THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 24426/043
~~Reportable/~~Not Reportable

In the matter between

HEN~~S~~ZEN WILSNACH DE KOCK **Appellant**

AND

THE STATE **Respondent**

Coram**:** **Mthiyane, Lewis, Heher JJA**

Heard: ***21 February 2005***

Delivered: ***18 March 2005***

Summary Credible and reliable evidence of indecent assault and assault constitutes prima facie proof of guilt which calls for an answer: appeal against conviction for indecent assault, and sentence in respect of assault, dismissed.

JUDGMENT

LEWIS JA

[1] [1] The appellant was charged and convicted in the Regional Court, Upington on two counts – indecent assault, and assault. He was sentenced to eight years' imprisonment on the charge of indecent assault, and to two years' imprisonment on the charge of assault. BothBoth sentences were ordered to run concurrently. In an appeal to the High Court (Northern Cape) the convictions were confirmed, as was the sentence for indecent assault, but the sentence for the assault was reduced to six months' imprisonment. The appeal to this court against the conviction on the first count, and against the sentence on the second count, lies with the leave of the High Court.

[2] In his plea explanation in terms of s 115 of the Criminal Procedure Act 51 of 1977 the appellant denied guilt on both charges. But on the charge of assault with intent to do grievous bodily harm The appellant had he admitted that he had assaulted the complainant with a 'plastiek pyp', thus admitting that he was guilty of common assault. and hence Consequently there is no appeal against the conviction on the second count. It should be noted, however, that he had originally been charged, on this count, with assault with the intent to do grievous bodily harm. The

charge sheet itself mentioned assault with a 'plastiek pyp' only, despite the fact that in his statement to the police, made the day after the assaults, the complainant had indicated that he had been assaulted with various other implements as well. ~~It is not clear why the trial court found the appellant guilty only of assault.~~

[3] In the appeal before us, ~~T~~the essence of the appellant's attack on the conviction on the charge of indecent assault is that the complainant was not a credible witness in so far as the second charge of assault was concerned. He had, it was argued, grossly exaggerated the extent of that assault, and there were contradictions in his evidence, such that his account of the indecent assault was also to be disbelieved. The state, had not, argued the appellant, established a *prima facie* case against him, and accordingly there was no case to answer – this despite a doctor's evidence in which he confirmed the contemporaneous J 88 report prepared by him on examining the complainant ~~, and the statement made by the doctor after examining the complainant~~ the day after the alleged assaults. Both that statement and the evidence of the doctor ~~corroborated~~were consistent with that of the complainant, but the appellant argues that there were shortcomings in the medical

examination. The argument is thus that the defects in the complainant's evidence and the deficiencies in the doctor's examination were such as to justify the appellant's failure to testify. There was thus, it was contended, no prima facie case to meet. I shall deal with the argument in this regard after briefly setting out the relevant portions of the evidence.

[4] The complainant, the doctor who examined him, Dr Meyer, and another employee of the appellant, Mr Rodgers Mohlai, testified for the state. A forensic pathologist, Dr Wagner, was the only witness for the appellant. The appellant did not testify in his own defence.

[5] The evidence of the complainant, borne out almost completely by the statement made by him to the police the day after the assault, was to the following effect. He was employed as a labourer by the appellant on a farm in Kakamas. The appellant had requested him to assist with building work on the farm on Saturday 10 March 2001. He had commenced work in the morning, sifting sand. The appellant had plied him with alcohol throughout the course of the morning. He had been given, and had drunk, first some nameless spirit, then six small bottles of beer ('dumpies'), and then brandy. The appellant had also drunk the same quantity of beer. Not surprisingly, after a while the complainant~~he~~ felt unable to work and asked if he could go back to the compound

where he lived. The appellant suggested instead that he just lie on the lawn next to his house and sleep. The complainant did so.

[6] A while later the appellant woke him up and asked him to assist with some work in a storeroom ~~nearby~~some 30 to 40 metres away from the appellant's house. They went to the storeroom together. The appellant closed the door. There the appellant grabbed the complainant by the neck and ordered him to pull down his shorts and underpants. The complainant refused but his shorts and underpants were forcibly taken off by the appellant, leaving him clad only in a T-shirt. The appellant then forced him to bend over a barrel and, against the complainant's will, penetrated ~~the complainant's~~his anus with his penis. The complainant testified that this went on for some time: the appellant was sweating and the complainant experienced much pain. He pleaded with the appellant to stop. Eventually the appellant turned the complainant over, grabbed his penis and ejaculated on the complainant's stomach. He then left the storeroom, locking the door behind him. ~~and t~~The complainant lay on the floor naked but for his T-shirt.~~.~~

[7] Later in the day, at about 13h00, the appellant appeared in the storeroom with another employee, Mr Mohlai, and told the latter to look at a man who had said ~~he was not~~ that he did not easily get drunk. The

complainant testified that Mohlai had told him to put his clothes on. Mohlai gave evidence for the state and confirmed that he had looked at the complainant in the storeroom, and had seen that he was naked. He denied, however, that he had told the complainant to put his clothes on, saying that he assumed that he was lying on the floor naked because he was drunk. Mohlai had then left the storeroom.

[8] The complainant told the appellant ~~–~~that he was going to lay a charge against him. In response, the appellant ~~had taken~~took the complainant to a garage on the property and ~~had~~ accused him of stealing various items. He locked him in the garage and then called another employee, Thys, and his wife, Maria, to the garage, where~~,~~ testified the complainant, the three of them ~~had –~~assaulted him. The appellant ~~had~~ hit him with a 'kabel' (presumably the plastic pipe referred to in the charge sheet), and Maria had hit him with a wooden plank. He had also been hit with a wire brush. Under cross examination the complainant claimed also to have been struck with an 'yster' (possibly the same wire brush or a pipe) and punched and kicked.

[9] Counsel for the ~~The~~ appellant submitted that the inconsistencies in the complainant's account of the assault, and the fact that the charge sheet had mentioned only an assault with a plastic pipe, indicated that

the complainant was an unreliable and untruthful witness. I shall return to the alleged contradictions later. But at this stage I reject the appellant's submission that the failure to describe the assault more fully in the charge sheet can be attributed to the untruthfulness of the complainant. The very fact that the statement made by him to the police the day after the assault was far more detailed about the nature of the assault shows that the suggestion is unwarranted.

[10] The complainant fell asleep after the assault on him, and was woken by police whom the appellant had called. There was of course no evidence as to why the police had been summoned since the appellant did not testify. The complainant was taken to the local police station and kept there overnight. He did not lay any charges at that stage, but did ask to be taken to a doctor. He was in pain from both the indecent assault and the beatings. His anus had bled a great deal and he experienced difficulty walking, he testified.

[11] The following morning, Sunday 11 March, he had been taken by the police to see Dr J H Meyer in Kakamas. The report of Dr Meyer (the J 88 form) is consistent with the complainant's account of the indecent assault and the other assault. Although he did not examine the

complainant's trousers or underpants (for which no explanation was given) he did note that there were blood stains on his shirt.

[12] He noted also cuts on the face, grazes on the shoulder, the calf, grazes and bruising on his back, and marks consistent with being assaulted with ''n elektriese of ander draad'. There were cuts and swelling on his left hip, bruising on his chest and injury to his left tibia. The back of the complainant's head was also injured.

[13] Meyer's examination of the complainant's anus is ~~equally~~ consistent with the latter's evidence. He noted two~~various~~ tears on the skin, variously described as 'skeure' and 'velonderbrekings' (and as 'skeurkies' when being cross-examined), and noted their sizes. He also noted that there was dry blood in the region of the anus. In giving evidence Dr Meyer confirmed his report and said that he believed the anal injuries to be consistent with penetration or at least an attempt at penetration of the complainant's anus.

[14] Under cross examination Dr Meyer conceded that he had done no internal examination, nor taken any samples. He had not followed the general procedures normally undertaken when a sexual assault was alleged. Nor had he noticed that the complainant had walked with

difficulty. Much was made of these shortcomings by the only witness for the ~~state~~defence, a forensic pathologist, Dr L Wagner. Again, this is an issue to which I shall revert.

[15] After the examination by Meyer, the complainant made a statement to the police through an interpreter. It is largely consistent with the evidence given in court. C~~The c~~harges were then laid against the appellant.

[16] Dr Wagner was the only witness for the ~~defence~~defence. His testimony consisted in the main of a lecture on how an ideal examination would be carried out by a doctor following a charge of rape. It had little bearing on the complainant's condition and indeed Wagner had never examined him, although he had listened to the evidence of the complainant and Dr Meyer. Although Wagner attempted to suggest that penetration could not have taken place in the position described by the complainant (while he was bent over a raisin barrel) he had to concede that he could not exclude the possibility that, given the injuries described by Meyer, the appellant might have penetrated the anus of the complainant.

[17] The essential question before this court is whether the state had established a prima facie case against the appellant that necessitated an explanation. While an accused has the right to remain silent, a right now also entrenched in the Constitution, where the evidence for the state is such that it calls for an answer, and none is forthcoming, the state's case will be found proved beyond a reasonable doubt. The classic statement of this principle is to be found in *S v Mthetwa* 1972 (3) SA 766 (A) at 769D-F, per Holmes JA:

'Where . . . there is direct *prima facie* evidence implicating the accused in the commission of the offence, his failure to give evidence, *whatever his reason may be* for such failure, in general *ipso facto* tends to strengthen the State's case, because there is then nothing to gainsay it, and therefore less reason for doubting its credibility or reliability; . . .'

[18] This statement was adopted by this court in *S v Chabalala* 2003 (1) SACR 134 (SCA) at 142e-f, where Heher AJA pointed out that the principle was consistent with 'the constitutional position elucidated' in para 22 of *Osman v Attorney-General, Transvaal* 1998 (2) SACR 493 (CC); 1998 (4) SA 1224 (CC) at 1232. . . and *S v Boesak* 2001 (1) SACR 1 (CC); 2001 (1) SA 912 para 24. In *Chabalala*, said Heher AJA, the appellant had been faced with direct and credible evidence which made

him ‘the prime mover in the offence’, and that his failure to face the challenge raised by the evidence was damning.

[19] In *Osman* Madala J said (para 22):

‘Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that absent any rebuttal, the prosecution’s case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.’

And in *Boesak* Langa DJP said (para 24):

‘The fact that an accused person is under no obligation to testify does not mean that are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.’

[20] It is the appellant’s contention, as I have indicated, that the evidence presented by the state is not such as to establish a prima facie case, and that there is thus no reason for the appellant to provide any

answer. The only basis for that contention is that the complainant was not a consistent, satisfactory witness. It was submitted that he had exaggerated the extent of the assault on him by the appellant and Thys and Maria, and that he had described that assault somewhat differently in evidence-in-chief and in cross-examination. Moreover, it was argued, his evidence as to what was said when Mothlai came to see him and that of Mothlai was not entirely consonant, as indicated previously. A further inconsistency relied upon related to whether the door to the storeroom had been locked. The complainant said it had been. Mothlai said it was not. In my view nothing turns on this.

[21] All the discrepancies alluded to by the appellant are of a trivial nature, and can be explained to a considerable extent by the fact that when the complainant was assaulted he had been very drunk (for which the appellant was responsible) and his recollection was ~~obviously~~understandably affected by that. ~~Yet despite this, the statement made by him to the police the day after the assaults was almost entirely consistent with his evidence given some time later.~~

[22] More importantly, the complainant's evidence was corroborated by that of Dr Meyer. The account likelihood of the anal penetration was confirmed by Meyer. The account of the assaults with a cable or plastic pipe, with a wire brush, with a plank and with fists are consistent with the injuries noted by Meyer the day after the assaults. The fact that Meyer did not notice that the complainant's underpants were soaked with blood (as the complainant had said), could be explained by several factors: that he had not taken note of the underpants or the complainant's trousers at all; that the examination occurred a day after the indecent assault; that the complainant (as he had testified) might have cleaned himself and his pants. None of this was put to Meyer. The fact is that Meyer found dried blood in the region of the complainant's anus, and injuries consistent with penetration.

[232] The trial court did not regard the complainant as untruthful although it accepted that he had not been an entirely satisfactory witness. The court said:

'Hy was aan volledige kruisondervraging onderwerp, en daar kan nie sover dit hierdie Hof aanbetref, gesê word dat daar op enige wyse afbreek aan sy getuienis gedoen is, sodat hy as ongeloofwaardig aangemerk kan word nie.'

That is borne out by the record of the evidence. The court also took into account the fact that the complainant is an unsophisticated man with little education. That he had not apparently mentioned in his statement, as he had done in his evidence, that he had been kicked and punched, is explicable on the basis that he made the statement through an interpreter, and that he had not been able to read it, nor was it read, and translated, to him. Any omissions or inaccuracies would inevitably have gone unnoticed by him. It is clear that the magistrate was alive to these apparent discrepancies in the evidence but did not consider that they detracted from his reliability or credibility. It is as well to remind oneself that an appellate court will not ordinarily interfere with the findings of fact by a trial court in the absence of misdirection. (See *Rex v Dhlumayo* 1948 (2) 677 (A) at 698.) None has been shown to have occurred in the present case and any invitation to interfere with the factual findings by the magistrate must accordingly be declined.

[243] The complainant's evidence, his statement to the police the day after the assaults, and the evidence of Dr Meyer called out for an explanation. In my view, the state established a strong prima facie case of indecent assault and the appellant's failure to answer it is damning. I find that the ~~totality~~ cumulative effect of the evidence presented by the

state proves beyond reasonable doubt that the appellant did indecently assault the complainant. I consider it appropriate to add that were the common law to be changed, as indeed it should be, such that forced penetration of a man were to be regarded as rape, the appellant would have been charged with and convicted of rape. The question was not argued before us, and since it would be germane particularly to the sentence, against which there is no appeal, I shall not deal with it further.

[24~~5~~] In so far as the appeal against the sentence in respect of the second count – assault – is concerned, my view is that it is without any merit. Six months' imprisonment for an assault committed in the most humiliating of circumstances is, if anything, rather lenient. It is to be recalled that the appellant, who as the complainant's employer was in a position of power, had first plied the complainant with alcohol; then indecently assaulted him, leaving him to sleep naked on a floor; then falsely accused him of theft, and then called in other people to assist in a brutal assault which resulted in the injuries described by Dr Meyer.

[25~~6~~] In the result the appeal against conviction on the charge of indecent assault is dismissed; and the appeal against sentence in respect of the charge of assault is dismissed.

C H Lewis
Judge of Appeal

C H Lewis
Judge of Appeal

Concur: Mthiyane JA
Heher JA