in the sentencing process. One must readily assume that the court of appeal was mindful of this. It is moreover of some significance that the magistrate thus interpreted the order, explicitly referred to it as a "recommendation" and independently reconsidered the question of sentence. The reasons furnished by Van Deventer J in support of correctional supervision are, with due respect, open to criticism in certain respects. It is, however, unnecessary to discuss them since they were not relied upon in argument before us.

In deciding upon the sentence the magistrate comprehensively weighed up all the relevant facts. As is regrettably often the case, these turn out to be largely irreconcilable when applied to the precepts of punishment. The appellant is a first offender and, according to the probation report, not given to violence even during his occasional bouts of excessive drinking. His misconduct, which certainly did evidence a degree of violence, would seem to have been out of character. On the other hand, the seriousness of the offence, its prevalence in the metropolitan Cape Town area and the effect it has had on the complainant were validly taken into account.

I need to refer to this last-mentioned consideration in more detail. When the complainant testified after judgment at the trial on 15 March 1994, some 5 months after the occurrence, she was half-way through a 4 months Rape Crisis counselling course. She was suffering from

nightmares, had lost 12 kilograms in weight, suffered from sleeplessness and had been booked off work by her doctor for 10 days due to stress. When the case was remitted for sentence she again gave evidence. She was reluctant to come to court to gave this evidence and it was a strain for her to do so. This was on 10 March 1995, a year later. Her sleeping problems persisted, so much so that she would wake up crying and find her flat-mates trying to console her. Her weight loss was now 16 kilograms. She was scared of the dark, unable to drive on her own and was perpetually concerned that she might meet up with the appellant. This caused her to leave Cape Town for Johannesburg in an attempt to make a fresh start in life. As a waitress if she had to serve a male patron on his own at a table she could not face him and would have to ask someone else to take the order. She had not been able to form any relationship with a man: her one attempt failed through lack of trust on her part. Her having to come to

court and testify contributed to this. This evidence of hers stands uncontroverted, was accepted, and must be taken at face value. One does not know whether or for how long it persisted after the case was finally concluded but it is plain that her suffering was extensive.

Mr Cloete quite correctly conceded that the magistrate had not misdirected himself in any respect when passing sentence after the case had been remitted to him for that purpose. His sentence may therefore be altered only if it (essentially one of an effective period of 4 years imprisonment) can be said to be disturbing excessive: that on that account it can be said that the magistrate failed to exercise a proper judicial discretion. I am unable to thus conclude and the sentence must also be confirmed. I should add that were this court to substitute a sentence of correctional supervision in terms of s 276(l)(h), as requested by counsel, its operation would be restricted to a period of three years and it would

prove to be a far more lenient sentence than the one the trial court regarded as appropriate.

The appeal is dismissed: the conviction and sentence are confirmed.

M E KUMLEBEN
JUDGE OF APPEAL

HARMS JA)
-Concur
SCOTT JA)