

SOUTH AFRICA / JUDGMENT

Yurell v S (Appeal) (CA & R: 55/2024) [2025] ZANCHC 16 (28 February 2025)

[2025] ZANCHC 16

COURT

Northern Cape High Court, Kimberley

BEFORE

MC Mamosebo, A Stanton

CASE / FILE NUMBER

CA & R: 55/2024

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: CA & R: 55/2024

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO

Circulate to Regional Magistrates: YES/NO

In the appeal of:

YURELL JOEL

Appellant

and

THE STATE

Respondent

Heard on: 25 /11/2024

Delivered on: 28/02/2025

Summary: Appeal against conviction: two counts of rape. Whether the sexual intercourse was consensual. Whether there was a material misdirection or gross irregularity committed by the trial court?

ORDER

In the result the following order is made:

1. The appeal against the conviction on the two counts of rape is dismissed.

JUDGMENT ON APPEAL

MAMOSEBO ADJP et STANTON J

- [1] The appellant and the complainant were involved in a 12-year love relationship from which two children were born, aged 12 and 5 years. The relationship became tumultuous and eventually ended in March
2017. This is buttressed by the existence of a protection order granted against the appellant by the Magistrate in Kimberley on 24 March 2016 under Case No 194/2016 in which he was ordered not to assault, threaten, and/or insult the complainant, Ms E[...] R[...] C[...].
- [2] The appellant was charged in the regional court, Kimberley, on the following six charges involving Ms C[...]: Count 1: kidnapping; Count 2: assault with intent to do grievous bodily harm; Count 3: rape; Count 4: rape; Count 5: assault with intent to do grievous bodily harm and Count 6: contravening the conditions of the Domestic Violence Protection Order as contemplated in s 17 of the Domestic Violence Act, 116 of 1998. He pleaded not guilty to all the six counts. The appellant was convicted on 2 November 2018 on all counts and sentenced as follows: Count 1: Three (3) years imprisonment; Count 2: Three (3) years imprisonment; Count 3: Twenty (20) years imprisonment; Count 4: Ten (10) years imprisonment; Count 5: Three
- (3) years imprisonment; and Count 6: Five (5) years imprisonment. The Court ordered that counts 2 and 5 run concurrently and count 3 with 4 run concurrently. The accused was declared unfit to possess a firearm.
- [3] The appellant approached the trial court for leave to appeal against his convictions on counts 1 to 5 and the sentences imposed on all counts. The court granted him leave to appeal his convictions on counts 3 and 4 involving rape but refused him on others, including leave on sentence in respect of the six counts. He filed a petition to this court against the trial court's refusal to grant him leave to appeal his sentences which Mamosebo J and Stanton J denied him on 8 September 2021.

- [4] This appeal is consequently confined to the conviction on counts 3 and 4 pertaining to the rape. It is common cause that sexual intercourse took place; however, the appellant's defence is that it was consensual. The regional magistrate permitted the complainant to testify through the assistance of an intermediary and the presence of a female police officer because she was observed to be shaking and sweating. The proximity to the appellant discomforted her.
- [5] The issues that stand for determination in this appeal as paraphrased from the Notice of Appeal dated 10 January 2019 are the following:
- (a) Whether there was any misdirection by the trial Court in its findings of fact that the accused could not beyond a reasonable doubt explain how he got consent to sexual intercourse, how the physical fight took place, etc. at para 13(l) of the

judgment.

- (b) Whether the finding that the rape in count 3 was preceded by an assault with a padlock, and therefore falls under Part 1 of Schedule 2 of Act 105 of 1997, was correct.
- (c) Whether the trial Court applied the cautionary rule when considering the evidence of Ms C[...] as a single witness.
- (d) Was it a misdirection by the trial Court in finding that the complainant was clear and satisfactory in all material respects in respect of the two counts of rape.
- (e) Whether the trial Court had erred in rejecting the appellant's version as not being reasonably possibly true in respect of the rape counts.
- (f) Whether the trial Court had erred in not taking into account the evidence of Haley-Ann Davids (the appellant's current girlfriend) and the complainant's concession that she visited the appellant's house after the incident as she was unhappy that he had moved on and was dating someone else.
- [6] As far as ground (issue) 5(a) of appeal is concerned.

On the face of it the regional magistrate applied the wrong test by implying that there is an onus on the appellant to explain beyond a reasonable doubt that he was not guilty or that he was innocent. That duty rests upon the State and never shifts. Having said so, the reasoning of the Court became muddled, as reflected below where the Court subsequently states, correctly, at para 13(n) and 13(o):

'13(n) Accused version on the totality of the evidence is full of extensions, unexplained, unclear account of fights and conduct wrongful onto the complainant vis-à-vis the charges against him. When viewed with the evidence of the State and when viewed in total his version comes out as not credible and not reasonably possibly true and is rejected as such in all the charges [in] counts 1 to 6.

13(o) I therefore find that the State managed to prove all charges against the accused beyond a reasonable doubt. However, on count 3, the 17 March rape, the assault with intent to do grievous bodily harm with a padlock happened on the complainant, then followed by the sexual intercourse. It is therefore a rape falling under Part 1 Schedule 2 of the Minimum Sentences Act 105 of 1997.’

[7] In the circumstances it is prudent to accept that the magistrate had misdirected herself in para 13(l) of the judgment. The proper approach is that, as a court of appeal, we are at large to assess the evidence afresh, as we hereby do hereafter. See *Rex v Dhlumayo* 1948 (2) SA 677 (A) at 705 and *S v Hadebe* 1997 (2) SACR 641 at 645j – 646b.

[8] As far as ground 5(c) relating to the cautionary rule of a single witness is concerned, the criticism lacks substance. This will emanate from how the incident unfolded as set out below.

[9] On Friday, 17 March 2017, while visibility was clear, Ms C[...] and Mr Regan Wilkinson were together in 14th Street, Kimberley. Their evidence is that the appellant accosted them and called Ms C[...] a whore and a bitch. He slapped her. Ms C[...] says he also kicked her, and she fell to the ground. Mr Wilkinson says he did not see or recall the kicking part. This may be attributed to the fact that he may have already left the scene without lifting a finger to protect Ms C[...]. Be that as it may, it is of no moment because the appellant admits to having kicked her at that stage. She did not embroider. He dragged her away by clutching her T-Shirt. Several streets away, at 4th Street, a police vehicle passed by. The appellant threatened that should she try to stop the police he would harm her. She obliged out of fear. He forced her into a backroom.

[10] Strangely, he told her to keep a panga which was already on the floor whilst he interrogated her about being in a love relationship with Wilkinson, which she denied. Wilkinson also refuted the accusation. When the appellant left the room temporarily, she concealed the panga because she feared that he would not hesitate to use it. For her denial he slapped her three or four times. He then undressed her and pulled tufts of her hair out. The affected areas are clearly depicted in the photos. For her persistent denial the appellant hacked her severely over her forehead with a padlock and forced himself sexually

upon her. He threatened to injure her further should she scream or attract attention. So, she submitted. He then ordered her to lie in the doorway and humiliated her by urinating over her to be cold. He ordered her back to bed.

[11] On Saturday, 18 March 2017, he brought painkiller tablets and a rubbing ointment from the main house and gave her. He had left the backroom door open, but she was too scared to escape. She had bled from her nose, mouth and forehead due to the assault. He ordered her to make up the bed and wash her bloodied top and pants, which she did. He again left the house, unlocked. She managed to fall asleep. He woke her up, ordered her to pray so that her head should not swing away, by which she understood: ‘so that he does not chop her head off’. He again left the backroom.

- [12] Ms C[...] summoned the courage and scaled a fairly high perimeter wall (depicted in photos but not measured) into a neighbour's yard and fell through the branches of a fig tree. She reported her ordeal to the elderly couple and pleaded with them to summon the police. Ms Mercy Puley, the neighbour, obliged by dialling the police emergency number
- (10111) and handed the phone to Ms C[...]. Ms Puley testified that at that stage she summoned the appellant's uncle, Mr Theodore Manus, to her place. She enquired from him whether he knew Ms C[...]. He said he could not recognise her because her face was too swollen. Mr Manus then unwittingly committed a cardinal sin by confronting the appellant with what he had observed at Ms Puley's place and reported to him that the police are being summoned.
- [13] In no time, the appellant appeared and wrenched the phone from Ms C[...] and thus thwarted the call. Not only that, but he forced her back to his place. He attempted to compel Ms C[...] to tell Mr Manus that Wilkinson was the one who had assaulted her, but she refused. He gave Ms C[...] painkiller tablets to wash down with Castle beer. On a whim he produced a knife and stabbed her on her cheek and her lips. He ordered her to sleep which she did while he sneaked away temporarily.
- [14] The appellant returned when it was already dark. He took her from the main house to the backroom. She was wearing only her top and panty. He said to her 'ons gaan nou weer saam kom slaap dat ek sien het jy 'n man.' He penetrated her and thereafter continued to interrogate her on her relationship with Regan. These responses, in my view, are relevant to the issue of consent[1].

'Prosecutor: Did you allow him to have sex with you?

Complainant: 'Ek het niks gesê nie. Dit het net gebeur want ek was te bang.

Prosecutor: What were you afraid to do?

Complainant: Ek wil nie geskree het nie of weer verder gepraat het nie.

Prosecutor: And if you could scream why would you be screaming?

Complainant: Net vir help. Vir iemand om my uit te kom haal.

Prosecutor: Now are you referring to the sex now or just being in that room?

Complainant: Om uit die kamer ook te kom.

Prosecutor: What do you mean and also? Are you referring again to just the sex or being in that room or both?

Complainant: Al twee en om weg te kom van hom af.

Prosecutor: You may proceed.

Complainant: Toe het hy my gevra het jy 'n verhouding met Reagan. Toe haal hy die hamer uit... En toe sê ek nee. Toe kap hy my op my skouers, my kop en my knieë, my bene en my enkels. Hy het my elke tyd een vraag oor en oor gevra. Toe kap hy my net elke tyd op dieselfde plekke.

Prosecutor: Did you ever call out for help?

Complainant: Nee

Prosecutor: Why not?

Complainant: Want hy het gesê as ek weer kan skree hy gaan my seermaak. En niemand gaan help bring nie.

The complainant lost consciousness which concluded the Saturday episode.

[15] On Sunday morning, 19 March 2017, Ms C[...] walked with difficulty. The appellant carried her from the backroom to the main house. There he ran a cold bath and ordered her to bathe. When she was through, he lifted her out of the bath to his room inside the main house where he gave her his pair of pants and a shirt as well as pain tablets and returned to the backroom where he ordered her to sleep. She was awakened by a knock on the door. It was police officers, Csts Katlego Boitse and Phiri. Cst Boitse testified that they were summoned telephonically by Ms Jennifer Erasmus, the complainant's aunt. Ms Erasmus testified that she made the report to the police because Ms C[...] had been missing since Friday. She accompanied the police

to the accused's place but remained inside the vehicle. The appellant tried to dupe Cst Boitse that he would take Ms C[...] to the doctor the following day. Ms C[...] used the opportunity to run, with difficulty, to the police van where she found her aunt and daughter. Ms Erasmus explained that she could not even recognise her niece due to her facial injuries. Ms C[...] own daughter could only identify her mother by the marks on her left hand.

[16] According to the evidence of Cst Boitse, the complainant informed them that the appellant had locked her in his room the entire weekend, assaulted her and had sexual intercourse with her without her permission. She evidently was too afraid to speak in the appellant's presence. The appellant was arrested. The complainant was taken to her home for a change of clothes and handed over to the trauma unit of the SAPS and later taken to Kimberley Hospital for a full medical examination.

[17] Dr Labala Gusti Mafusi examined the complainant on 19 March 2017 and recorded the following injuries on the J88 form: multiple bruises over both legs, both upper arms and elbows; bruised and swollen bilateral eyelids; about three 1cm lacerations on the left cheek; 0.5 cm laceration over the left side upper lip and the inner part of the upper lip; 0.5 cm laceration over lower lip. The doctor found that the injuries were consistent with physical assault. The bruises were consistent with blunt force trauma while the lacerations were caused by a sharp object. The doctor ruled out the contention by the appellant that the injuries on her body could have been caused by the fig tree when scaling the wall. He

explained that the lesions would have been localised rather than having multiple cuts and bruises like the complainant had. A normal gynaecological examination was conducted. The doctor opined that his conclusion does not rule out any sexual penetration. This is immaterial because it is common cause that sexual intercourse had taken place.

The defence case

[18] The appellant's evidence was that he found Ms C[...] in the company of Wilkinson kissing and holding each other in the street. He asked her why she would be there instead of being home. Wilkinson left. He asked her if she and Wilkinson were in a love relationship. Instead, she slapped him twice on his cheek and refused to discuss her business in public. She suggested that they speak at his home. He suggested that they should rather speak the following day, but she persisted that they speak on the same day. When they reached his home, he told her he did not want to be with her but would rather be with his friends. She told him she was willing to wait for him, but that he should get her something to drink and play music for her.

Which he did.

[19] After about an hour she called him and complained of being lonely and missing him. He returned home. He found that she had consumed one dumpie of Castle Lite beer. She invited him to a couch where they started kissing. She loosened his pants and removed his t-shirt. She performed oral sex on him followed by sexual penetration, with her on top. She unfolded the sleeper couch and made the bed. She also asked for pain tablets which he gave her. She asked him not to leave since

it was late, and they both fell asleep lying next to each other.

[20] The following morning, on Saturday, 18 March 2017, she woke him up and started kissing him. She climbed on top of him, and they had sex again. She washed the clothes she was wearing and asked him for his clothes to wear. He left. On his return he found her asleep. He enquired about his phone, but she hurled an empty beer bottle at him, striking him on his head. She broke another bottle and chased him with the shard. He fled to his friends. He waited for about an hour for things to cool down and returned home where he found her sitting on the stoep. He observed that she had damaged his cellphone and laptop. He left to buy them another six-pack of beer.

[21] As they sat in the room consuming beer, she demanded to know what his plans are with her because she wanted them to raise their children together. He intimated that he did not feel the same way about her. She hit him with a clenched fist on his nose causing it to bleed. She also slapped him. He pushed her against a mirror which caused a scratch on her cheek. He fled to his room. When he exited after a while she slapped him again and he slapped her back. He disarmed her of the shard she removed from her trousers' pocket and threw it away. She then opened another beer and invited him to join her. He

neither assaulted the complainant with a knife nor a hammer. He followed the complainant to the neighbour's house to fetch his wallet which was in her possession. He only took the wallet and left. She followed him home voluntarily from the neighbours' place. He gave her R500 and left. When he returned later that night, he found her sleeping in his bedroom. He slept next to her.

[22] On Sunday morning, 19 March 2017, there was no incident. The police came and demanded to know Ms C[...] whereabouts. He confirmed her presence. She left with them to the police van. He remained behind to lock up and while walking to his mother's house the same police apprehended him. He sat next to the complainant, but after she told them that he had assaulted her they stopped the bakkie and placed him at the back. He concedes to having slapped the complainant, punched her with a clenched fist and elbow because she wanted to stab him with a shard. He also pulled out a tuft of her hair on Saturday afternoon during the fight. He denies keeping the complainant against her will.

[23] A challenge was raised that the trial court erred in not taking into account the evidence of Haley-Ann Davids, the appellant's current girlfriend, and the complainant's concession that she had visited the appellant's house after the incident as she was unhappy that he had moved on and was now dating someone else. The evidence of this witness clearly did not take the appellant's case any further as it does not bear any relevance to the rape accusations. The witness was absent during the ordeal. These are *ex post facto* occurrences. The attack on the rejection of this part of the evidence by the magistrate lacks merit and stands to fail. Her motivation for assisting to secure his release on bail is ascribed to the fact that she wanted him to maintain his children. That cannot be

faulted and did not detract from nor erase his misdeed.

[24] It was aptly pronounced by the SCA in *Director of Public Prosecutions Eastern Cape v Coko*:
[2]

'[13] It bears mentioning that this case falls within the category of sexual violence committed in the context of an intimate relationship. Consequently, this can be particularly difficult to navigate, given the intimate nature of such relationship, familiarity coupled with the fact that the parties would in most cases have previously been involved in some form of sexual contact prior to an allegation of rape by one of the parties against the other. This point was studiously emphasised by counsel for the second amicus curiae, Initiative for Strategic Litigation in Africa. However, it must be stressed that this in no way means that consent by one party to a specific form of sexual act should be taken to be a licence to every other sexual act. It is, *inter alia*, those types of situations that the Sexual Offences Act was designed to address.'

The learned Judges went further to state:

[34] Insofar as the proper approach to evaluation of evidence in a criminal matter is concerned, bearing in mind that the onus is on the prosecution to prove its case against the accused beyond reasonable doubt, the current state of the law is settled. What Nugent J said in *S v Van der Meyden* [1999

(1) SACR 447 (W) on this score is instructive. The learned judge said:

“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable

doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.

In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.’

[35] Van der Meyden was cited with approval in *S v Chabalala*, [2003 (1) SACR 134 (SCA) in which Heher JA said:

‘The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.’

[25] On the criticism that the trial court did not apply the cautionary rule when considering the evidence of a single witness. In as far as the offences of rape are concerned, the complainant is a single witness. It is settled that a cautionary approach must be adopted when considering the evidence. Sec 208 of the Criminal Procedure Act 51 of 1977 stipulates that an accused may be convicted of any offence on the single evidence of any competent witness. In this regard, the

trial court referred to s 208 at para 13(a) of its judgment and buttressed it with well-known precedents which need not encumber this judgment. She explained satisfactorily why she did not raise the “hue and cry” and why she only escaped when she thought it was opportune and safe. A court must be astute not to hark back to the cautionary rule in sexual cases which was outlawed in *S v Jackson*[3] in these emphatic terms:

'In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes

complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.'

[26] 'Consent' is defined in s 1(2) of the Sexual Offences Act as 'voluntary or uncoerced agreement'. Section 1(3), in turn, lists instances where a complainant would be taken not to have voluntarily or without coercion agreed to an act of sexual penetration. The section further stipulates under (3) Circumstances in subsection (2) in respect of which a person ('B') (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 and 4, or an act of sexual violation as contemplated in sections 5 (1), 6 and 7 or any other act as contemplated in sections 8 (1), 8 (2), 8 (3), 9, 10, 12, 17 (1), 17 (2), 17 (3) (a), 19, 20 (1), 21 (1), 21 (2), 21 (3) and 22 include, but are not limited to, the following:

- (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of
 - (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
 - (ii) a threat of harm by A against B, C or D or against the property of B, C or D;
- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act.

[27] The SCA in Coko[4] pronounced:

'[56] As this court made plain in *S v SM*, [2013 (2) SACR 111 (SCA) para 40] mere submission, or acquiescence, or lack of resistance does not convey a willingness to engage in a penetrative sexual act. Thus, none of these would constitute consent. The court had this to say:

'The law requires further that consent be active, and therefore mere submission is not sufficient. In *R v Swiggelaar*, Murray AJA commented as follows:

"The authorities are clear upon the point that though the consent of a woman may be gathered from her conduct, apart from her words, it is fallacious to take the absence of resistance as per se proof of consent. Submission by itself is no grant of consent, and if a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realises is useless."

[28] In addition to consent, the SCA in Coko[5] further dealt with the required element of mens rea in a rape charge and said:

'[62] As to the element of mens rea, it is beyond question that intention is a prerequisite for a conviction as it is an integral part of the definition of the statutory crime of rape. A must know that B had not consented to a penetrative sexual act. Therefore, the accused may 'escape [criminal] liability on the ground of absence of knowledge of unlawfulness of his conduct if he [or she] believed the complainant ...was in fact consenting'. Even dolus eventualis suffices, which means that it is sufficient to prove that A foresaw the possibility that B's free and conscious consent might be lacking, 'but nevertheless continues to act [recklessly] appreciating that [he/she may be acting without her/his consent], therefore

"gambling" as it were [with the security, bodily integrity and dignity] of the person against whom the act is directed'.

[29] The appellant's contention that the trial court was wrong in its finding that the assault of the complainant with a padlock preceded the sexual intercourse and therefore falls under Part 1 of Schedule 2 of the Act is flawed. The basis for invoking Part 1 of Schedule 2 cannot be faulted. It provides:

'Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-

(a) when committed-

(iii) by the accused who-

(bb) has been convicted by the trial court of two or more offences of rape or the offences of rape and compelled rape, irrespective of-

(aaa) whether the rape of which the accused has so been convicted constitutes a common law or statutory offence;

(bbb) the date of the commission of any such offence of which the accused has so been convicted;

(ccc) whether the accused has been sentenced in respect of any such offence of which the accused has so been convicted;

(ddd) whether any such offence of which the accused has so been convicted was committed in respect of the same victim or any other victim; or

(eee) whether any such offence of which the accused has so been convicted was committed as part of the same chain of events, on a single occasion or on different occasions.'

In convicting the appellant, the trial court was correct in following Part I of Schedule 2 because it finds application. The challenge to its application is flawed.

[30] The criticism by the defence on the oral sex issue is bemusing, and in fact, self-defeating. Ms C[...] neither disclosed in her police statement that oral sex had taken place nor did she testify to that effect in her evidence-in-chief. This occurrence was only elicited from her under cross-examination, which she readily acknowledged. She says it escaped her mind. This may or may not be so. What is undeniable is that Ms C[...] cannot be accused of fabricating evidence to portray the appellant in a worse light than he already was in. The defence solicited the unfavourable evidence. They must live with it. Ms C[...] did the appellant's bidding. It was part of the unwelcome sex. It bears reminding that the SCA in *S v Mafaladiso en Andere*[6], inter alia, stated that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. The situation sketched above, far from discrediting her, in fact, enhances her credibility.

[31] To sum up:

- (a) The uncontroverted evidence is that the love relationship between the complainant and the appellant became so tumultuous and abusive that it led to her obtaining a protection order against him on 24 March 2016 and formally terminated the relationship and cohabitation during March 2017;
- (b) When appellant abducted the complainant on 17 March 2017, he not only effectively contravened the terms of the protection order for which he was convicted, but had assaulted her as well. He also falsely accused her of having a romantic relationship with Wilkinson. Even if such relationship existed it is not for the appellant to prescribe to her who to associate with and in what manner;
- (c) As demonstrated above, the complainant's evidence was materially corroborated by Mr Wilkinson, Ms Puley, Mr Manus, Cst Boitse, Ms Erasmus and Dr Mafusi. The appellant literally held her hostage or prisoner for three days during which he had tortured and raped her repeatedly. He proved himself to be sexist and a sexual predator. If she was not rescued by the police the outcome may have been too ghastly to contemplate.
- (d) The magistrate, who was steeped in the trial, was justified in having found her to be a reliable and credible witness. In addition, none of the state witnesses named above were discredited in cross-examination. To reject their evidence would imply that they conspired with each other to implicate the appellant falsely. They were clearly independent and credible witnesses.
- (e) It is common cause that the appellant supplied Ms C[...] with a rubbing ointment and painkiller tablets. He, and nobody else, had inflicted the pain that had to be dulled by the medication. In addition he tried to convince the rescuing police officers that he preferred to take Ms C[...] for medical treatment. This was an admission that she required medical attention. Once more, the appellant was solely culpable for her poor physical condition. Her prolonged mental torture and anguish, which may not be physically perceptible, must not be left out of the reasoning or underestimated.

[32] The principle pertaining to the injuries sustained analogous to the case before us has been enunciated by the SCA in *S v Van Aardt*[7] that an accused cannot convincingly disavow having inflicted the injuries in circumstances where the overwhelming evidence demonstrates that when the accused had accosted the victim the victim was uninjured; that the victim was under the control of the accused throughout; that no one would conceivably have assaulted the victim in the intervening period; that the accused was the last person to be seen with the victim who was severely injured; that the irresistible conclusion must be that the accused caused all the injuries. In this case, the State went further in that Ms C[...] supplied the direct eye-witness testimony after she was rescued by the police.

[33] On the contrary, the appellant built a castle in the air and expected whoever to live in it.

- (a) No, he was the victim of the assaults, and the complainant was the aggressor and the culprit;
- (b) No, he did not abduct her, because she initiated the move to his home. She did so on her own volition.
- (c) No, the sexual intercourse was consensual. In fact, complainant initiated it and was the dominant partner;
- (d) No, the extent to which he raised his hand to her was in protecting himself or self-defence. He did so unarmed and in a non-violent manner. Wilkinson may have inflicted the injuries, he suggested.
- (e) No, he did not hunt the complainant down to return her to his home against her will. He merely went to retrieve his wallet and even gave her R500.00 from it. The appellant is a pathetic liar.

[34] Having regard to the common cause factors, the undisputed evidence, the weight of the evidence and the probabilities in the case, any suggestion that, in the circumstances the sexual intercourse could have been consensual should not be taken seriously. The appellant never intended to seek Ms C[...]’ consent to be intimate with her. He was determined to punish her for being in the company of Mr Wilkinson and did so sadistically. To suggest that there was consent is, by the same token, to suggest that she consented to be assaulted.

[35] In the result, the evidence of the appellant was not only not reasonably possibly true but unquestionably false. It follows that the State had proved its case beyond a reasonable doubt.

[36] In the result the following order is made:

1. The appeal against the conviction on the two counts of rape is dismissed.

MC MAMOSEBO

ACTING DEPUTY JUDGE PRESIDENT

NORTHERN CAPE DIVISION

I concur

A STANTON

JUDGE OF THE HIGH COURT

For the appellant Adv. CF Van Heerden Instructed by: Strauss de Waal Attorneys For the respondent: Adv. SK Weyers-Gericke Instructed by: Office of the Director Public Prosecutions

- [1] Record page 65 from line 22
- [2] Director of Public Prosecutions Eastern Cape v Coko 2024 (2) SACR 113 (SCA) paras 29 - 32
- [3] S v Jackson 1998 (1) SACR 470 (SCA) at 476E - F
- [4] Ibid para 56
- [5] Ibid para 62
- [6] S v Mafaladiso en Andere 2003 (1) SACR 583 (SCA)
- [7] S v Van Aardt 2009 (1) SACR 648 (SCA) at 33

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