THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 417/03

In the matter between:

KOOS STEVENS Appellant

and

THE STATE Respondent

Coram: *Navsa, Van Heerden JJA et Ponnan AJA*

Date of hearing: **26 August 2004**

Date of delivery: **2 September 2004**

Summary: **Approach to evaluation of evidence of single witnesses – assessment of totality of evidence – misdirections by trial and appeal courts.**

JUDGMENT

NAVSA and VAN HEERDEN JJA:

[1] Courts in civil or criminal cases faced with the legitimate complaints of persons who are victims of sexually inappropriate behaviour are obliged in terms of the Constitution to respond in a manner that affords the appropriate redress and protection. Vulnerable sections of the community, who often fall prey to such behaviour, are entitled to expect no less from the judiciary. However, in considering whether or not claims are justified, care should be taken to ensure that evidentiary rules and procedural safeguards are properly applied and adhered to.

[2] The present appeal raises the question as to whether the trial court and, thereafter, the High Court to which the first appeal was directed, followed this approach satisfactorily. The background against which the appeal is to be decided is set out hereafter.

[3] The appellant, Koos Stevens, was convicted in the Wynberg Magistrates' Court on three counts of indecent assault and was thereafter sentenced to one year's imprisonment in terms of section 276(1)(*i*) of the Criminal Procedure Act 51 of 1977 on each count. The appellant appealed against his conviction and the related sentences to the Cape High Court, which dismissed his appeal. That court, however, granted the appellant

leave to appeal to this court. The present appeal is directed only against conviction.

[4] At the time of the events which led to his conviction, the appellant was a detective sergeant at the Claremont police station. He encountered the three complainants, Rachel Vuyiswa Gxekwa (Rachel), Samantha Lumkwana (Samantha) and Norooi Gogotya (Norooi), for the first time on the afternoon of 7 August 1998 at the Claremont police station after Rachel had been arrested for shoplifting at a clothing store.

[5] Rachel testified that shortly after her arrest, during questioning by the appellant, he had caused her to undress and had touched her breasts, buttocks and thighs. According to Rachel, she was later asked by the appellant to identify the two friends who had accompanied her to the store from which the theft allegedly took place. The result was that, accompanied by Rachel, the appellant fetched Samantha and Norooi that night from Nyanga East, where they lived, and transported them to the Claremont police station to be questioned by the appellant. It is common cause that, although Rachel had already been released on bail, she also returned to the police station with the appellant and her two friends.

[6] Samantha and Norooi testified that they were each separately questioned by the appellant in his office after being fetched from a temporary holding cell in the charge office. They were each then taken to another room where, after taking their fingerprints, the appellant caused them to undress and touched their breasts, buttocks and thighs. According to Norooi, the appellant also touched her vagina with his fingers.

[7] All three complainants testified that upon leaving the police station they had informed Samantha's boyfriend, Bantoe Bonwana (Bonwana) – who was waiting outside the police station to take them home - of what the appellant had done to them. He had immediately confronted the appellant with their allegations, but the latter had denied everything.

[8] Bonwana's evidence was to the effect that, on the evening in question, he had gone to the Claremont police station to fetch his girlfriend, Samatha, and her two friends, Rachel and Norooi, all three of whom he believed to have been arrested. As he was walking to his car with the three complainants, Samantha informed him that the appellant had forced her to undress and had touched her body. The other two complainants then told him that the appellant had done the same thing to them. Bonwana immediately confronted the appellant with these accusations. The latter

denied the allegations against him and took Bonwana to his office where he purported to show him the documents which he had completed in the course of interviewing the complainants. Bonwana did not read these documents. Thereafter Bonwana drove the complainants home. Upon being told by Bonwana that the appellant had denied any impropriety, the complainants became angry and insisted that he had indeed forced them to undress. No further evidence was presented on behalf of the State.

[9] The appellant was the only witness for the defence. His version was that on the afternoon in question, he took Rachel from the cell where she was being held to his office on the first floor of the police station to obtain a warning statement and fingerprints. Whilst he was thus engaged, a man and two women walked into his office and enquired about her. It is apparent from the evidence as a whole that the two women were the other two complainants whose identities at that stage had not been revealed to the appellant. The appellant was also not told at that time that they had been involved in the incident which led to the charge of theft against Rachel. They stated that they were in possession of a receipt that would prove that the item allegedly stolen had been paid for. He advised them to produce it and informed them that he was going to charge Rachel with theft.

[10] After obtaining a statement and fingerprints from Rachel, the appellant permitted her to make a telephone call so as to arrange bail. Her sister subsequently arrived at the police station and paid the bail in an amount of R100-00. While her sister was at the police station, Rachel offered to identify two other persons who had been involved in the incident at the clothing store. The appellant, Rachel and her sister thereupon travelled to Nyanga East where they found the other two complainants who, according to Rachel, were the persons in question. During the search for the other two complainants, Rachel, her sister and the appellant had encountered and spent some time with Rachel's mother. Rachel, the appellant and the other two complainants then travelled back to the Claremont police station in the appellant's motor vehicle.

[11] After their return to the police station Rachel waited in an office on the first floor whilst Samantha and Norooi were placed in a holding cell in the charge office on the ground floor from which each was removed to be questioned by the appellant.

[12] Shortly after their arrival at the police station, the appellant interviewed Norooi and Samantha in his office separately and at different times. He questioned each about her involvement in the shoplifting

incident. He was satisfied with their explanation that they were not present when the alleged theft had taken place and released them. They departed with Rachel. Shortly thereafter he was confronted by Bonwana, who had apparently been waiting for the three complainants in the parking area at the police station. Bonwana said that the complainants had informed him that the appellant had touched their naked bodies. The appellant denied this and attempted to explain to Bonwana the procedure he had followed in respect of the three complainants. When Bonwana refused to listen to him, the appellant had, via Bonwana, invited the complainants to lay a charge against him.

[13] In his testimony the appellant denied that he had committed any impropriety in respect of any of the three complainants. Thus, as regards the indecent assaults allegedly committed by him, his version conflicts completely with that of the complainants. In respect of the alleged indecent assaults, each of the complainants was a single witness.

[14] In convicting the appellant, the magistrate reminded herself that she was dealing with a single witness in respect of the essentials of each of the charges and stated that she was approaching the complainants' evidence with the necessary caution. In her assessment of this evidence, the

magistrate found that there were ‘sekere getrouheidswaarborge in hulle getuienis met betrekking tot die uitleg van die gebou. . . [en] die prosedure wat gevolg is. . .’. She found it reassuring that Samantha and Norooi could describe where their fingerprints were taken, in the face of the appellant’s denial that he took their fingerprints. In dismissing criticism of the contradictions between the complainants’ evidence in court and their written statements to the police concerning the charges against the appellant, the magistrate reasoned that such contradictions were understandable and excusable, as all three complainants are Xhosa-speaking and their written statements had been obtained without the assistance of an interpreter. She was also dismissive of the suggestion made on behalf of the appellant that the complainants had conspired against him. In this regard, she stated that there had been no opportunity for Samantha and Norooi to discuss the matter with each other and that they had, upon leaving the police station, immediately reported the indecent assaults to Bonwana who then confronted the appellant about their accusations. The complainants’ version of events was, in her view, further corroborated by this report to Bonwana. She concluded that the evidence of the complainants was satisfactory.

[15] As regards the appellant's evidence, the magistrate considered certain aspects thereof as 'nie baie duidelik nie'. She found it strange that the appellant had placed Samantha and Norooi in a holding cell when, on his version of events, they had not been arrested. She also found it troubling that, although Rachel had been released on bail earlier on the day in question, the appellant considered it necessary to transport her to Nyanga East and then back again with the other two complainants. She failed to understand why the appellant had informed Norooi and Samantha that he would 'set their bail' at a high amount. She was not convinced by the appellant's explanation to the effect that he had done this because he was unhappy that they had wasted his time.

[16] On appeal to it, the Cape High Court considered that the period of almost two years between the date of the alleged offences and the appellant's trial explained the complainants' imperfect recall of events. In the view of the court below, the numerous contradictions in the complainants' evidence did not impinge on the reliability of 'die kern van die verhaal wat hulle vertel'. Erasmus AJ, with whom Motala J concurred, echoed the magistrate's view about the language problem leading to the differences between the complainants' evidence in court and their written statements. In essence, the court below, in a terse judgment, simply

confirmed the convictions on the basis as set out by the magistrate in her judgment.

[17] As indicated above, each of the complainants was a single witness in respect of the alleged indecent assault upon her. In terms of s 208 of the Criminal Procedure Act, an accused can be convicted of any offence on the single evidence of any competent witness. It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (see, for example, *S v Webber* 1971 (3) SA 754 (A) at 758G-H). The correct approach to the application of this so-called 'cautionary rule' was set out by Diemont JA in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G as follows:

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber*. . .). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in *R v Mokoena* 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean "that the

appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded" (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

(See further in this regard the useful discussions in respect of single witnesses in DT Zeffert, AP Paizes and A St Q Skeen *The South African Law of Evidence* 4ed (2003) p 799-801 and in CWH Schmidt and H Rademeyer *Law of Evidence* (2003, with looseleaf updates) para 4.3.1.)

[18] As will be discussed in further detail below, an analysis of the magistrate's judgment in this case supports the conclusion that in fact she failed to approach the evidence of the complainants with the necessary caution. Moreover, her judgment illustrates the dangers of what has been called 'a compartmentalised approach' to the assessment of evidence, namely an approach which separates the evidence before the court into compartments by examining the 'defence case' in isolation from the 'State's case' and *vice versa.* In the words of Nugent J in *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449c-450b:

'Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent. But what is required in order to reach that conclusion is at least the equivalent

possibility that the incriminating evidence might not be true. Evidence which incriminates the accused, and evidence which exculpates him, cannot both be true – there is not even a possibility that both might be true – the one is possibly true only if there is an equivalent possibility that the other is untrue. There will be cases where the State evidence is so convincing and conclusive as to exclude the reasonable possibility that the accused might be innocent, no matter that his evidence might suggest the contrary when viewed in isolation.

. . . The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

(See also *S v Tellingen* 1992 (2) SACR 104 (C) at 106a-h and the judgments of this court in *S v Van Aswegen* 2001 (2) SACR 97 (SCA) para 7-8 at 100f-101e and *S v Trainor* 2003 (1) SACR 35 (SCA) para 8-9 at 40f-41c.)

[19] There were material contradictions between the evidence given by the complainants during the trial and the contents of the police statements made by them within a period of approximately six weeks from the date of the alleged offences. These contradictions related not only to the nature of the indecent assaults to which they were allegedly subjected by the appellant, but also to the sequence of events on the afternoon and evening in question and the circumstances and content of the report made to Bonwana.

[20] As indicated above, the magistrate purported to explain these material contradictions on the basis that the three complainants are Xhosa-speaking and that the police statements had been taken in English without the assistance of an interpreter. In this regard, the magistrate, in our view, overlooked the complainants' levels of education and the fact that each such complainant testified that she was proficient in English. None of the complainants was either illiterate or unsophisticated. Indeed, Rachel (21 years old) was a student of the University of the Western Cape at the time of the alleged offences, Norooi (24 years old) was in her Matric year and Samantha (also 24 years old) had already passed Matric. Each complainant confirmed that her statement to the police had been read to her by the relevant police officer before she signed it under oath. In the

absence of any acceptable explanation for the material differences between the complainants' evidence in court and the versions advanced by them in their police statements, it would appear that the magistrate misdirected herself by failing to attach sufficient weight to such differences in her assessment of the credibility of the complainants.

[21] The magistrate's finding of a 'getrouheidswaarborg' on the basis that Samantha and Norooi were apparently able to describe the layout of the police station building, including the place where their fingerprints were allegedly taken by the appellant, is fallacious. Although Norooi denied visiting the police station before she was taken there by the appellant, it seems clear from the evidence as a whole that both she and Samantha *had* in fact gone to the police station after Rachel had been arrested, had entered the appellant's office in which Rachel was being questioned by the appellant and had waited for a while in the passage outside that office. That office and the 'fingerprint room' are on the same floor of the police station building and it is common cause that both Norooi and Samantha were later questioned by the appellant in the said office. Neither purported to give any description of the room in which their fingerprints were allegedly taken (and in which they were also allegedly indecently assaulted), other than stating that it contained a basin in which they washed their hands.

They did not provide a description of the position of this room in relation to the appellant's office. Their sole testimony in relation to the 'procedure' followed by the appellant was that he had taken their fingerprints and had thereafter provided them with soap or gel to wash their hands. Bearing in mind the fact that Rachel's fingerprints *had* been taken by the appellant that day and that the three complainants had, on their own versions, discussed their experiences at the police station with one another on more than one occasion, the 'getrouheidswaarborg' found by the magistrate to exist in this regard carries no weight at all.

[22] The magistrate based her dismissal of the suggestion that the complainants may have conspired to concoct a story against the appellant on her finding that there had been no opportunity for the complainants to discuss the matter with one another prior to the report made by them to Bonwana. This finding is, however, *not* borne out by the complainants' evidence. Thus, for example, Samantha testified that she and Norooi had told each other what the appellant had done to them while they were together in the holding cell before being allowed to leave the police station. Although this was denied by Norooi, she in turn testified that the three complainants had discussed their experiences at the hands of the appellant while they were walking out of the police station to meet Bonwana.

[23] It must also be remembered that the three complainants were taken by the appellant from Nyanga East to the Claremont police station in the same car, some time after Rachel had allegedly been indecently assaulted by the appellant. According to Rachel, she had not, during the course of this journey, told her friends what the appellant had done to her or warned them against him in any way. The court below explained this by reference (*inter alia*) to the fact that it was not clear whether or not the complainants knew at that stage that the appellant did not understand Xhosa. This was not, however, the explanation given by Rachel under cross-examination. According to her, she had not said anything about the indecent assault on her to her friends because she was 'in shock' and did not think that the appellant would also indecently assault them. Her testimony in this regard was contradictory, evasive and not at all persuasive.

[24] On a conspectus of all the evidence the complainants did in fact have the opportunity to discuss the matter with one another, and must indeed have done so, prior to making their report to Bonwana. This being so, the magistrate's finding to the contrary indicates a failure properly to assess the evidence in this regard.

[25] Another aspect not given due consideration by both the magistrate and the court below is that initially, during evidence in-chief, the complainants' reaction to what was clearly reprehensible behaviour on the part of the appellant was, hesitant (had to be painstakingly extracted by the prosecutor by way of *very* leading questions) and muted. The complainants' initial reaction was almost uniformly that they found it strange that they were being 'searched' in the absence of a policewoman. Later, under strenuous cross-examination, their reactions mutated to 'shock'.

[26] The magistrate does not appear to have given any consideration in her judgment to the inherent probabilities of, in particular, the appellant's version (cf in this regard, *S v Shakell* 2001 (2) SACR 185 (SCA) para 30 at 194h-195a). The indecent assault on Rachel was allegedly committed in an office on the first floor of the Claremont police station on a Friday afternoon. By Rachel's own admission, other police officials (including a woman) were also present at the station at that time. For at least part of the time which Rachel spent with the appellant, Samantha and Norooi, together with another man, were sitting in the passage outside the appellant's office. While Rachel could not remember whether or not the appellant had closed the door of the room in which he had allegedly assaulted her, the appellant's evidence to the effect that he had not closed

the door of any of the rooms in which he had been with Rachel was not disputed. Even much later that night, when the appellant had questioned Samantha and then Norooi, other police officials were still present on both floors of the police station. Two inspectors had in fact entered the appellant's office while he was questioning Norooi, prior to their going off duty. Each of the complainants had been left alone by the appellant for periods of time, with the opportunity of telling other police staff at the station of what was happening, but none of them had done so. It appears to be most unlikely that the appellant would, in these circumstances, on three different occasions have taken the risk of being interrupted by one or more of his colleagues while forcing young women to undress in front of him and touching their naked bodies.

[27] It is also unlikely that, had the appellant indeed indecently assaulted the complainants, his reaction upon being confronted by Bonwana would have been, in a composed manner, to invite the complainants immediately to lay charges against him. Yet Rachel and Narooi testified that Bonwana informed them that the appellant had indeed reacted in this way. Furthermore, according to Samantha, Bonwana told all the complainants at the police station that they should lay charges against the appellant. None

of the complainants was able to offer a plausible explanation for why they had not in fact laid charges against the appellant on the night in question.

[28] The magistrate's concerns about aspects of the appellant's evidence, as set out in para [15], do not take into account that his actions, though open to criticism, are explicable in the light of preceding events.

[29] The contradictions between the evidence of the three complainants, and the inherent contradictions and inconsistencies in the evidence of each of them, are numerous and, in many respects, undeniably material. It is not, however, necessary to analyse these contradictions in any greater detail than that set out above. Suffice it to say that, in our view, the magistrate failed to give sufficient weight to these contradictions and, in addition, failed properly to weigh the complainants' evidence against that of the appellant and against the probabilities. The same can be said of the approach adopted by the court below in dismissing the appellant's appeal to it. To our minds, it cannot be said that the evidence, taken as a whole, establishes beyond reasonable doubt that the appellant indecently assaulted any of the three complainants.

[30] The appeal succeeds. The appellant's convictions on the three counts of indecent assault and the related sentences are set aside.

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MS Navsa

Judge of Appeal

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BJ van Heerden

Judge of Appeal

CONCUR:

Ponnan AJA