IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

70/2001

In the matter between:

CEDRIC YORK **Appellant**

and

THE STATE **Respondent**

CORAM: **Howie, Schutz JJA and Nugent AJA**

Date of Hearing: 13 November 2001

Date Delivered: 19 November 2001

Rape: possibility of consent even if this not the defence raised.

J U D G M E N T

HOWIE JA

HOWIE JA

[1] The appellant was convicted in a regional court of rape. His appeal against the conviction to the Cape of Good Hope Provincial Division was unsuccessful. With the leave of that court he appeals further.

[2] The events giving rise to the charge occurred on Sunday 15 January 1996. The complainant, then aged 20, was due the next morning to start the first term of her matriculation year at a school at Atlantis. Orphaned many years earlier, she had, for some of the school holidays, been staying with an aunt in Retreat. She intended returning by public transport to Atlantis and aimed to get to her lodgings at the house of an acquaintance, one Christopher Anderson, early that evening. During the course of the day, however, the appellant, who lived across the street from her aunt offered the complainant a lift to Atlantis and she accepted. She knew him reasonably

well and was friendly with his older children. He was then nearly 50 years of age and a warrant officer in the Navy. They left in mid-afternoon.

[3] The trip to Atlantis took quite some hours. First, the appellant's motor car required certain repairs which were effected at a garage in Elsie's River. Then the appellant took time to drink beer with the mechanic and two other men, one of whom was Rodney Fortuin. When the journey resumed the appellant took Fortuin home to Ottery and only after that did they finally set off for Atlantis. Allowing for two stops along the way when he bought food and cigarettes, they reached the lodgings at about ten o'clock that night.

[4] The complainant's evidence was that between Ottery and Atlantis the appellant made several physical advances to her. She alleged he was by this time intoxicated although able to drive. She said she made it plain that his

attentions were unwelcome and when he desisted she thought that she would have no further trouble.

[5] When they arrived at the house Anderson, who had expected her earlier, had given up waiting, but she had her own key. When the appellant made to carry her luggage inside she though it right to invite him in. Once inside, he asked her to put on some music. She complied. He then said he wanted to dance with her. She said she was not interested but he persisted. He overcame her resistance by pulling her towards himself and holding her tightly against his body. In that fashion he attempted to dance with her but she was soon able to disengage herself

[6] At a loss to know what to do next she made for her room and began getting her things ready for school the next day.

[7] The appellant followed her. Without further ado he threw her on to her bed. He used one hand to pin her arms underneath her and employed

his greater weight, size and strength to keep her down. With his other hand he untied and lowered her shorts and underwear and opened his trousers. He then raped her.

[8] The complainant said she did not scream for help although the room of another lodger was across the passage. She said it did not occur to her. She resisted physically as much as she could and kept saying words such as "No Mr Yorke please stop this".

[9] When he got off her he went to the lavatory. Her only thought then was to get him to leave. He returned and told her that what had happened had to remain something just between the two of them. To soothe her he said if she needed money or anything else she had only to contact him. She told him he had better go as he had made things bad enough already.

[10] In reaction to the rape the complainant became withdrawn and depressed and said she felt soiled. As a result she did not attend school the

next day. She said Christopher Anderson obviously noticed a change in her for he later said as much and repeatedly asked her what the matter was. Initially she did not want to say but his persistence made her tell him what had occurred. She said this was about two weeks or more after the event. Despite her strong reluctance to make a report to the police he persuaded her to do so. She said that but for his insistence she would not have taken that course. She reasoned that laying a charge would expose her, and the details of her intimate trauma, to the pressures of public examination and cheap gossip.

[11] Having laid the charge, she decided to telephone the appellant's wife and tell her what had happened. In doing so she did not mention rape but merely said "he did the thing with me".

[12] In outlining the defence case in cross-examination the appellant's attorney said that the alleged advances in the car and the rape were all

denied. It was put that the only physical contact the appellant had with the complainant was that she willingly danced with him and that on leaving the house he gave her a squeeze.

[13] When the appellant testified, he said that he had never instructed his attorney that he admitted dancing with the complainant He denied that he had danced with her "under any circumstances". He said that their only physical contact was that on departure he "hugged and ... kissed her, as normal." However, what transpired from his later evidence as being "normal" was that his relationship with the complainant was

> "very cordial in this sense that we [he and his wife] would just greet her. I did not have any personal contact with them. Only with her aunt."

[14] At the trial the appellant faced a second charge, that of attempting to defeat the ends of justice. He was also convicted of that offence and has

never sought to attack the conviction. It accordingly stands proved that after learning of the rape charge the appellant suborned Rodney Fortuin to give false evidence that he was a passenger in the appellant's car to Atlantis, that they all went into the complainant's lodgings for a while and that nothing untoward occurred before the appellant and he returned to the Peninsula.

[15] The evidence concerning the rape count was not confined to the testimony of the complainant and the appellant. The State also called Christopher Anderson. He worked during the daytime but used to see the complainant in the evenings. He described her as normally of happy and even bubbly disposition. The day after the Sunday in question he immediately noticed that she was not herself. When he asked if anything was wrong she was very reticent. He kept on pressing his enquiries, however, and she eventually broke into tears and told him that the appellant

had raped her. She was very much against going to the police because, so she said, nothing would remain private after that. In the end he convinced her that laying a charge was the right thing to do because, as he saw it, the appellant might do it again to somebody else. Anderson did recall an interval of about two weeks but said this was between her report to him and her report to the police and not, as she said, the time it took her to tell him of the rape. This discrepancy is not important. In the result Anderson's evidence provides material support for the complainant's allegations.

[16] In a careful and considered judgment the trial magistrate reviewed the relevant evidence and concluded, for abundantly sound reasons, that the complainant's account was to be believed and that of the appellant rejected.

[17] Counsel for the appellant in this Court did not contend that such rejection was unwarranted. What he did urge, however, was that although the defence was not one of consent there were features of the complainant's

story and her evidence which attracted the inference that any intercourse that there was, may well have been consensual.

[18] In particular, counsel pointed to the complainant's decision, despite the appellant's advances to her in the car, to invite him inside; her going to her bedroom when she had just broken free of his efforts to dance with her; her failure to shout for help; the physical improbabilities allegedly inherent in her description of the rape; her failure to go to the police sooner; and, finally the ambivalent terms of the report she made to the appellant's wife.

[19] It is always, of course, for the prosecution to prove the absence of consent. This entails that even if the defence, as here, is that no intercourse took place, the court must, in the adjudicative process, be alive to the possibility that there might have been consent nonetheless. What requires emphasis, though, is that without an evidential basis such a possibility would be no more than speculative and one would be free to disregard it in coming

to one's eventual conclusion. And it need hardly be said that an accused's failure to allege consent will be weighed in the scales when considering whether the postulated possibility is reasonable or not.

[20] As to the first three considerations relied on by counsel, and the last, the record reveals the complainant as having been subject to somewhat paradoxical influences. On the one hand the absence of her parents for many years seems to have imbued her with a certain independence, worldliness and resilience in advance of her age. On the other hand the appellant was about 30 years older, and known to her as an apparently reliable and trustworthy man-next-door, whose family, so she said, she almost regarded as family of her own. Despite her life experience, therefore, it is not remarkable that, having been done the favour of the lift, she asked him to come in. In addition, he was carrying her luggage. It is also not remarkable that having escaped his attempts to dance she was not

able to think of anything better to do than to retire to her room and get prepared for the following day. If he was the man she had always taken him to be he would have left then and there.

[21] The fact that she did not cry for help is explicable by reference, once again, to the fact that this was someone she knew who could perhaps be prevailed upon to come to his senses and desist of his own accord. Someone, moreover, whom she would in all probability come across again in future.

[22] As to the argument that her description of the rape is improbable, neither cross-examination nor any evidence showed it to be such.

[23] That she went to the police as late as she did is something which the evidence of herself and Anderson explains with complete clarity and convincing reasoning.

[24] In my judgment, therefore, the suggested possibility of consent has no basis in the evidence.

[25] The appellant was correctly convicted.

[26] The appeal is dismissed.

_____
CT HOWIE
JUDGE OF APPEAL

CONCUR:

SCHUTZ JA
NUGENT JA