REPORTABLE

CASE NO: 96/2002

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

E GABAATLHOLWE **1ST**
APPELLANT

N RAMMUTLE **2ND**
APPELLANT

and

THE STATE **RESPONDENT**

CORAM: SCOTT, FARLAM JJA and HEHER AJA

DATE OF HEARING: 15 NOVEMBER 2002

DELIVERY DATE: 28 NOVEMBER 2002

Summary: Court - duty to call witness in terms of s 186 of CPA - when arising

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JUDGMENT

HEHER AJA

HEHER AJA:

[1] The appellants and a third man, all policemen, were convicted by Labuschagne J and assessors of rape and kidnapping. They were each sentenced to life imprisonment and ten years imprisonment for the respective crimes. An application for leave to appeal was refused by the Court *a quo* and thereafter, on petition, by this Court. However, at the request of counsel for the first and third accused (the appellants) the trial judge made a special entry in terms of s 317 of the Criminal Procedure Act 1977 in the following terms:

'1. Nadat die Staat se saak gesluit was het die verdediging ingevolge die bepalings van artikel 186 van Wet 51 van 1977 die hof versoek om vir Stanley van der Westhuizen as getuie te dagvaar of te laat dagvaar.

2. Van der Westhuizen was die betrokke nag van die voorval in die teenwoordigheid van die klaagster en het 'n verklaring aan die polisie gemaak.

3. Die Staat het besluit om nie vir Van der Westhuizen as 'n getuie te roep nie en het hom as 'n getuie tot die beskikking van die verdediging gestel.

4. Die hof was meegedeel dat Van der Westhuizen in sy verklaring sou gesê het dat die klaagster die betrokke nag '*gedrink*' was.

5. Die verdediging het die hof verder meegedeel dat Van der Westhuizen die verdediging vyandig gesind was maar het betoog dat sy getuienis noodsaaklik was vir die regverdige beregting van die saak.
6. Na oorweging van die aansoek het die hof beslis dat sy getuienis nie noodsaaklik was vir die regverdige beslissing van die saak nie en is die aansoek afgewys.

7. Die verdediging beweer dat sodanige weiering onreëlmatig alternatiewelik strydig met die reg was.'

[2] With reference to paragraph 5, the record does not bear out the statement that counsel informed the Court that Van der Westhuizen was hostile to the defence. What counsel did say was that the defence had not enjoyed an opportunity to consult with him and he was unaware of whether Van der Westhuizen would co-operate or consult with the defence. He therefore sought the assistance of the Court relying upon the power (and duty) created by s 186 of the Act:

'. . . and the court shall so subpoena or cause a witness to be subpoenaed if the evidence of such witness appears to the court to be essential to the just decision of the case.'

[3] In his judgment refusing the application to subpoena the witness the trial judge furnished no reasons other than to say that he was unpersuaded that the witness was essential at that stage of the proceedings. That stage was after the close of the state case and before any evidence was called for the defence. Thereafter the two appellants and a witness testified. The application to subpoena Van der Westhuizen was not renewed. On the contrary, before closing the defence case, counsel informed the Court that although he had not yet consulted with him

he intended to call him as a witness, that contact had been made with him the previous day and arrangements were being made for a temporary replacement for him in his shift as a mine driver. However, after a short adjournment it appeared that, because of problems at work, the witness was not prepared to come to court without a subpoena. Counsel believed that the problems had been sorted out. It was in this context that he described the witness as hostile. Counsel expressed himself as frustrated and closed his case.

[4] The manner in which the special entry was framed would suggest that the judge only had in mind his refusal of the application. However counsel for the appellants drew to our attention that his application for the special entry referred to the 'failure or refusal' to call the witness. The record reflects that the judge said that he would make an entry in those terms. Counsel submitted that the 'failure' was a breach of the duty imposed by s 186 which persisted until the end of the case, notwithstanding that there was no express renewal of the application. This Court, he said, should approach the special entry on the broader basis on which the trial judge intended to frame the entry but erroneously failed to do. I am prepared to accede to counsel's submission.

[5] The role of a judicial officer in a criminal trial as an administrator of justice, open-minded, impartial and fair in fact and in demeanour (*R v Hepworth* 1928 AD 265 at 277; *S v Rall* 1982(1) SA 828 at 831 A - 832 H; *S v Gerbers* 1997(2) SACR 601 (SCA) at 606 a - 607 c) informs the exercise of its judgment in terms of s 186. Although the section contemplates the exercise of the court's power at any time during criminal proceedings, the necessity of calling a witness in the interests of a just decision will usually be less apparent at the end of the state case than it would be after all the evidence has been heard. At the earlier stage the trial court does not know whether the accused will testify and, should they do so, precisely what will be placed in dispute. It can only make assumptions based on the plea and the substance of the cross-examination. Generally the result must be that in any reassessment on appeal of a decision to refuse a subpoena even greater latitude will be allowed to the trial court's discretion than would be the case if the application had been brought after the defence case.

[6] In s 186 'essential to the just decision of the case' means that the court, upon an assessment of the evidence before it, considers that unless it hears a particular witness it is bound to conclude that justice will not be done in the end result. That does not mean that a conviction or acquittal (as the case may be) will not follow but rather that such conviction or acquittal as will follow will have been arrived at

without reliance on available evidence that would probably (not possibly) affect the result and there is no explanation before the court which justifies the failure to call that witness. If the statement of the proposed witness is not unequivocal or is non-specific in relation to relevant issues it is difficult to justify the witness as essential rather than of potential value.

[7] The parties will often possess insights into the contribution which a witness could make not apparent to the judge or magistrate and their views should always be canvassed before the decision is taken (as the judge did in this case). The best indication to the trial court of the importance that a party attaches to calling a witness is the assiduity which that party applies to ensuring that the witness is available to it. In this case the defence made no attempt to subpoena the witness. The explanation that he was hostile was both unconvincing and insufficient. The Court was not asked to exercise its powers although it had made perfectly plain that its earlier ruling was limited to the stage at which it was made. Nor was any indication given it that defence counsel regarded his earlier submissions about the essentiality of the witness as being of continued validity.

[8] Because the assessment of whether evidence is essential is left to the presiding judge or magistrate, a court on appeal will only interfere with the exercise of the discretion on very limited grounds: *R v Zackey* 1945 AD 505 at 510; *S v Seheri en Andere* 1964(1) SA 29 (A) at 33 G; *S v B and Another* 1980(2) SA 946 (A) at 953 A - F. Where, however, a party contends *ex post facto* that a witness who was not called was, objectively, essential to a just decision and it is apparent that the trial court did not apply its mind to the question (perhaps, as here, because it was not expressly called on to do so after the close of the state case) the exercise of a discretion does not arise. A court on appeal would then be justified in interfering if it is satisfied that the witness was indeed essential. Because of the manner in which the special entry is to be interpreted in this case (as discussed above) one or both of these bases for intervention may become appropriate depending on our evaluation of the importance of the evidence which Van der Westhuizen could probably have given.

The facts

[9] The complainant, a 21 year old hairdresser, was asked by a friend, Stanley van der Westhuizen, to meet her at a dance hall, the Bundu Inn at Westonaria, on the night of 26 March 1999. She was taken there by her stepfather. According to her evidence they danced and Van der Westhuizen bought liquor, a single fruit-flavoured alcoholic drink for her and whisky for him. When the premises closed they went, at his suggestion, to the Sports Bar in the town arriving about half an

hour after midnight. They sat and drank the same liquor in the same quantities as before and danced. A former girlfriend of Van der Westhuizen arrived. She swore at him. The complainant finished her own drink and helped herself to his whisky. She danced with friends. When she returned, Van der Westhuizen and the woman were still quarrelling. After a short while the complainant asked him to take her home in accordance with their arrangement. It was then about 03h30. He refused because he was not yet ready to leave. The complainant told him she would phone her mother. She walked alone to a Shell garage (service station) in the vicinity for that purpose. She asked the attendant in the shop whether she could use the phone. He told her that it was in the manager's office which was locked. Two policemen in uniform entered the shop. One asked where the complainant was going. She said she wanted to get to Randfontein but had no transport. He offered to take her. Trusting in his uniform she went outside to a white Golf car (which she had already noticed through the window) and climbed into the back. It is common cause that the occupants were the three accused at the trial. It is unnecessary to go into the detail of her subsequent evidence save to say that after they drove off she fell asleep and when she awoke she realised that they were not headed in the direction of her home. She protested. A jacket was thrown over her head and, during the subsequent events, held there, preventing her from identifying her attackers. She was struck in the stomach and threatened. The vehicle was brought to a stop. Despite her pleas and struggles she was forced to lie on the back seat and was there raped three times. Her two rings were removed

from her fingers. Afterwards she was helped to dress after a fashion outside the car. She was then pushed to the ground, the jacket was dragged from her head and the car drove off, leaving her in an unfamiliar place to find her own way. She staggered into her home at about 06h00 clutching her panties in one hand and wearing no shoes and only one sock. She was in an hysterical state.

[10] According to counsel who cross-examined the complainant he was in possession of a statement made by Van der Westhuizen to the police the substance of which was the following:

During the course of their sojourn at the Bundu Inn and the Sports Bar Van der Westhuizen and the complainant shared about ten drinks between them. By the end the complainant was affected by the liquor ('gedrink') but not to the extent of being unsteady on her feet. At the Sports Bar the complainant struck up a conversation with another man which gave rise to an argument between himself and the complainant. Van der Westhuizen wanted to leave but the complainant was not amenable. She told him to go. He arranged with the owner of the tavern that she could have access to a phone to contact her mother. The complainant used the phone but he could not say whether she spoke to her mother. He also asked his sister (who was present at the tavern) to give the complainant a lift home but the complainant left the premises on her own.

The complainant denied the whole of this version and held to the evidence which I have set out.

[11] The defence put forward in cross-examination on behalf of the accused was that the complainant sold her favours to accused 2 and the second appellant and that intercourse took place by consent; the first appellant was said to have been

taken home before that occurred and his answer was therefore an alibi.

[12] The defence version (as put to the complainant) did not dispute that the complainant begged the attendant for leave to use the phone and was told that he did not have access to one, that she purchased some chips, that the second appellant in uniform came into the shop, saw the complainant speaking to the attendant, and that she climbed into the back of the police vehicle. It was also common cause that shortly after leaving the Shell garage the complainant fell asleep in the vehicle.

[13] Counsel put in cross-examination of the complainant that when she turned towards the second appellant in the brightly-lit shop he could see that her eyes were red and that she appeared to him to be under the influence because her breath smelled of liquor. It was put to her that in the car she fondled the first appellant and asked for money in return for sex. Counsel did not suggest to her that any of the conduct that his clients attributed to the complainant was influenced by her intake of liquor or that her imperfect recollection of events before or after leaving the garage was the result of inebriation.

[14] It was apparent from the cross-examination that it was common cause that the acts of intercourse took place in the police car probably about half an hour after leaving the garage and at an isolated place somewhere on the outskirts of Randfontein.

[15] The State called as a witness the attendant at the garage, Mr Mokane, who was on duty on the night of 26 - 27 March 1999. He confirmed that the complainant arrived at the shop at a time fixed by an internal camera at just before 04h00. She asked to use a phone to call her mother in Randfontein to fetch her. He informed her that there was no accessible direct line out of the premises. The complainant purchased a packet of chips. She spoke and walked normally. A police vehicle from Westonaria arrived in the forecourt. The second appellant entered the shop. He took a can of soda water from the refrigerator and came to the counter to pay for it. The witness attended to another customer. The second appellant and the complainant left the shop together and got into the car. Accused 2 came into the shop and bought bread. The car drove off. Under cross-examination Mokane was unable to remember whether he had drawn the second appellant's attention to the complainant's plight. The trial Court was entitled to regard as significant the failure of defence counsel to challenge the evidence of the witness as to the normality of her speech and gait or to suggest to him that she showed any signs of having consumed liquor.

[16] The State also called as witnesses the complainant's mother to whom she made a report on her return home and who confirmed the description I have outlined earlier, and Ms Neville, a worker at the Crisis Centre to which the mother took her daughter on the morning of 27 March and who testified to the extreme hysteria which affected the complainant on her arrival.

[17] The complainant was examined by the district surgeon of Krugersdorp, Dr

Broughton, at 12h15 on 27 March. He testified that she was emotional. He found two scratches in the vicinity of the left hip (which the complainant testified had been caused by a knife while her head was covered but which he attributed to 'any sharp - pointed object'). She complained of pain in her lower abdomen. His gynaecological examination caused the complainant pain. The vestibule and hymen were swollen. He was unable to conduct a manual examination of the vagina because of the pain. There were superficial skin tears in the fourchette that were sufficient, in the doctor's opinion, to have provoked an immediate termination of intercourse by the complainant when she suffered the injury. He concluded that there had been penetration with injuries to the sexual organs which he would not have expected from consensual intercourse although he could not exclude the possibility, given the scenario of more than one partner in uncomfortable circumstances.

The application to the trial court to subpoena Van der Westhuizen

[18] When the application was made the Court *a quo* had before it the evidence I have sketched and the propositions put to the complainant in cross-examination. In support of his application counsel submitted to the trial judge that Van der Westhuizen would make a material contribution in respect of

(i) the sobriety of the complainant;

(ii) the movements of the complainant and Van der Westhuizen on the night in question; and

(iii) the times at which things happened.

The argument on appeal

[19] The second and third reasons mentioned to the trial Court were not pursued before us, and rightly so, since the places to which they went were of no relevance to the issue and the times of relevant events (as mentioned in my earlier summary of the evidence) were not in dispute.

[20] Counsel directed his argument to us to the effect which the evidence of Van der Westhuizen concerning the amount of liquor consumed by the complainant and her condition when he last saw her at the Sports Bar would have had on the

findings of the trial Court concerning the credibility and reliability of the complainant. He also submitted that the evidence was such as to render the likelihood of irresponsible and sexually uninhibited conduct more probable. He drew attention to a number of contradictions and inconsistencies in the evidence of the complainant and in statements made by her to the police and to Ms Neville for which the trial Court had found explanations in the horrific circumstances and in the terror and confusion of mind which they had wrought in her. He submitted that if Van der Westhuizen had testified the trial Court would probably have been obliged to reason differently to the advantage of the appellants.

[21] In my view it is unnecessary to address the criticisms individually as I believe that the argument must be rejected on broader considerations.

[22] Before proceeding I should mention that counsel for the respondent submitted *in limine* that whatever Van der Westhuizen could say concerning the amount which the complainant had to drink on the night in question and its effect on her would have been evidence collateral to the issues and therefore inadmissible. I do not agree. The issues were consent in respect of the second appellant and the presence or absence of the first appellant at the crucial time. The evidence was to be adduced to show that the complainant's consumption would have rendered her more irresponsible and susceptible to the temptation to engage in sex with the appellants and that her evidence generally should have been approached with much greater circumspection than the trial judge was said to have applied to it. Those seem to be matters from which the inference might, on a proper consideration of the evidence, have been drawn as to the existence of consent and as to the substantial unreliability of the witness. On that basis the evidence was relevant and admissible: *S v Green* 1962(3) SA 886 (A) at 894 D - E; *S v Sinkankanka* 1963(2) SA 531 (A) at 539 C - F.

Evaluation

[23] Accepting the statement of Van der Westhuizen at face value-

1. The statement does not suggest a marked degree of intoxication. While it tells us that the complainant was *not* 'onvas op haar voete', it does not attribute any adverse effect to her. 'Gedrink' covers a range of meaning from 'affected by liquor' to 'drunk' and depends on the facts on which the observer bases the opinion. The mere allegation of sharing about ten drinks is not of much assistance. The reader is obliged to speculate in order to reach a meaningful conclusion.

2. Van der Westhuizen's own conduct belies any belief that the complainant was in the least degree incapacitated. Despite his obligation to see her home safely, he was prepared to leave her at the tavern; he allowed her to make her own phone call to her mother; when she left the tavern he was unconcerned to restrain or follow her although he knew she was a long way from home, very late at night; he seems to have made no enquiry as to her safe arrival home.

3. The complainant walked about 300 metres (according to counsel) or about 5 minutes (on her evidence) to the Shell garage.

4. She made enquiries from the attendant and purchased chips. He noticed nothing abnormal. Counsel for the defence did not suggest to him that he should have. She understood his explanation that the phone was not accessible. It is clear that her main consideration was to find a means of getting home. She testified that she took comfort in the uniform of the policeman and the security it represented. That seems to me to have been a rational reason for accompanying him.

5. Although counsel for the defence suggested to the complainant that the appellants would say that the complainant had red eyes and that her breath smelled of alcohol he went no further. Indeed he could hardly have done so since the first appellant testified that the complainant in offering herself for sex was perfectly well aware of what she was about and what was going on around her.

[24] However there is no reason why Van der Westhuizen's proposed evidence should have been accepted at face value. It raised more questions than it answered and, on the face of it, warranted some scepticism. If the complainant was affected by liquor, how sober was he? If she had insisted on staying, why did she leave the Sports Bar at the first opportunity? Why did Van der Westhuizen not find out whether she had contacted her mother? Why did he not ask where she was going when she left the tavern or go with her since he was about to leave anyway? If the complainant indeed had the opportunity to use the phone at the Sports Bar,

why did she choose to walk into the night to look for another one, given that the intention uppermost in her mind was to get home? By the time that the application was brought, the trial Court had had an extended opportunity to observe the complainant in the witness-box and, aware of the criticisms against her, to form at least a *prima facie* impression on these matters. They did not involve conflicts of fact between the complainant and the accused and were certainly not matters which in her mind were such as to bear significantly on the question of whether she had consented or not. There was no apparent reason for her to lie about them.

[25] A further factor which could properly have weighed with the trial Court in rejecting the application was the sum of the probabilities which opposed consent even accepting that the complainant was affected to a degree by intoxication. These were-

(i) the determination of the complainant to get home; it was in the highest degree improbable that she would have entered the car without an assurance that the accused would take her home;

(ii) the inherent unlikelihood that the complainant would, out of the blue, suddenly start making sexual overtures to uniformed policemen whom she had never met before (which she was said to have done before asking for money);

(iii) her apparent credibility in relation to the details of the assault and, particularly, the manner in which she was disabled by the jacket flung over her head and the calculated assault with a knife (accompanied by a threat) which scratched her bare stomach (and for which the accused could suggest no explanation);

(iv) the condition in which she arrived home which was wholly at odds with a voluntary submission to the accused;

(v) the evidence of the district surgeon.

None of the criticisms directed against the complainant's reliability and credibility could fairly be divorced from or was not capable of rational explanation by its relation to the events of the night.

[26] In all these circumstances the trial judge would have been justified in concluding that the evidence for the State was that liquor played no meaningful role and that the case for the accused placed little emphasis on it. Why in the circumstances should the judge have thought that the witness was essential or even material to a just decision of the case?

[27] It follows that I remain unpersuaded that the judge was wrong in refusing the application to subpoena Van der Westhuizen, let alone that no reasonable judge could have reached that conclusion.

[28] In so far as counsel based his case on the *failure* to call the witness and a submission that the trial judge should have been alive to the essential nature of the evidence which Van der Westhuizen could provide at the time when counsel informed him that the defence would not call him, and, was therefore, subject to a duty in terms of s 186, I would merely add that the evidence of the appellants added nothing which would have changed the initial view of the inconsequential role which the complainant's intake of liquor probably played in the subsequent events.

[29] The appeal is dismissed.

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J A HEHER
ACTING JUDGE OF APPEAL

SCOTT JA)Concur
FARLAM JA)