SA 4/2000

IN THE SUPRME COURT OF NAMIBIA

In the matter between:

ALBERTUS JACOBUS HANEKOM

APPELLANT

Versus

THE STATE

RESPONDENT

Coram: Strydom, C.J.; O'Linn, A.J.A. *et* Manyarara, A.J.A.

Heard on: 2001/04/02

Delivered on: 2001/05/11

APPEAL JUDGMENT

STRYDOM, C.J.: The appellant was charged before the Regional Court, Windhoek, firstly of the crime of rape and secondly of indecent assault. Both charges related to an incident which took place on 6 January 1998 at Dorado Park, Windhoek. In regard to

the first charge it was alleged by the State that the appellant did wrongfully, unlawfully and intentionally have sexual intercourse with one SM, a female person, without her consent. On the second charge it was alleged that the appellant did unlawfully, indecently and lasciviously assault the said SM by placing his penis in the mouth of the complainant and forcing her to suck it.

The appellant pleaded not guilty to these charges and was throughout legally represented. After a somewhat lengthy trial the appellant was convicted on both charges. The convictions were taken together for purposes of sentence and the appellant was sentenced to seven years imprisonment of which one year imprisonment was suspended on certain conditions.

The appellant appealed against his convictions to the High Court but was unsuccessful. Thereafter, and with leave of that Court, he appealed to the Supreme Court. In this Court the appellant was represented by Mr. Botes whereas Mr. Von Wielligh represented the respondent.

The grounds of appeal are set out on pages 818 to 821 of the record and reads as follows:

> "1. That the learned judges erred in the law and/or facts in not rejecting the complainant's evidence in *toto*;
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> 2. That the learned judges erred in the law and/or on the facts in finding that the differences between the complainant's evidence, her police

statements and the evidence of Anna Beukes were not material in context;

3. That the learned judges erred in the law and/or on the facts in finding that the cross-examination conducted by the defence attorney was improper and should not be allowed especially if one have regard to *inter alia;*

(a) The nature of the complainant's evidence in court;

(b) The complainant's evasiveness in answering questions put to her;

(c) The complainant's refusal to answer certain questions;

(d) The duration of events as to which the complainant testified.

4. That the learned judges erred in the law and/or on the facts to give no, alternatively insufficient weight to the fact that there was not corroboration of whatsoever nature for the complainant's version.

5. That the learned judges erred in the law and/or on the facts to give no, alternatively insufficient weight to the evidence of the medical doctor, Dr. Asser, who testified as to the possibility that semen could have entered the complainant's vagina from the outside to the inside as well as to his findings as to the physical condition of the complainant when

examined.

6. That the learned judges erred in the law and/or on the facts to find that it is extremely improbable that the complainant had no conceivable reason to not disclose the appellant's identity to the police or to her father.

7. That the learned judges erred in the law and/or on the facts to find that the only conceivable reason why the complainant reported a case of rape and indecent assault to Beukes and the police was that she wanted to get the appellant into trouble as suggested by the appellant because she was angry at his rejection of her invitation to have sexual intercourse.

8. That the learned judges erred in the law and/or on the facts to rely on the quoted passage in the judgment of Davis, A.J.A. in R v D. Dhlumayo & Another 1948(2) SA 677 (A) at p. 705 especially in the light thereof that it was clear that the learned magistrate in several respects misdirected herself on the facts and in law.

9. That the learned judges erred in the law and/or on the facts in giving insufficient weight to the evidence of Mr. Pfeifer which evidence clearly corroborate the evidence of the appellant.

10. That the learned judges erred in the law and/or on the facts to give no, alternatively insufficient weight to the improbabilities in the complainant's version as was set out in the appellant's Main Heads of

Argument on appeal.

11. That the learned judges erred in the law and/or on the facts in not finding that it cannot be said in all the circumstances that the appellant's version of the events could not reasonably be true.

12. That the learned judges erred in the law and/or on the facts to find that it cannot be said that the court *a quo* was wrong in finding that the state's case had been made out beyond reasonable doubt."

Most of the grounds of appeal are aimed at the acceptance, by the Court *a quo*, of the evidence of the complainant, and the rejection of the evidence of the appellant. In regard to what actually happened, there were only two witnesses namely the complainant and the appellant. The other evidence consisted mainly of reports made by the complainant to various other people, the medical evidence and circumstantial evidence.

It was common cause that about 4 o'clock on the 6th January 1998 the appellant went to the house where the complainant stayed with her parents. The two versions of how this came about and what then happened were completely divergent. According to the complainant her parents were away on holiday to Swakopmund. Shortly after her brother had also left the house she received a phone call and a foreign male voice told her that he knew that she was alone at home. She later elaborated on this phone call and said that the caller also told her that if he was alone he would acquire a blue movie and do it to himself. She then told him that he was sick and put the receiver down.

She then took a bath and lay down on a mattress in front of the television. She fell asleep and was awoken by a knock on the front door. She looked on her watch and saw that it was 4 o'clock. Before she opened the door she looked through the window but she could not see anything.

When she opened the door a strange male person was standing there. She asked him if she could help him and told him that her father was not there. He replied that he hoped that she was not disappointed and that he came for her. The complainant tried to close the door but the person blocked the door with his foot. This person, who later proved to be the appellant, then grabbed her hand and she fell down on the floor. Thereupon the appellant touched her all over her body. Complainant said that she was screaming and crying. The appellant opened his trousers and pulled them down. He then grabbed her by her hair and put his penis into her mouth and he pulled her head upwards and forwards. Complainant struggled and fought the appellant. At one stage the appellant succeeded in parting her legs and to remove her panty. He then inserted his penis into her vagina. Before he ejaculated he however pulled out and ejaculated over her. The appellant got up and after he had fastened his trousers he said that something like that was bound to happen to a beautiful girl like her and walked out of the door. The complainant then took a bath because she felt dirty and took a taxi to the house of one Anna Beukes from where she was taken to the police and the doctor.

The complainant testified that she did not know the appellant but that from the 1st up to the 6th January he phoned her every day. On the first occasion he asked to speak to her cousin and she informed him that her cousin was no longer staying with them.

Complainant also testified that on each and every occasion the appellant phoned her she was able to recognise his voice. She also testified that on the 4th January she went to see a doctor.

The appellant's version of what happened on the 6th January started with a chance meeting with one Aletta, a cousin of the complainant. This happened during the end November 1997 when appellant gave her a lift in his car. She informed him that she was writing her matriculation examination and was on the lookout for work. Aletta asked the appellant if he could not assist her in this regard. He told her that he was employed by Transnamib and, although there were no vacancies at that stage, he undertook to let her know if any should become available. Aletta wrote her name and a telephone number in his diary where appellant could contact her. It later proved that Aletta, at that time, was living with complainant and her parents, and that the telephone number she gave to appellant was their house number.

Appellant testified that he subsequently went on holiday and returned to work at the beginning of January 1998. On the 5th January he was transferring information, noted in his old diary, into the new one, when he came upon Aletta's name and telephone number. As there were then some vacancies at Transnamib he phoned the number to inform Aletta thereof. The phone was answered by one S who told him that she and Aletta had a quarrel and that the latter was no longer staying with them. Appellant told S that Aletta had asked him for a job and whether she knew where he could find her. S, who proved to be the complainant, told the appellant that she was also looking for a job and appellant said that she should come to Transnamib to fetch application forms.

However, complainant had a problem. She informed the appellant that she did not have transport and that she had a doctor's appointment. Complainant suggested that they meet in the afternoon at a café called Le Bistro. Appellant agreed to this arrangement but wanted to know how he would be able to recognise her. Complainant then told him that she had two highlights in her hair which resembled horns and that she would be wearing a black dress.

Appellant went to Le Bistro at one o'clock but when by one forty-five the complainant had not as yet turned up, appellant returned to work. The next day, that was the 6th, appellant again phoned the complainant to find out what had happened. He was told by complainant that she was delayed at the doctor. After some further discussions complainant asked him to bring the application forms to her house. He agreed to do so after work at 4 o'clock. Appellant then obtained the address from her namely L Street in Dorado Park.

Appellant further testified that he left his office at 4 o'clock and he took with him the necessary application forms. He could however not find the complainant's house. In Hebra Street he asked a Mr. Pfeiffer, a teacher at the Augustinium School, for directions. Mr. Pfeiffer also did not know where L Street was but with the aid of a refuse street map of Windhoek they were able to locate the street. Pfeiffer also showed appellant where to turn off to find L Street. With the assistance of Pfeiffer appellant was then able to find complainant's house.

When the appellant knocked on the door, the complainant opened it, and introduced herself as S. The appellant introduced himself as Kobus and was invited into the

house. Complainant locked the door and explained that her brother was due home any moment and would find it strange to see them there. They went to sit in the TV room where a mattress was lying on the floor. After expressing an interest in the layout of the house, the complainant took him on a guided tour of the house.

They subsequently returned to the TV room where the complainant started to talk about sex. Appellant testified that after continuing in this vein for some time, the complainant undressed herself, stroked his penis over his trousers and also stroked over her vagina and invited him to have sex with her. The appellant said that he was overwhelmed by the boldness of her behaviour and the invitation. He stated that he became aroused but was nevertheless scared, knowing about Aids, and the fact that she had been to see a doctor the previous day. He in turn began to stroke her vagina, took out his penis and started to masturbate. He satisfied himself in this way and ejaculated over her. He then got up and went to the kitchen where he washed his hands. The complainant called him to come back but he unlocked the door and went to his car. He said that the complainant was very angry and unhappy with him. He was still sitting in his car when the complainant came out of the house. She now wore jeans and a white T-shirt. He asked her if he could take her somewhere but she declined his invitation. Appellant said that he again phoned the complainant on the 15th January but when the phone was answered by a strange voice he put down the receiver.

As previously stated no other witness could really add to what had actually happened between the complainant and the appellant but from the evidence of some of the witnesses probabilities emerged and inferences could be drawn which support one or

other of the versions.

The magistrate in the Regional Court accepted the evidence of the complainant and rejected the evidence of the appellant. These findings were mainly based on the evidence of the forensic analyst, Mrs. Noble, who stated that swabs and smears taken by the doctor inside and outside the vagina, were proved on analyses to contain spermatozoa which caused the witness to express the opinion that intercourse must have taken place. Furthermore the court found that there was no reason why the complainant should have lied and also found corroboration for her evidence in the evidence of Mrs. Beukes. The magistrate was further of the opinion that such discrepancies and conflicts that existed in the evidence of the complainant were of a relatively minor nature and was to be expected from an honest but imperfect recollection by the witness. In the light of what had happened the magistrate found the version of the appellant totally unacceptable and improbable. Issues such as how appellant could have known the outlay of the house if, according to the evidence of the complainant, he at no stage went further than the entrance-hall, was found by the magistrate not to be material to a charge of rape and indecent assault.

Although on appeal the Court *a quo* did not in all respects agree with the findings and approach of the Regional Magistrate, the Court, with reference to the case of R v Dhlumayo and Another 1948(2)SA 677(A), pointed out the advantages the trial court had of seeing and hearing the witnesses, and was satisfied that there were no grounds upon which they could interfere with the magistrate's findings on credibility. To this must be added what the Court termed the extreme improbability of the appellant's version. The Court found that there may have been questions which the evidence had

not answered, such as how the appellant discovered the address of the complainant and acquired knowledge of the outlay of the house, and certain of its contents, but was not persuaded that such shortcomings could disturb the findings on credibility by the magistrate. However at no stage did the magistrate undertake an analysis of the evidence and because of its acceptance of the findings of the magistrate, neither did the Court *a quo*.

Having set out the versions of the two main characters it is now necessary to refer also shortly to the other evidence presented by the State and the appellant. After the complainant had left her house she went to the house of Anna Beukes in search of her brother, M. He was not there and she intended to leave when she was called back by Mrs. Beukes. Complainant started to cry and reported to Mrs. Beukes that she had been raped. When M arrived at the house it was decided to report the matter to the police. From there the complainant was taken to the doctor the same day. She was examined by the doctor who also took smears and swabs inside and outside the vagina for analysis. However, the doctor did not find anything untoward and concluded that there was no good evidence to show any sexual intercourse. In regard to his examination the doctor testified that it was easy.

As a result of the incident the parents of the complainant cut short their holiday and returned to Windhoek. On enquiries made by the father of the complainant the police informed him that they had not made any progress as far as their investigation of the case was concerned. The complainant had however told the witness of the telephone calls made by the appellant and he then obtained a printout from Telecom of calls made to his house. This printout was made from the 4th to the 6th of January at the request

of the complainant's father. Two of the calls, namely one on the 5th and one on the 6th, were made from Transnamib Marketing where the appellant was employed. Mr. M went to Transnamib Marketing where he spoke to the switchboard operator. Because of the description given to him by the complainant the operator was able to give him two possible names. One of these people he could eliminate immediately because of the thick spectacles he was wearing. The other person, namely Kobus Hanekom, was not at Transnamib and Mr. M decided to hand this information to the police.

With the information obtained from Mr. M, Sergeant Mujambo of the Woman and Child Protection Unit went to the offices of Transnamib where he introduced himself to the appellant and informed him that he was investigating a complaint of rape. He said that the appellant was shocked and asked to phone his father to arrange for a lawyer. The appellant was allowed to make the call and the sergeant overheard the appellant telling his father that there was an allegation that he had raped someone but that he knew nothing about it. On the way to the offices of the Unit, Mujambo asked the appellant some questions, *inter alia*, whether he had a non-white girlfriend or whether he knew a non-white girl, to which the appellant replied that he did not.

At the Offices of the Unit the appellant was interviewed by Sgt. Mujambo and the Commanding Officer of the Unit, Warrant Officer Katjipara. During this interview Sgt. Mujambo saw a diary in the pocket of the appellant and when he paged through it he saw the name of the complainant and her telephone number written in the diary. The appellant said that he could not remember whose name and telephone number it

was. The appellant was then warned of his rights and given the opportunity to make a statement. This, the appellant refused to do stating that he first wanted to consult a lawyer.

The following day an identification parade was held where the complainant pointed out the appellant as the person who had raped her. Aletta, the cousin of the complainant, also attended the parade but she was unable to identify the appellant as the person who had given her a lift and whom she had asked for a job. Mujambo testified that after the parade the appellant said that he wanted to tell the Sergeant something but he must not mention this to his lawyer. He then told Mujambo that he now recognized the two ladies who were at the identification parade and he told Mujambo what had happened.

A Mrs. Nkushenghili of the Unit also testified that she was the person who completed certain forms whereby the rape kit was sent to the forensics laboratory. Cst. Hansen, another member of the Unit, testified that she accompanied the complainant to the doctor and was present during the examination. During the examination the complainant cried and the witness could see that she was in pain.

One witness was called to testify on behalf of the appellant, namely a Mr. Pfeiffer. Mr. Pfeiffer, a teacher at the Augustinium High School, lives at Hebra Street, Dorado Park. He testified that on the 6th of January the appellant came to his house to ask for directions to a certain street. He explained that at that stage there were not yet any street name signposts in place. He further testified that that was the first time that he saw the appellant and from what he could recall the appellant was looking for L Street. By means of a refuse street map he was able to locate L Street. Pfeiffer testified that

from time to time people came to his house to ask for directions and he could remember that somebody came to him on the 6th because he remembered that he was busy with preparations as school was due to re-open again the following day. When asked whether he was sure that it was the appellant he replied that he was a 100% sure. Under cross-examination this witness further elaborated on what had happened. He said that some three months after the incident he read in a newspaper that a girl had been raped in L Street whereupon he phoned the Woman and Child Abuse Centre which gave him the telephone number of the investigating officer. He phoned this officer because he thought that he could assist him with a description of the person who had made enquiries at his house. The said officer did however not contact him again. A few months later the appellant came to his house and asked him whether he could recall that he was the person who made enquiries at his house. However, the person who made the enquiries had a beard and he was not able to confirm that it was indeed the appellant who had been at his house on the 6th. He was also not able to say at what time the person, making the enquiries, was at his house. Further, under cross-examination, the witness stated that he could not say that it was indeed the appellant although the build of the appellant was the same as that of the person who came to his house on the 6th.

On behalf of the appellant Mr. Botes launched an attack on the evidence of the complainant. He submitted that she was a single witness whose evidence was not corroborated by any other witness. He furthermore referred the Court to various examples where the evidence of the complainant was in conflict with the evidence of other witnesses, to whom she had made reports concerning the incident, or where her

evidence conflicted with evidence previously given by her. Mr. Botes also submitted that the probabilities did not favour the version of the complainant.

Mr. Von Wielligh, on behalf of the State, argued that this Court should accept the credibility findings made by the Regional Magistrate. In this regard he referred us to the Dhlumayo-case, *supra*, and submitted that there was no good reason to interfere with these findings. Counsel found some corroboration for the evidence of the complainant in the evidence of Mrs. Beukes who testified about the emotional state of the complainant when she made the report to her and also that she had felt a lump at the back of the complainant's head when she stroked her hair. Mr. Von Wielligh further relied strongly on what he said was an improbability that complainant would lay a charge of rape out of revenge and not reveal the identity of her attacker. He further urged the Court to ignore the evidence of Mr. Pfeifer because the witness had made a complete *volte-face* during cross-examination and was not able to identify the appellant as the person who had asked directions on the 6th. Counsel also submitted that it was possible that the appellant asked directions from the witness but that it was on a different occasion.

It is clear that it was common cause that the appellant was at the house of the complainant on the 6th January. What had happened further the versions of the complainant and the appellant differ almost completely. In the case of State v K, 2000(4) BCLR 405 (NmS); 2000(1) SACR 162 (NmS), the cautionary rule, previously applied by our Courts in respect of the evidence of complainants in sexual cases, was finally put to rest. It was laid down that the Courts must approach such evidence as it

would approach and evaluate evidence in any other case. The Court, in S v K, *supra*, cited with approval the words of Taylor, CJ, in R v Makanjuola, R v Easton [1995] [3] All ER 730 (CA) where the learned Chief-Justice succinctly sets out the approach of a Court to such evidence at p 733c-d:

> "(3) 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 above passage was a guideline laid down by the learned Chief-Justice after the cautionary rule, concerning the evidence of complainants in sexual cases, was abrogated by statute in England, as was pointed out in S v K, *supra*. There is therefore no longer a specific cautionary rule to be applied solely because the witness is a complainant in a sexual offence.

Before evaluation of the evidence of the various witnesses mention must also be made of the fact that not every contradiction or discrepancy in the evidence of a witness reflects negatively on such witness. Whether such discrepancy or contradiction is serious depends mostly on the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence. (See S v Oosthuizen, 1982(3) SA 571 (TPD) at p 576G.) (See further S v Jochems, 1991(1) SACR 208 (A) at p 211g-h; S v Mkohle, 1990(1) SACR 95(A) at p 98f-h and S v M, 2000(1) SACR 484 (WLD) at p 499h-j.) I also agree with the Court *a quo* that police statements are often incomplete and not supposed to contain all the witness's evidence. Again, contradictions between the witness's evidence and the statement must be

properly evaluated on the lines set out herein before.

Mr. Botes has referred us to a host of contradictions in the evidence of the complainant. These contradictions exist not only in the evidence given by her in court but also between her evidence and her police statements and reports made by her to other witnesses called by the State. Some of these discrepancies are of a minor nature but some need closer scrutiny.

An important issue concerns the evidence of the telephone calls and the contents thereof. From the evidence of the complainant the first impression gained was that she was pestered by an unknown man who, from the 1st of January until the 6th of January, phoned her every day. Some of these calls had a sexual undertone and in some not only her movements were described but also what she was wearing on a particular occasion. This evidence created the image of a man who was dangerous and who was lying in wait for an opportunity to strike at his victim. This image would have fit nicely into the evidence of the complainant, of a man, when he gained entrance to the house, immediately threw her on the floor and raped her there and then. If the situation developed in this way, as was testified to by the complainant, then that would have been strong corroboration of her version. A closer look at this evidence however shows serious discrepancies.

In her first statement to the police the complainant made no mention of any telephone calls. That in my opinion is not of great significance because she also did not mention the calls which were admitted by the appellant and which were made on the 5th

and the 6th. However, under cross-examination it became clear that the complainant had made a second statement to the police. According to her evidence it was to correct the first omission and to tell the police of these calls. Although the complainant persisted in her evidence that she told the police of all the calls it was put to her that the statement only reflected two calls namely that of the 5th and the 6th. Although she initially said that she perused the statement after it was written down, on further cross-examination as to why she then did not correct the statement, so as to include also the calls made from the 1st to the 4th, she then made an about-face and stated that she did not peruse the statement after it had been made.

Complainant also stated that she told her father of the telephone calls that had been made. He indeed went to Telecom and obtained a printout of calls made to his telephone. What is however significant is that he asked for a printout only from the 4th of January to the 6th. He did so in order to assist the police in their investigation, which, at that stage, was getting nowhere. It is inconceivable that if Mr. M had known of the calls made on the 1st to the 3rd that he would not have included those dates when he made the enquiries from Telecom. The fact that he had included the date of the 4th seems to me to have been a mistake made by the complainant because the same mistake was made by her in her evidence-in-chief where she testified that she went to see the doctor on the 4th whereas, from other evidence, it is clear that it was on the 5th.

There is however another piece of evidence by Mr. M which is significant. He testified that after he obtained the printout he saw that there were two very strange

numbers from which calls were made to his house. He was able to establish that these numbers were from Transnamib Marketing and a phone booth situated at Novel Ford. The one Transnamib call was made on the 5th and the other on the 6th. The call from the phone booth at Novel Ford was also made on the 6th. Nothing turns around this call as, according to the evidence of the complainant, she only spoke to the appellant once on the 6th. The significance of all this is that on the 4th there was no strange or suspicious phone call made to the house of the witness as was testified to by the complainant. It seems from notes made on the printout that Mr. M was able to trace all the calls made on the 4th.

This immediately raises the question whether the complainant can be believed when she said that calls were also made on the 1st to 3rd of January. In the light of the unsatisfactory evidence given by the complainant in this regard, the fact that she only informed the police of calls on the 5th and the 6th, the fact that on information given by the complainant, Mr. M limited his enquiries as from the 4th and the fact that the printout did not bear out the evidence of the complainant, I am of the opinion that the complainant is not to be believed in this regard. All the facts, except for the say-so of the complainant, supported the version of the appellant regarding the calls he made. Under the circumstances there is also no reason why the Court should not accept the appellant's version of the contents of the conversations between him and the complainant. The printout also shows that both calls were appreciably longer than any other call made to this number, which seems to support the evidence of the appellant on this point and does not support the evidence of the complainant who, according to her,

was an unwilling listener who, at least on the last occasion, threw down the receiver of the telephone in order to end the call. According to the printout the duration of the call on the 5th was 1190 seconds, i.e. more than 19 minutes, and the call on the 6th 748 seconds, which was more than 12 minutes. This in no way corresponds with the evidence of the complainant who testified that she was able to recognise the voice on each occasion and who tried to convey the impression that she was an unwilling listener. The duration of the calls alone shows that something else was discussed than what the complainant wanted the Court to believe. There is another inherent improbability in the complainant's evidence concerning these phone calls. She testified that on the first occasion the appellant identified himself as the person who offered to assist Aletta to find a job. That being the case there was no way in which the appellant could have hoped to retreat into anonymity as Aletta at least knew where he was working and appellant could not have known that Aletta would not be able to recognize him again.

Another aspect which is closely related to the above issue, which reflects on the image which the complainant wanted to create of the appellant as a dangerous stalker, is the evidence of the appellant that after he had left work at 4 o'clock, he was unable to find the house of the complainant and stopped to get directions from Pfeiffer as to where L Street was situated. In this regard the evidence of the appellant was supported by that of Pfeiffer. However, the Regional Magistrate did not at all deal with this evidence and one must accept that the evidence was rejected by implication.

On appeal to the High Court that Court made specific findings in regard to the evidence of Pfeiffer. Pfeiffer testified that the person who came to his house on the 6th had a

beard. In this regard the Court *a quo* found that it was apparent that the appellant did not have a beard at the relevant time. It is correct that there is no direct evidence that the appellant did have a beard at the relevant time but it is also clear that there is no evidence that he did not have a beard. In fact in the statement of Mrs. Beukes, which was handed into Court, she stated that the complainant described the man as a white man with long hair and beard and he was fat.

The Court *a quo* also found in this respect that a witness who made such a *volte-face* on a central aspect of his evidence, namely by first identifying the appellant positively as the person who came to his house on the 6th, and thereafter stating that he was not able to do so, is a witness whose evidence is of little or no value.

However, unless there are grounds on which the Court could find that the appellant and Pfeiffer colluded to fabricate false evidence, consideration should have been given to this evidence. Both appellant and Pfeiffer testified that they did not know each other and that the 6th was the first time that they had come face to face. Pfeiffer's evidence as to what had happened on the 6th was in no way attacked or discredited. But the further question remains how, in the absence of any suggestion or grounds that showed the witnesses colluded to fabricate evidence, would the appellant have known what had happened at the house of Pfeiffer. Pfeiffer testified that at the time there were no street signs in Dorado Park, which explains why the appellant got lost, and both of them testified to the fact that Pfeiffer himself did not know where L Street was and had to consult a refuse street map of Windhoek. In argument before us Mr. Von Wielligh submitted that the Court should reject the evidence of Pfeiffer out of hand. But

confronted with the fact that something like that must have happened as there was no other reasonable explanation for appellant's knowledge, Counsel submitted that the witness might be mistaken as to the date on which the appellant visited him. Counsel's argument was based on the evidence of Pfeiffer that, because of the position of his house, people have, from time to time, asked him for directions in Dorado Park. There would have been merit in this argument but for the fact that Pfeiffer's evidence concerning the date of the incident was very specific. He said that he remembered the date of the 6th of January because it was a day before schools were to open for the first term, and he was busy preparing for school. This is further supported by the fact that when, three months later, he read about an alleged rape in L Street in a local newspaper, he phoned the police and offered his assistance. Under the circumstances I am satisfied that the evidence of Pfeifer as to the date on which this happened and what had happened, must be accepted. I am also satisfied that it was indeed the appellant who asked directions from Pfeiffer to an address in L Street and that the Court *a quo* were wrong to reject this evidence by appellant and Pfeiffer.

The acceptance of this evidence throws great doubt on the evidence of the complainant as was correctly conceded by Mr. Von Wielligh for the State. Her version that she was telephoned by the appellant and told that he knew that she was alone at home presupposes that he knew where her house was and that, prior to the call, he had observed the comings and goings of people to and from this house. Furthermore that he continued this vigil after the telephone call and up to the time he decided to strike at his victim, otherwise how would he have known that she was still alone at home. We know from the printout, "**Exh. C**", that the telephone call to the house of the complainant was made from Transnamib at 13h49. Why the appellant then waited for

more than two hours before he launched his attack is somewhat inconceivable. How, in terms of the scenario sketched by the complainant, the appellant would know that her parents, or one of them, was not at home is another unexplained piece of evidence. The only reasonable explanation for this is that the appellant said that the complainant herself told him.

In the light of the above findings it is now important to look at the other evidence given by the complainant in support of the scenario sketched by her. As to how it happened that she landed on the floor of the entrance hall the complainant gave various versions. She firstly said that she was grabbed by the hand and landed on the floor (p. 14). Later she said that she did not know how she landed on the floor (p. 31). It was then put to her that according to her police statement she was thrown to the floor (p. 148). According to Mrs. Beukes the complainant told her that she slipped on a carpet and fell to the floor (p. 276). I am mindful of the fact that Mrs. Beukes's evidence on this point is far from satisfactory. Her evidence ranges between an inference drawn by her, namely that the complainant possibly slipped on the carpet, to that she was in fact told by the complainant that she had indeed slipped and still further that the complainant told her that she was thrown to the floor. (See pp. 276, 287, 288 and 301.) Even if Mrs. Beukes's evidence is left out of consideration what had actually happened is far from clear.

Another part of the evidence of the complainant, which is conflicting, is her description of what had happened when the appellant put his penis in her mouth. Apart from the fact that it must have been exceedingly difficult to do so, as she was at that stage fighting the appellant and further bearing in mind that the penis was not a loose object which could be easily manoeuvred, it seems also to have been a very risky operation

under the circumstances. Complainant could never explain why she did not utilize the opportunity to put her assailant out of action. She testified in this respect that at the time she felt like biting his penis. However under cross-examination, and in an attempt to explain why she did not do so, she stated that she did not think of that possibility. Still later she said that she only thought about it afterwards. (See pp. 21, 239 and 244). Also as to how the episode ended complainant first said that the appellant himself removed his penis from her mouth but later said she turned her head and the penis then slipped out. To this can be added the very unlikely story by Mrs. Beukes namely, that she could still smell sex on the face of the complainant when she sat close to her. That was after the complainant had taken a bath after she was allegedly raped. (See pp. 233, 236 and 278.) The way in which the complainant described this episode and tried to explain her lack of doing anything is far from reassuring.

A further aspect, which is of importance, is whether the complainant had any injuries after the attack on her. According to the complainant her private parts were so sore after the attack that she was not able to sit properly and when she was at the doctor she told him not to touch her there because of the pain. However later she withdrew this evidence when she said that she never talked to the doctor. She did however, when at the doctor, vocally express pain and she also physically withdrew when touched by him. She was also crying during the examination. (See pp. 27, 28, 223/4/5, and 214). Complainant described her other injuries. There was a lump at the back of her head, which was caused when she fell on the floor; there were red marks on her arms and bruises and red marks on her legs, caused when the appellant forced her legs open. Her vagina was also still red. (See pp. 28, 33, 39, 40 and 224 ff) The doctor found

none of these injuries. He said that her emotional state was good and the examination was easy. On the physical examination of the complainant he concluded that there was no “good” indication of sexual intercourse.

Mr. Von Wielligh criticized the doctor because he admitted in evidence that he was called to attend to an emergency and that he was in a hurry. He said however that he nevertheless did a thorough examination of the complainant. Even if, under the circumstances, the doctor missed the red marks and bruises he would hardly have described the examination as easy when the complainant had vocally expressed pain and physically withdrew when he touched her. The doctor was a state witness and even if the Court should ignore his evidence in *toto*, which I do not think is possible, he in no way corroborated the evidence of the complainant.

There is however two witnesses who, to a certain extent, supported the evidence of the complainant. Mrs. Beukes said that when she stroked over the hair of the complainant she could feel the lump on her head. She did not mention this to the police when she made a statement. Nor did she mention this when the prosecutor went through her statement with her prior to giving evidence. Her reason for not doing so in the first place was that she had forgotten about it and that she only remembered it later on. She had no explanation as to why she had forgotten to tell the prosecutor about it. (See pp. 286 and 291.)

The second witness was Cst. Hansen, a member of the Woman and Child Abuse Centre. She stated that she had accompanied the complainant to the doctor and was present when he examined her. The witness said that the complainant was crying a lot and that she cried when the doctor inserted an instrument in her vagina. The witness

inferred that the complainant was experiencing pain because she grabbed the side of the bed. Under cross-examination the witness admitted that she only made her statement to the investigating officer more than a year after the incident had taken place, that was on 20 January 1999. That was after the complainant was already cross-examined for more than two days. This evidence is in total contrast to that of the doctor and also does not support the evidence of the complainant that she verbally expressed pain. It is a pity that the witness did not make her statement at the time when the investigation was launched. When a witness, such as a police witness who was at all relevant times available to make a statement, is called in to fill some gap in the State's evidence, such evidence is, rightly or wrongly, treated with some suspicion.

Turning now to the evidence of the appellant I must immediately say that his evidence is not free from criticism. He certainly lied to Sgt. Mujambo when he stated that he could not remember who S was and whose telephone number, written next to her name in his diary, it was. I also think that when Mujambo referred to non-white lady friends, the appellant had a pretty good idea what was being referred to. That, no doubt, was the reason why he feigned ignorance when he was confronted with the name and telephone number. What is also somewhat inconsistent with human nature is the length to which the appellant was willing to go to assist the complainant in finding a job for her. I suspect that it was not solely done out of the goodness of his heart or to be helpful.

However, suspicion is not enough to convict an accused, nor the fact that he or she has told a lie on some immaterial aspect of the case. The accused was a married man and a member of society where clandestine sexual affairs were hopefully still frowned upon

and which could have cost him his marriage, and this could be so whether what had happened on the 6th of January, amounted to rape or not. It is conceivable that under such circumstances a person would lie. However, after the identification parade it must have been clear to the appellant that the matter was not going to disappear and he told Sgt. Mujambo his version of what had happened. This was essentially the version which he testified in Court.

This Court's rejection of the evidence of the complainant concerning the number of telephone calls made and the contents thereof, and the acceptance of Pfeiffer's evidence, whereby the image created of the appellant as a stalker and roaming rapist, was also rejected, places a completely different complexion on the evidence of the appellant. Now the only reasonable explanation of how the appellant knew that the complainant visited a doctor on the 5th of January and what clothes she was wearing and how her hair was done, was that he was told about that by the complainant herself when they set up a meeting at Le Bistro restaurant. The appellant was also able to give a fairly accurate description of the layout of the complainant's house and what he could remember of the contents. This included a photograph of the father of the complainant, which he saw in the study. This would not have been possible if the incident took place in the entrance hall as described by the complainant. Again it seems to me that the only reasonable way in which the appellant could have gained this knowledge was in the way as explained by him. He even referred to the formal sitting room and the complainant admitted that that was how members of the household referred to it. All these, of course, further supported the Court's findings that the incident did not take place immediately on opening of the door and there at the entrance

hall.

It is so that the trial court had advantages which the Court of Appeal didn't have in seeing and hearing the witnesses and being steeped in the atmosphere of the case. (See R v Dhlumayo and Another 1948(2) SA 677(A) at 705 to 706). The case however also made it clear that where the trial court had misdirected itself on the facts, even though based on credibility, the Appeal Court was then at large to disregard such findings in whole or in part and come to its own conclusion on the matter (p. 706).

In my opinion the trial court erred in accepting complainant's evidence in regard to the telephone calls, their contents and the image created by the complainant of the appellant as a stalker and by rejecting the evidence of Pfeiffer. The High Court, on appeal, erred similarly. A proper evaluation of this evidence would have shown that the complainant was lying in this respect. (See S v Francis 1991 SACR 198a at 204d.)

The question remains what about the allegation of rape by the complainant. The State must prove its case beyond reasonable doubt. There is no onus on an accused and if a prima facie case is made out against him he need not go further than put a version before the Court that may reasonably be true. (See R v Difford 1937 AD 370 at 373.)

The complainant was a single witness whose evidence was only to a limited extent supported by the unsatisfactory evidence of Mrs. Beukes and Cst. Hansen whose evidence was based on an inference, which did not find any support in the medical evidence. The evidence of the complainant is subject to the cautionary rule applied by our Courts to the evidence of single witnesses and the Court must be satisfied that her

evidence is satisfactory and can be believed. (S v Sauls, 1981(3) SA 172 (AD).)

From what has been set out herein before, it is clear that the complainant was not a satisfactory witness. There are serious shortcomings in her evidence and in certain material respects it was found that she did not tell the truth. The probabilities as to how this whole incident started, how and why the appellant went to the house of the complainant, his knowledge of the house and the fact that she visited a doctor on the 5th, what clothes she was wearing and what she looked like, all favour the version of the appellant. To this must be added the objective evidence of Mr. Pfeifer and the fact that, notwithstanding the evidence of the complainant regarding injuries and sex by force, the doctor found nothing. It is so that on analysis spermatozoa were found to have been present inside the vagina, according to the evidence of the analyst, Dr. Noble. However the evidence of the complainant and the appellant is that the appellant ejaculated outside the vagina. According to the medical evidence there are two possible explanations. One is that intercourse took place and that spermatozoa escaped into the vagina prior to ejaculation. The other possibility is that no intercourse took place and that after ejaculation spermatozoa, in contact with the vagina, found their way into this organ. There is no evidence that one possibility is more probable than the other and does therefore not take the matter any further. But even if we accept that intercourse took place the question remains whether such intercourse was consensual or not. Bearing in mind the unsatisfactory evidence given by the complainant this Court is not able to answer this question in favour of the State, bearing further in mind that it must do so beyond reasonable doubt.

I have already referred to the various probabilities, which favour the version of the

appellant and other objective evidence, which is to the same effect. Much was made of the fact that the complainant, when she laid a complaint with the police, did not state the name of the appellant. This is not what one would expect where the motive is one of revenge. However, as was pointed out by Mr. Botes, revenge is not the only motive for laying a false charge. Direct evidence of motive is seldom available. To speculate would be impermissible but in a case, such as the present, where the complainant was able to create a scenario of telephone calls and of a person who was watching her every move, which this Court has found not to be true, anything is possible. In this regard it must be mentioned that the complainant did practically nothing to initially assist the Police in their investigation. She first of all did not mention the telephone calls which were made and it is at least also clear that at that stage she also did not mention the connection between the appellant and Aletta to the police. If the complainant really wanted to bring the appellant to book then this neglect is hard to understand.

The uncertainty created by the evidence of the complainant draws, in my opinion, a veil of doubt over all her evidence. Also her evidence that she was raped. If intercourse took place and if it was without the consent of the complainant then she has only herself to blame that on her evidence, it is impossible for this Court to find beyond reasonable doubt that the State has proved the charges against the appellant. The Court need not go further than this but seen against this background, and the totality of all the evidence, I am also satisfied that there is a reasonable possibility that the version of the appellant may be true. It follows therefore that the appeal must succeed.

There is one further matter to which I want to refer shortly, namely the curtailment of

the cross-examination of the witness Noble by the Regional Court Magistrate. In this regard Mr. Botes submitted that the appeal should succeed on this point alone. This was in my opinion an irregularity as was also correctly conceded by Mr. Von Wielligh. Under certain circumstances the curtailment of cross-examination is so serious that the prejudice or potential prejudice caused thereby *per se* vitiates the proceedings. I agree however with the Court *a quo* that in this instance there was no prejudice. This is so because Dr. Noble found spermatozoa present on all the smears and swabs that were taken inside and outside the vagina and further cross-examination could not have taken the matter any further.

In the result the appeal against the convictions and sentence succeeds and the convictions and sentence are set aside.

(signed) STRYDOM, C.J.

I agree.

(signed) O'LINN, A.J.A.

I agree.

(signed) MANYARARA, A.J.A.

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