Case number 374/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the mailer between:

JAN CHRISTOFFEL ENGELBRECHT Appellant

and

THE STATE Respondent

CORAM JOUBERT, V1VIER, HARMS,

OLIVIER JJA et VAN COLLER AJA

DATE OF HEARING : 5 SEPTEMBER 1995 DATE OF JUDGMENT : 22

SEPTEMBER 1995

J U D G M E N T

VAN COLLER AJA/.....

VAN COLLER AJA :

The appellant was convicted of rape in the regional court sitting in East London. He was sentenced to eight years' imprisonment of which three years were conditionally suspended for five years. His appeal to the Eastern Cape Division was unsuccessful but he was granted leave to appeal to this Court against both the conviction and the sentence.

At the commencement of the hearing of the appeal Mr Redpath, who appeared on behalf of the appellant, applied in terms of s 22 of the Supreme Court Act 59 of 1959 for leave to lead further evidence. It will be convenient to deal with this application after the following summary of the evidence.

It is common cause that the complainant, a 31 year-old married woman, and her four year-old child spent the night of 19 July 1992 in the house of the appellant's parents in Southernwood, East London. It was the State's case that

the appellant, who with his girlfriend also slept in the house, went to the complainant's room during the night, sexually assaulted and raped her. The appellant denies that he assaulted the complainant or that he raped her.

The complainant testified that she and her husband had been experiencing matrimonial problems from time to time. She approached Mr and Mrs Engelbrecht, the appellant's parents, on occasions to make telephone calls from their house. On one occasion prior to 19 July 1992 she and her daughter were compelled to leave their home as result of her husband's behaviour and they spent the night at the house of the appellant's parents. The complainant said that she saw the appellant previously on only one occasion at his parents' home. That was when she telephoned her brother-in-law, Brown, from the Engelbrecht home. When Brown came to fetch her the appellant, being under the impression that Brown was her husband's brother, threatened to assault him.

On 19 July 1992 she went to the Engelbrecht home at approximately 20h00 because her husband had once again verbally abused her earlier that evening. She arrived in tears. The appellant's father invited her to stay the night and told her that she would be safe with them. The appellant and his girlfriend at the time, Miss Debbie Watkins, were also present and they all gathered in the kitchen. Later they retired to their various bedrooms. In the bedroom allocated to her she and her daughter slept in separate beds. At about 04h00 the following morning she woke up and saw someone standing next to her bed. He said to her "Lynn I am going to rip your guts out of your body." She first thought it was her husband but when the man spoke she recognised the appellant's voice. He pulled her panties down and then put his hand into her vagina and scratched her. It was very painful and she pleaded with the appellant not to do that to her. She was paralysed with fright and could not believe that such a thing could

happen to her in a place where she thought that she would be safe. The appellant then pulled down his trousers and told her to suck his penis. She refused, the appellant forced himself upon her and pinned her to the bed. He then raped her. The appellant also pushed her legs upwards and thrust his penis into her anus. According to the complainant this was extremely painful and for a few days afterwards she was unable to sit. At that stage she was crying loudly and the appellant left the room. The complainant explained that her biggest fear during the ordeal had been that her daughter would wake up and that the appellant would molest her as well. The complainant then put on a dress and went to the room of the appellant's parents. She told them that the appellant had raped her and she heard a motor car driving away from the front of the house. Mr Engelbrecht did not believe her and told her to go back to sleep. Mrs Engelbrecht, however, got out of the bed and started crying. At that stage a motor vehicle

stopped at the house. The appellant came up the passage and indicated to the complainant not to say anything. He also made a threatening gesture with his fist and then returned to his own room. It was now approximately 04h40 and she phoned Brown to come and fetch her. She told him that she had just been raped by "that aggressive man, John". She used these words because of the appellant's aggressive attitude towards Brown on a previous occasion to which reference has already been made. She was examined by Dr Filmer, a medical practitioner at about 10h00 that morning. Kroon J who gave the judgment of the court a quo aptly summarised the relevant part of Dr Filmer's evidence as follows:

> "Dr Filmer's evidence was that he examined the complainant at 10.40 a.m. that day. She was in a state of neurogenic shock, very anxious and nervous. There was bruising and a haematoma of the anus and bruising of the left lateral wall of the vagina. There were lacerations of the right labia minora into the vagina and on both sides of the vagina. The examination of the vagina was painful. There was a bloody discharge of the vagina which appeared to come

> from the walls. He noted that 'the evidence suggested injuries were caused by stretching or sharp objects like fingernails' and he testified that the injuries did not have the appearance of having been caused by penetration by the male organ."

According to Brown, who was also a State witness, the complainant told him that she had been raped by "that man". He asked her whether it was that aggressive man and she confirmed it. He corroborated the complainant's evidence about the appellant's aggressive attitude towards him on a previous occasion. He testified that when he fetched the complainant that morning she was very upset. She at no stage told him that her husband had raped her. Brown also testified that he and his wife had visited the complainant and her husband the previous afternoon and when they left there had been nothing wrong with the complainant.

The complainant's husband, who was also called as a witness, gave evidence about their marital problems. According to his evidence these problems originally related to his over-indulgence in alcohol and to the fact that they

were both rather short-tempered. He had not assaulted the complainant although he did give her a few light smacks on the buttocks. On the night in question he had had an argument with the complainant and she had left the house shortly before 20h00. He denied that he had assaulted or raped her.

The appellant testified that the complainant and her daughter arrived at about 20h00. He could see that the complainant was upset and when she and Miss Watkins returned from the bedroom to the dining room he heard the complainant telling Miss Watkins that her husband had sexually assaulted her and that she was sick and tired of it. It was obvious from the complainant's behaviour that she had been drinking and during the course of the evening she drunk almost a bottle of cane spirits. His parents went to bed fairly early and Miss Watkins accompanied the complainant to her bedroom. Later that evening he saw the complainant sitting in front of his parents' bedroom. She

was crying and wanted to sleep with them in their bed. She was again taken to her room. He and Miss Watkins then left the house to buy a dummy for the complainant's child, but they could not obtain one. On their return the complainant once again appeared from her room and fell on her way to the toilet. When she emerged from the toilet her clothes were tucked into her panties and she wanted more alcohol. His uncle, Ben Engelbrecht, who was also at his parents' home that evening, then left and he and Miss Watkins retired to their room. During the night he heard a mumbling and moaning coming from the complainant's room. He went to her room, turned on the light and saw the complainant and her child in one bed. He woke her and told the complainant that she should stop her mumbling or she would wake the rest of the household. He also told her that it was the last time that she would come to their house. He returned to his bedroom and when he got up the next morning the complainant had already left. The

appellant denied the complainant's allegations that he had assaulted and raped her.

Mr Josef Engelbrecht, the appellant's father, said in his evidence that the complainant had been under the influence of liquor on the other occasions that she had come to his house. She told him that her husband assaulted her and that he used dagga and other drugs. On the evening in question he was not keen to have the complainant at his house, but he could not turn her into the street. During the evening they, with the exception of Miss Watkins, all had a few drinks. He and his wife went to bed and the next morning at about 05h00 the complainant came into their room. She asked permission to use the telephone. He denied that the complainant told him and his wife that the appellant had raped her. He also denied that his wife had started to cry and testified that she had been asleep all the time. He also said that he had heard no screams from the complainant's room during the night. When she spoke to

him that morning she was very calm and there was nothing wrong with her. In reply to questions by the magistrate Engelbrecht said that his wife opened the front door for the complainant when she left with her brother-in-law.

Miss Debbie Watkins said in her evidence that at the time of the alleged incident she had been the girlfriend of the appellant for approximately two years. The relationship ended during October or November 1992. When the complainant arrived on the evening in question she was unsteady on her feet and one could smell that she had been drinking. The complainant was hysterical and told them that her husband had abused her. She took the complainant to the bedroom to calm her down. The complainant told her that her stomach was sore and she was sore between her legs. She gathered that the complainant had been physically and sexually abused. The complainant had quite a few drinks during the course of the evening and she confirmed the appellant's evidence that they had left the

house at one stage to go and buy a dummy. Miss Watkins said in her evidence that during the evening the complainant went to her room on two occasions. On the first occasion she had to support herself against the wall and later on the appellant and his uncle helped the complainant to her room. During the night the complainant's child was crying and the appellant went to her room. She heard the appellant telling the complainant to keep the child quiet because others in the house were trying to sleep. She said that if the appellant had raped the complainant and the latter had begged him to stop she would have heard it. She did not hear the appellant leaving the house.

At the conclusion of the case for the defence the magistrate recalled the complainant. In reply to questions by him the complainant disputed the evidence about the liquor allegedly consumed by her. She was emphatic that she does not drink spirits at all and said that she only

drinks beer. She also denied that she was assisted to her room.

The trial was then postponed for a month and at the resumption the magistrate called the appellant's uncle, Mr Daniel Benjamin Engelbrecht. His evidence was briefly as follows. He understood from the complainant that her husband had chased her out of the house. He and the appellant poured drinks for the complainant, who consumed almost a bottle of cane spirits. It was shortly before 02h00 that he and the appellant had helped the complainant to her bed and he had then left the house.

At this stage of the proceedings in the trial court a different prosecutor appeared on behalf of the State and he did not put any questions to this witness.

The magistrate found that the complainant was in fact sexually assaulted and also raped on the evening in question. The main issue to be determined according to his judgment was whether it had been proved beyond a reasonable

doubt that it was the appellant who raped the complainant. The magistrate was satisfied that the complainant was in fact a honest witness and he described her evidence as very satisfactory. He concluded that the evidence of the appellant and his witnesses was not only improbable but should be rejected as false. He found that the appellant was in fact the perpetrator of the assault and attack on the complainant.

A petition by the appellant has been filed in support of the application to lead further evidence. The petition sets out that leave to appeal to this Court was granted by the court a quo on 2 May 1994. Subsequently, and only in January 1995, copies of the case docket, including copies of the statements made by the complainant and the witness Brown to the police prior to the trial, were received. These statements have been annexed to the petition. The appellant submits that a perusal of these statements establishes that they contain material allegations that are

contrary to the complainant's viva voce evidence. To substantiate this submission the appellant refers to a number of instances where the statements are, according to the appellant, in conflict with the oral testimony of the complainant. The appellant submits that the prosecutor's failure to disclose these statements constitutes an irregularity which caused serious prejudice to him resulting in a failure of justice. It can serve no purpose to burden this judgment with a detailed consideration of the alleged discrepancies. Suffice it to say that some of the instances referred to are not really discrepancies but omissions of minor importance. The other discrepancies relied upon are also of a minor or trivial nature and can certainly not be regarded as serious. There is in my judgment not "a real possibility that the probing of it [the discrepancies] by means of cross-examination could have an adverse effect on the assessment by the trial court of the witness' credibility and reliability" (per Botha JA

in S v Xaba 1983 (3) SA 717 (A) at 729 H). Consequently there was no duty on the prosecutor in this case to make the statements available to the defence. With regard to this duty of a prosecutor see also R v Steyn 1954 (1) SA 324 (A) at 337 A and S v Xaba (supra) at 728 E-H and 729 A-C. In view of this finding one of the basic requirements before an application in terms of s 22 of Act 59 of 1959 could be granted, namely that the evidence should be materially relevant to the outcome of the trial, has not been complied with. See S v Swanepoel 7983 (1) SA 434 (A) at 439 C-E. The application to lead further evidence in this Court can therefore not be granted.

Before he dealt with the merits, Mr Redpath firstly contended that the appeal should be upheld on the ground that the prosecutor stopped the prosecution in his address to the magistrate at the conclusion of the evidence. It appears from the record that he made the following submissions :

> "Your Worship what we know from the evidence, and particularly the medical evidence, is that the complainant was sexually tampered. There is no question about that. I think it is common cause Your Worship, and the doctor says that there were scratches in the complainant's outer lips, that there was a discharge, haematoma on the anus, but precisely who caused these injuries Your Worship, it appears that the complainant was to a certain extent under the influence of liquor and that her opportunities of observing, given that she had been sleeping, her opportunities to observe were impaired Your Worship and I do not think that it can safely be said that the accused is the person who sexually assaulted her Your Worship. There appear to be strong suggestions that it might be the accused, but I must concede that the State has not proved beyond reasonable doubt that it was the accused Your Worship."

According to Mr Redpath this attitude amounted to a

stopping of the prosecution in terms of s 6 of the Criminal

Procedure Act. This section reads as follows:

> "An attorney-general or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution under section 8, may-fa) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge; (b) at any time after an accused has pleaded, but before conviction, stop the prosecution

> in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge: Provided that where a prosecution is conducted by a person other than an attorney-general or a body or person referred to in section 8, the prosecution shall not be stopped unless the attorney-general or any person authorized thereto by the attorney-general, whether in general or in any particular case, has consented thereto."

This contention was also advanced by Mr Redpath in the court a quo. Kroon J, with whom Froneman J concurred, however, found that the prosecutor's submissions amounted to no more than an expression of this opinion on the merits of the case, but that the matter was being left in the hands of the magistrate. In coming to this conclusion the court a quo applied the approach adopted by Corbett J in the case of S v Bopape 1966 (1) SA 145 (C). At the time of that judgment the corresponding section was s 8 of Act 56 of 1955, the wording of which, although not identical, was similar to that of s 6 of Act 71 of 1977. In the court a

quo in that case the prosecutor's address to the magistrate was to the effect that he was unable to advance reasons why the accused should be convicted and he submitted that the accused should be found not guilty. The accused was, however, convicted. On appeal Corbett J, with whom Banks J concurred, said at 148 E-G that whether a prosecutor's conduct amounts to the stopping of a prosecution is a question of fact to be decided with reference to all the circumstances of the individual case. He then continued as follows at 149 A-F:

> "It seems to me that there are three possible attitudes which a prosecutor may adopt towards a prosecution. He may press for a conviction, or he may stop the prosecution, or he may adopt an intermediate, neutral attitude whereby he neither asks for a conviction nor stops the prosecution but leaves it to the court to carry out the function of deciding the issues raised by the plea of not guilty. In the present case the statement made by the prosecutor may, in my view, be construed as evincing either of the latter two attitudes. ... In view of this ambiguity I do no think that it can be said that the prosecutor made "perfectly plain" his intention to stop the proceedings."

The words "perfectly plain" in this context had their origin in the remarks of Dove-Wilson J in the case of Rex v Kelijana (1909) 30 N.L.R. 437 at 445 quoted by Corbett J at 148 B-D.

If one now has regard to what the prosecutor submitted in this case then it is clear that he adopted a neutral attitude. He certainly did not press for a conviction, but he also did not explicitly stop the prosecution but merely expressed his opinion. In my judgment the prosecutor did not make his intention to stop the proceedings "perfectly plain". The correct approach, with respect, adopted by Corbett J in the Bopape case was applied by the court a quo. I cannot therefore agree with counsel's argument that the submissions made by the prosecutor amounted to a stopping of the prosecution. Should a prosecutor intend to do that he should say so explicitly. In view of this finding it is not necessary to deal with the question whether or not it was necessary for the trial court to be

satisfied that the prosecutor had in fact been authorised by the Attorney-general to stop the prosecution.

I now turn to the merits of the appeal. The crucial question in this case is whether the complainant sustained the injuries found and described by Dr Filmer at her home or at the house of the appellant's parents. If she sustained these injuries at the Engelbrecht home, then there can be no doubt that it was the appellant who inflicted the injuries. The complainant knew the appellant, her assailant spoke to her during the assault and his face must have been very close to hers. There was also no suggestion by the defence that the complainant could have been assaulted in the house of Engelbrecht senior by someone other than the appellant. On the contrary, the evidence of the appellant and Miss Watkins was to the effect that the complainant told them that her husband had sexually assaulted her. The appellant's case, therefore, was that whatever injuries the complainant

sustained had been inflicted at her home.

If one has regard to her injuries it appears highly improbable that the complainant would have acted in the manner ascribed to her by the appellant and his witnesses. She would in all probability have been in such a shocked state that she would immediately have gone to her sister instead of staying at the Engelbrecht home. According to this version the complainant not only stayed there, but she drank a large quantity of alcohol and went to bed at a late hour. It is common cause that the complainant got up very early the next morning, went to the bedroom of the appellant's parents and spoke to his father. It is also common cause that she contacted Brown and that he fetched her. In cases of sexual assault, false charges do get laid for a variety of reasons but this is indeed strange behaviour on the part of the complainant who at that stage must have decided not to blame her husband any longer but to accuse the appellant of rape. The probabilities support

the evidence of the complainant that she was assaulted in the house of the appellant's parents. The magistrate accepted the evidence of the complainant and the other State witnesses. He rejected the evidence of the appellant and his witnesses as false. I do not intend to deal with all the arguments and criticism levelled at the magistrate's findings by Mr Redpath. Kroon J in the court a quo dealt comprehensively and convincingly with Mr Redpath's argument on the merits. I have also not been persuaded that the magistrate misdirected himself in any material respect or that his judgment is wrong. In my view it has been proved beyond a reasonable doubt that the complainant sustained the injuries found by Dr Filmer in the Engelbrecht home and it follows that the appellant was the person who inflicted those injuries. Mr Redpath submitted that even if the complainant had been assaulted at the Engelbrecht home, it was not proved that she had been raped. He contended that the medical evidence did not

confirm the evidence of the complainant that penetration had in fact taken place. It is true that Dr Filmer, in dealing with the bruises and scratch marks inside the vagina, said that it did not look like a penetration of a penis but appeared to have been caused by some sort of sharp object. His evidence, however, does not exclude the possibility that penetration could have taken place after the injuries described by him had been inflicted. This is what happened according to the complainant's evidence. The complainant is a married woman who had already given birth to a child and one would not necessarily expect to find signs of a forced penetration. The magistrate described the complainant as an honest witness and he accepted the evidence that penetration did take place. In my view that finding cannot be faulted. The appellant deliberately took the risk of giving false evidence and failed to reveal what really happened, if it was less serious than rape. This is one of those cases where the argument that the appellant

should be convicted of a less serious offence can be rejected with justification. Cf R v Mlambo 7957 (4) SA 727 (A) at 738 B-D. The appeal against the conviction cannot succeed.

In considering sentence the magistrate took into account all the relevant circumstances. He has not misdirected himself in any material respect and the sentence can certainly not be regarded as one which no reasonable court could have imposed. Mr Redpath contended, inter alia, that the magistrate misdirected himself in finding that correctional supervision would not be a suitable sentence "for this type of offence". I do not agree. The magistrate clearly did not intend to convey that correctional supervision should not be imposed in rape cases. A proper reading of his judgment indicates that he had serious cases, as this one undoubtedly is, in mind. I agree with the magistrate that the only appropriate sentence in this case is a period of imprisonment. The

appeal against the sentence can also not succeed. The following order is made:

1. The application to adduce further evidence is refused.

2. The appeal is dismissed.

A.P. VAN COLDER ACTING JUDGE OF APPEAL JOUBERT JA]

VIVIER JA] CONCUR

HARMS JA] OLIVIER

JA]