THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 317/03
Reportable

In the matter between :

HEINRICH GENTLE APPELLANT

and

THE STATE RESPONDENT

CORAM : FARLAM, CLOETE, PONNAN JJA

HEARD : 14 MARCH 2005

DELIVERED : 29 MARCH 2005

Summary: Section 316 of the Criminal Procedure Act 51 of 1977: SCA granting leave to appeal where High Court believing that leave unnecessary but indicating that it would have been refused. Evidence: effect of document handed in by consent; what is meant by corroboration.

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] At the outset of this appeal the court granted the appellant's application for condonation for the late delivery of his application for leave to appeal to this court. The application was, correctly, not opposed by the representative of the State. At the conclusion of the hearing and after a short adjournment the court granted the appellant's application for leave to appeal, upheld the appeal against conviction and set the appellant's conviction and sentence aside. The appellant was released from custody later the same afternoon. It was indicated that reasons for the court's order would be furnished in due course. These are the reasons.

[2] On 26 July 2000 the appellant and his co-accused were charged in the Regional Court, Oudtshoorn, with having raped the complainant on 31 January 1999 at Matjiesrivier. Both pleaded not guilty but both were convicted. The magistrate found that each had raped the complainant twice. This finding meant that the offence was one specified in Part 1 of Schedule 2 of the Criminal Law Amendment Act, 105 of 1979 ('the Act'). The regional magistrate was accordingly obliged in terms of s 52(1) of the Act to stop the proceedings and commit the appellant and his co-accused for sentence by a high court as contemplated in s 51(1) of the Act.

[3] The procedure which the high court was obliged to follow is set out in s 52(3), which provides inter alia:

'(a) Where an accused is committed under subsection (1)(b) for sentence by a High Court, the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that Court.

(b) The High Court shall, after considering the record of the proceedings in the regional court, sentence the accused as contemplated in section 51(1) or (2), as the case may be, and the judgment of the regional court shall stand for this purpose and be sufficient for the High Court to pass such sentence: Provided that if the judge is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he or she shall, without sentencing the accused, obtain from the regional magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused.'

The sentence prescribed in s 51(1) is imprisonment for life; but s 51(3)(a) provides that if the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence, it may impose a lesser sentence.

[4] The matter came before Griesel J on 12 November 2001 in the circuit court at Oudsthoorn. The learned judge recorded that he was satisfied that the proceedings were in accordance with justice; found that substantial and compelling circumstances were present; and sentenced

the appellant to fifteen years' imprisonment and his co-accused to ten years' imprisonment. Both applied to the learned judge for leave to appeal against the convictions and sentences imposed. Their application was heard together with four other applications in similar matters. On 19 April 2002 the learned judge handed down a joint judgment in which he concluded that each of the applicants had an automatic right of appeal against conviction, but that leave to appeal against sentence was required. The learned judge continued:

'Sou die Volbank van my bogemelde benadering verskil, òf wat die feite òf wat die reg aanbetref, word geboekstaaf dat ek in elk van die vyf aansoeke wat die onderwerp van die huidige uitspraak vorm sodanige verlof sou geweier het. In daardie geval kan die gebrek aan verlof ondervang word deur die uitoefening deur die Hof van Appél van sy wye hersieningsbevoegdhede voortspruitend uit die bepalings van art 309(3), gelees met art 304(2) van die Strafproseswet.'

In the case of the appellant and his co-accused, leave to appeal against sentence was refused.

[5] In coming to the conclusion that the appellant and the other applicants for leave to appeal had an automatic right to appeal against conviction, the learned judge reasoned as follows:

'Hierdie hof het geen onafhanklike skuldigbevinding ten opsigte van enigeen van hulle uitgebring nie en het selfs nie eens nodig gehad om hul skuldigbevindings te bekragtig

nie. Wat wel gebeur het, is dat hierdie hof die verrigtinge in die laer hof onder hersiening geneem het en tot die gevolgtrekking gekom het dat reg tydens sodanige verrigtinge behoorlik geskied het.'

That reasoning is inconsistent with the later decision of this court in *S v B* 2003 1 SACR 52 (SCA). In para [9] of the judgment Streicher JA concluded, with reference to s 52(3) of the Act, that:

'Die skuldigbevinding in die streekhof is dus, in effek, 'n voorlopige skuldigbevinding wat finaal word indien dit aanvaar word of bekragtig word deur die Hoë Hof. Met ander woorde die Strafwysigingswet het 'n spesiale prosedure geskep ingevolge waarvan die verhoor van 'n beskuldigde in die streekhof begin en in die Hoë Hof afgehandel kan word.'

[6] The appellant and his co-accused appealed to the Cape High Court . The decision of this court in *S v B* was available to that court. In a judgment delivered on 20 February 2003 Knoll J (Selekowitz and Blignaut JJ concurring) found that although the Act had been amended with effect from 23 March 2001 by the Judicial Matters Amendment Act, 62 of 2000, the conclusion reached in *S v B* was unaffected; and accordingly correctly held that the appellant required leave to appeal against his conviction in terms of s 316 of the Criminal Procedure Act, 51 of 1977. Because such leave had not been granted by Griesel J, and because leave to appeal against sentence had been refused by him, the full court struck the appeal

off the roll. The full court was unable to exercise its review jurisdiction inasmuch as the decision of a superior court is not reviewable.

[7] The obviously bewildered appellant then applied for condonation and for leave to appeal to this court. The applications were dated 29 April 2003 and were received by the registrar on 17 July 2003. On 22 August 2003 this court made the following order:

'1. The application for condonation and leave to appeal is referred to this court for oral argument.

2. The parties must be prepared, if called upon to do so, to address the court at the hearing on the merits of the conviction and sentence.

3. The applicant is to file five additional copies of the application for condonation and leave to appeal and to file with the registrar of this court the record of the proceedings and to comply with all the rules relating to the prosecution of an appeal.

4. The applicant should arrange to be legally represented, if necessary, by applying to the Legal Aid Board for assistance.'

[8] As I have said, the application for condonation was granted at the outset of the hearing. The question which then arose for decision was whether this court could hear the appeal. The answer to that question depended upon whether it could be found that Griesel J refused to grant leave to appeal — in which case this court could grant the application for

leave. Griesel J refused leave in regard to the sentence he imposed. In the passage I have quoted in paragraph [4] above, Griesel J said expressly that he would have refused leave to appeal against conviction; and that is no doubt what he would have done, had the matter been sent back for his consideration by this court. If the matter were to have been sent back, this court could nevertheless have heard the appeal pending the decision of Griesel J for the reasons given in paras [18] to [28] of the judgment of this court handed down on 20 December 2004 in *Pharmaceutical Society of South Africa v The Minster of Health; New Clicks South Africa (Pty) Ltd v Dr Manto Tshabalala-Msimang NO*, SCA cases 542/04 and 543/04; and this court could itself have granted the necessary leave were it to have been refused. But to follow this approach would have been pointless, would have caused further unnecessary delay and would have resulted in form triumphing over substance — all for the purpose of obtaining an entirely predictable result. In the circumstances this court was of the view, and the representative of the State on appeal conceded, that Griesel J's approach should be interpreted as a refusal of leave to appeal on conviction. This court therefore considered that it was in a position to grant such leave in terms of the provisions of s 316(13)(c) of the Criminal Procedure Act, in view of the application before it and the

previous order made by this court on 22 April 2003 quoted in para [7] above. The application was accordingly granted.

[9] I turn to examine the merits of the appellant's conviction. It was established that at about five p.m. on the day in question the complainant left her home where she had been drinking wine all day with her husband, the appellant and another person. She had her baby with her. According to the appellant, he accompanied her as she had agreed to have sexual intercourse with him, and on their way the co-accused joined them. According to the complainant on the other hand, the appellant and his co-accused accosted her some distance from her home. It is common cause that the complainant and the appellant went to a place amongst the bushes next to a dirt track and that the co-accused followed them. Whether the complainant was a willing partner or was dragged there by the appellant, was in dispute. The complainant made no allegation that the co-accused forced her into the bushes nor did she suggest that he was acting in concert with the appellant when he, on her version, did so. The complainant said that the appellant then hit her on the eye, leaving what she described as a 'rooi kolletjie'. The appellant denied any such incident. It is further common cause that the appellant and thereafter his co-accused had sexual intercourse with the complainant in the bushes. It

is not necessary to consider whether the co-accused had sexual intercourse with the complainant twice (although that question will arise for decision should the co-accused obtain condonation and prosecute an appeal). Whether the appellant again had sexual intercourse with the complainant after his co-accused had done so, was in dispute. At some stage Mr Moos Barnard walked past the scene and at another stage the complainant's son Mario together with Daniël Malgas and another young person, who did not give evidence, arrived on the scene. The complainant's sister-in-law was summoned by Mario and he took her and her sister to the scene. Ultimately the police were called.

[10] In convicting the appellant, the magistrate committed a number of fundamental misdirections. It suffices to refer to two at this stage. First, the magistrate used the contents of the plea explanation of the appellant's co-accused to discredit the appellant's version. The appellant testified that the complainant had undone the button of her shorts herself. The co-accused had said in his plea explanation that the appellant had done this before dragging her into the bushes and having sexual intercourse with her. The magistrate could not rely on the evidence of the co-accused as it was patently unsatisfactory on this very point. Initially, the co-accused said in his evidence in chief that the complainant had gone

into the bushes with the appellant willingly. This elicited the following retort from the co-accused's attorney: 'Jy het my gesê sy is daar ingesleep', to which the co-accused responded: 'Hy het gegaan met haar daarin'. In response to the question: 'Wie trek wie se broek af?', the co-accused said 'Ek weet nie of sy [*sc*. hy] hom afgetrek het of sy nie meneer'. The co-accused's attorney then said 'Die verklaring wat jy vir my gegee het wat gesê het: "Klaagster se kortbroek losgeknoop haar die bosse ingesleep en met haar omgang gehad", is dit nie reg nie?' and after some further cross-examination (and I use this word advisedly) by his own attorney, the co-accused finally agreed that his plea explanation was the correct version. I shall return to the credibility of the co-accused later. For present purposes it suffices to say that what is said in a plea explanation by one accused is obviously not evidence against another accused.

[11] Second, the magistrate used what he termed 'die mediese getuienis, die dokter se getuienis wat ingehandig is' as being an indication that the complainant's evidence was reliable. The medical evidence in fact shows the exact opposite. That evidence was contained in a form J88 entitled 'Report by District Surgeon, Medical Officer or Medical Practitioner on the Completion of a Medico-legal Examination'. According to the form a medical practitioner named Barnard examined the

complainant at 9:30 p.m. (i.e. four hours or so after the alleged rape). The medical practitioner recorded:

'Was glo dronk kan nie voorval onthou nie. Antwoord nie juis op vrae nie. Nog ver deur die wind. Sê eers 1 persoon toe weer twee.'

The form was handed in by the appellant's attorney with the consent of the prosecutor. The medical practitioner was not called to give evidence. The only conclusion which can be drawn from the procedure which was followed at the trial and the magistrate's reliance on the contents of the form is that in consenting that the form be handed in, the prosecutor accepted the correctness of what was stated in it. The representative of the State on appeal was obliged to concede that this must be so, although he submitted that in the absence of oral evidence by the doctor, the possibility exists that the doctor's examination of the complainant may have been perfunctory and the entries on the form unreliable; and that accordingly where the State witnesses contradicted the entries on the form, their evidence should be preferred. That approach is not open to the State. Had the prosecutor wished to challenge the weight to be given to the contents of the form, he should have called the doctor or timeously have advanced a submission to this effect, in which case the magistrate should himself have called the doctor in terms of the provisions of s 186 of

the Criminal Procedure Act. In any event, the argument advanced on behalf of the State on appeal does not explain the approach of the magistrate. The one thing that the report did not do, is show that the complainant's evidence was reliable. The magistrate's statement to the contrary, is inexplicable and a plain misdirection.

[12] The State's representative on appeal submitted that the misdirections to which I have referred were not material. They obviously were. They formed part of the reasoning of the magistrate and contributed to his conclusion that the appellant was guilty. The consequence of the first misdirection was that inadmissible material was taken into account to discredit the appellant's version; and the consequence of the second misdirection was that evidence was taken into account to show that the complainant's version was reliable, when such evidence showed the exact opposite. This court is accordingly at large to disregard the magistrate's findings of fact, even if based on credibility, and to come to its own conclusion on the record as to whether the guilt of the appellant was proved beyond a reasonable doubt; and the onus accordingly becomes all-important: *R v Dhlumayo and Another* 1948 (2) SA 677 (A) paras 10, 12 and 13.

[13] The complainant was an appallingly bad witness. She contradicted herself in numerous respects. In chief she said that the appellant had had sexual intercourse with her twice whilst his co-accused held her child, and that when the appellant had finished, the co-accused had sexual intercourse with her twice whilst the appellant held her child. In cross-examination she said that after the appellant had had sexual intercourse with her, he walked away and did not return; and that the co-accused then put the baby down whilst he had sexual intercourse with her. It was pointed out to her by the appellant's attorney that in repeating her version in cross-examination she had not claimed that the appellant had had sexual intercourse with her more than once. She then said that the appellant had come back after his co-accused had had sexual intercourse with her and it was then that the appellant had had sexual intercourse with her for the second time. When she was confronted with her evidence that the appellant had walked away and not come back after he had had sexual intercourse with her, she was unable to explain the contradiction despite the fact that she was repeatedly asked to do so.

[14] The evidence of the complainant was also unsatisfactory as to when Barnard had walked past the scene and her son Mario had arrived on the scene. In her evidence in chief she said that Barnard walked past after

both the appellant and his co-accused had had sexual intercourse with her. In cross-examination on behalf of the appellant, she said that Barnard had walked past whilst the appellant was still having sexual intercourse with her, for the second time. That is a clear contradiction. She was asked when her son had arrived. She said it was when the co-accused was having sexual intercourse with her, and that was after Barnard had passed the scene. On this version, her evidence in chief that both had finished raping her when Barnard passed, cannot be true because Mario arrived after Barnard and saw the co-accused raping her. Nor can her previous evidence in cross-examination that the appellant was raping her for the second time when Barnard passed, be true — because if Mario saw the co-accused raping her when he arrived, the appellant had not yet raped her for the second time and Barnard could not have seen him doing so.

[15] During cross-examination the complainant said:

'Ja, maar ek, my kop, ek kan nie meer so lekker onthou nie.'

The reason why the complainant had difficulty in remembering what had happened, is not hard to find. She was drunk. That much is quite apparent from the medical report according to which she was still intoxicated some four hours after the incident, could not remember it and gave a

contradictory account of what had happened. Her evidence as to how much she had had to drink, was also unsatisfactory. She said that she and her companions, including the appellant, had been drinking since 9 a.m. on the day in question. She initially said that she had had only three and a half glasses of wine. It was pointed out that this was not very much, bearing in mind that the incident had taken place at about 5 pm. After much hesitation, she admitted having had two further glasses of wine. (I should perhaps say in parenthesis that no attempt was made to argue before this court that the complainant was too drunk to consent to sexual intercourse.)

[16] In all the circumstances, it is difficult to understand how the magistrate was in a position to say that 'die hof is tevrede dat die klaagster 'n goeie indruk op die hof gemaak het'. It may well be that the magistrate was only referring to the demeanour of the complainant and not to the content of her evidence. If so, it is cause for comment that the magistrate did not deal with the latter aspect at all. The magistrate said:

'Daarna het die verdediging mnr. Delport haar [the complainant] onder kruisondervraging geneem. Deur die kruisondervraging het hierdie prokureur daarin geslaag om ook 'n geheelbeeld, 'n prentjie voor die hof te plaas van wat presies daar plaasgevind het. Hy het haar stap-vir-stap deur die proses gevat en daaruit kon die hof

dan aflei wat gebeur het. Sy kon meer in detail vertel as gevolg van die kruisondervraging van mnr. Delport.'

As I have demonstrated, however, the complainant did not give more detail in cross-examination, nor did she clarify what she had said in her evidence in chief. She gave contradictory versions. These contradictions in the complainant's evidence were simply ignored by the magistrate.

[17] The complainant's evidence has very little probative value. The magistrate did not consider that a cautionary approach was necessary, but purported to follow such an approach. In *S v Jackson* 1998 (1) SACR 470 (SCA) at 474f-475e Olivier JA surveyed the history of the cautionary rule and the position in other jurisdictions, and concluded at 476e-f:

'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.'

The learned judge then quoted with approval from the decision of the English Court of Appeal in *R v Makanjuola*, *R v Easton* [1995] 1 All ER 730 (CA), including the following passage at 477c-d:

'In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential

basis does not include mere suggestions by cross-examining counsel.'

The evidence in this case certainly did call for a cautionary approach. Quite apart from her contradictory evidence to which I have already referred, the complainant had been seen by Barnard, her son and some of his friends in an extremely compromising situation. The lower half of her body was naked when her sister-in-law arrived on the scene. Her husband and her family would undoubtedly have called for an explanation. Rape was an obvious answer. These facts alone provide an evidentiary basis for the suggestion that the version of the complainant that she was raped may be unreliable and such evidence accordingly had to be approached with caution.

[18] The representative of the State submitted on appeal that (I quote from the heads of argument): '[T]here was sufficient corroboration or "indicators" to support the occurrence of the rapes.' It must be emphasized immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, *on the issues in dispute* (cf *R v W* 1949 (3) SA 772 (A) at 778-9). If the evidence of the complainant differs in significant detail from the evidence of other State witnesses, the court must critically examine the differences with a view to establishing whether

the complainant's evidence is reliable. But the fact that the complainant's evidence accords with the evidence of other State witnesses on issues not in dispute does not provide corroboration. Thus in the present matter, for example, evidence that the appellant had sexual intercourse with the complainant does not provide corroboration of her version that she was raped, as the fact of sexual intercourse is common cause. What is required is credible evidence which renders the complainant's version more likely that the sexual intercourse took place without her consent, and the appellant's version less likely that it did not.

[19] I shall deal with each of the facts that we were asked to take into account as providing corroboration. First, it was pointed out that the complainant had complained to her sister-in-law that she had been raped when the latter arrived on the scene. That is not corroboration. This court held in the as yet unreported decision in *Hammond v S* (SCA case 500/03 in which judgment was delivered on 3 September 2004) that the fact and contents of a complaint in a sexual misconduct case can be used only to show that the evidence of a complainant who testifies that the act complained of took place without her consent, is consistent. It is relevant solely to her credibility. The complaint cannot be used as creating a probability in favour of the State case i.e. it cannot be argued that because

the complainant complained shortly after the incident, it is probable that the incident took place without her consent.

[20] Second, reference was made to what was termed the ‘naked and injured state’ of the complainant. The magistrate found corroboration for the complainant’s version inter alia in the fact that the complainant’s sister-in-law saw blood coming out of the complainant’s private parts, and that the complainant was not wearing her panties, when she arrived at the scene. The fact that the lower half of the complainant’s body was unclothed, is neutral, as the State’s representative correctly conceded. The fact that the complainant was bleeding is of no significance as it is clear from the medical evidence that she was menstruating.

[21] Third, reference was made to the alleged injury sustained by the complainant to her eye. The complainant’s sister-in-law and Daniël Malgas testified that they had seen such an injury. The problem facing the State is that the doctor found that the complainant was not injured. It is clear from the form J88 that the doctor was not referring to her private parts. If such injury was obvious to the complainant’s sister-in-law and Malgas, the probabilities are that it would also have been noticed by a trained doctor whose function it was to record such an injury. It is not as

though the alleged injury was concealed under her clothing. The contradiction in the evidence casts doubt upon the veracity of the evidence given by those who said that they did see it — particularly because the complainant's own son Mario made no mention of it. In the circumstances it would be unsafe to find corroboration for the evidence of the complainant that the appellant hit her leaving a visible mark on her face.

[22] Fourth, reference was made to the fact that the complainant's pair of panties was torn. The appellant said that they were not torn. They were handed in as an exhibit and they were torn. There is therefore corroboration for the complainant's evidence on this point.

[23] Fifth, reference was made to the evidence of the co-accused that the appellant had dragged the complainant into the bushes. I have already dealt with this evidence. It is contradictory and completely unreliable.

[24] Sixth, reference was made to the evidence of the complainant's son Mario regarding drag marks ('sleepmerke') on the ground. This evidence is of no value, even assuming that it was admissible. (The question which arises in this latter regard is whether the magistrate's warning to Mario and to his youthful companion Daniël Malgas to tell the truth was

competent or whether he should have administered the oath. I find it unnecessary to decide the point.) Mario said nothing about drag marks in his evidence in chief. In cross-examination he began talking about 'toe die oom Mamma aangesleep het' and 'toe hy Mamma ingesleep het'. It appears from the context in which this evidence was given that Mario was talking about the co-accused and not the appellant as the 'oom'. The following exchange then took place between Mario and the magistrate (it is notable that up until that time, Mario had consistently referred only to one person who had dragged his mother into the bushes):

'Het hulle vir haar ingesleep? -- Ja meneer.

Het jy dit gesien? -- Ja meneer.'

The proceedings continued with the co-accused's legal representative asking the questions:

'Was jy daar toe jou ma gesleep is? -- Nee meneer.

Het jy sleepmerke gesien of hoekom praat jy van sleep? -- Ja meneer ek het die sleepmerke daar gesien meneer.'

The magistrate then asked:

'Het jy sleepmerke gesien, jy het nie gesien jou ma word gesleep nie?'

to which Mario replied:

'Ek het nie gesien hulle word gesleep nie meneer, ek het die sleepmerke daar gesien.'

As the representative of the State readily conceded, what appears to have

happened is that in order to explain why he said his mother was dragged into the bushes when he was not there, Mario claimed to have seen drag marks. The evidence is obviously unreliable and no weight can be attached to it.

[25] Seventh, reference was made to the evidence of the co-accused that the appellant had had sexual intercourse with the complainant after he (the co-accused) had had sexual intercourse with her. The co-accused was demonstrated to be an out and out liar. He claimed to have been impotent for some time before the incident but ended up conceding that this was not correct and that he had indeed had sexual intercourse with the complainant. His evidence was also unsatisfactory as to whether the complainant was dragged into the bushes by the appellant, as I have already indicated. Whether his evidence can be regarded as corroborative of the complainant's evidence depends upon whether any credence can be attached to it; and I am quite unable to do so.

[26] Finally, the State's representative relied on the evidence of the complainant's son Mario and his companion Daniël Malgas to show that the complainant had called for help. The problem facing the State in this regard is that there is a contradiction between the two witnesses on this

very point. Malgas said that when he arrived on the scene, the co-accused was having sexual intercourse with the complainant and she called for help. Mario confirms that the co-accused was having sexual intercourse with the complainant when they arrived but, in his evidence in chief, when asked: 'Ja, en wat sê mamma toe vir julle?' he answered: 'Niks nie meneer'. It is far more probable that the complainant's own son would have remembered the complainant calling for help, if this occurred, than one of his companions. In the circumstances the evidence of Malgas on this point cannot be accepted.

[27] The only aspect —albeit an important aspect — on which the complainant's evidence is corroborated, is that her panties were torn. On the other hand, she is contradicted by the medical report and by Barnard on equally important aspects of her evidence. It cannot be accepted, in view of the medical report, that she had any injury to her face, and consequently her evidence that the appellant hit her also cannot be accepted. It also cannot be accepted, because of the evidence of Barnard, that she was screaming whilst she was being raped. She said that Barnard walked past the scene and I have already referred to her contradictory evidence in this regard. Barnard was called by the State. His evidence is confusing. One thing, however, is clear from that evidence,

namely, that he did not hear the complainant scream and that he would have heard this, had she done so. Indeed, if the complainant saw Barnard, as she said she did, it is inconceivable that she would not have called out for him to help her. Yet she does not say that she did; and it is clear from Barnard's evidence that she did not. The magistrate found that Barnard appeared to be an unwilling witness. But that is no warrant for ignoring his evidence. As Nugent J said in *S v Van der Meyden* 1999 (2) SA 79 (W) 82D-E, in a passage subsequently approved by this court in *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at 101e:

'What must be borne in mind, however, is that the conclusion which is reached (whether it to be convict or to acquit) must account for all the evidence. Some of the evidence may 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.'

[28] The appellant was not a satisfactory witness. He persistently denied telling the police the version which was recorded in his statement and contradicted himself as to whether he had read the statement before he signed it. His attitude is inexplicable inasmuch as there is nothing incriminating in the statement. His evidence in this regard leaves a poor impression of his credibility. He was also constrained to concede that his

version as to the amount of wine he had had to drink, was unlikely bearing in mind the time he had spent at the complainant's home. Furthermore, his version that the complainant's pair of panties was not torn, must be rejected and this must count against him.

[29] The State's representative submitted in argument that the appellant's version is so improbable that it cannot be true. The submission was that if the appellant and the complainant had mutually agreed that they would have sexual intercourse at a convenient place some distance from her matrimonial home, it is improbable that the appellant would have allowed the co-accused to watch; and that it is inexplicable how, without a word having been said, the co-accused would have ended up also having sexual intercourse with the complainant. One would indeed not expect rational people to behave in this way. But the complainant was drunk. So were the appellant and his co-accused. Their conduct as testified to by the appellant cannot accordingly be evaluated according to rational norms. It is quite possible in the circumstances that the complainant and the appellant could not have cared less whether the co-accused was around or not; and that after the appellant had satisfied himself, he walked away leaving the complainant to fend off the advances of his co-accused if that was his intention, or to succumb to them if she had no objection. There is

simply no evidence which suggests that the appellant and his co-accused had agreed that they would rape the complainant or why they would wish to do so together. It is quite possible that after the appellant had finished having sexual intercourse with the complainant with her consent, the co-accused, having seen that she was not resisting, decided to try his luck as well.

[30] Considering the evidence on the record as a whole I am not satisfied that the guilt of the appellant was proved beyond a reasonable doubt. The appellant was an unsatisfactory witness, and was proved to have lied as to whether the complainant's panties were torn. On the other hand, the complainant's evidence was patently unsatisfactory, and except for the aspect I have just mentioned, uncorroborated; and she was furthermore contradicted on two important aspects of her evidence, namely, whether she had screamed for help and whether the appellant has hit her on the face leaving a visible mark. A cautionary approach is called for in the circumstances of this particular case for the reasons I have given. The natural sympathy which one has for a woman who says that she has been raped, cannot be allowed to play any role in deciding whether the onus of proof in a criminal case has been satisfied. In the present case, it has not.

[31] In the circumstances this court concluded that the following order should be made, and it was made:

1. The application for leave to appeal is granted.

2. The appeal succeeds and the conviction and sentence of the appellant are set aside.

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T D CLOETE
JUDGE OF APPEAL

Concur: Farlam JA
Ponnan JA