THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 488/09

J G VAN DER WATT Appellant

and

THE STATE Respondent

Neutral citation: *Van der Watt v The State* (488/09) [2010] ZASCA 22 (23March 2010)

Coram: CLOETE, TSHIQI JJA and SALDULKER AJA

Heard: 15 February 2010

Delivered: 23 March 2010

Updated:

Summary: Rape – single witness – many indications that complainant's evidence fabricated – accused's version reasonably possibly true.

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ORDER

On appeal from: North Gauteng High Court (Pretoria) (Legodi and Jooste JJ sitting as court of appeal).

1. The appeal is upheld.
2. The order of the court a quo is set aside and substituted with the following:

   'The appeal is upheld. The conviction and sentence are set aside'

JUDGMENT

TSHIQI JA (CLOETE JA and SALDULKER AJA concurring):

[1] On 21 July 2003 the appellant was convicted in the regional court, Pretoria, of having raped the complainant, Mary Sesane, his domestic worker. The rape was alleged to have taken place in her room which was inside his yard at a distance of 10 metres from the main house, where he lived with his wife and children. On 30 September 2003 he was sentenced to 10 years' imprisonment. The appellant admitted that sexual intercourse had taken place but pleaded consent. On 26 September 2005, his appeal to the Pretoria High Court was dismissed and he now appeals with leave of that court, against both conviction and sentence.

[2] The layout of the appellant's home is relevant in assessing the credibility of both the appellant and the complainant for reasons that will become apparent. The layout of the appellant's home was described by the appellant and his evidence in this regard was confirmed by his wife. He testified that the main house was situated in the middle of the erf which measured 24 metres wide. A flat which was occupied by his son was also situated on the erf approximately 10 metres away from the right side of the main house. The complainant's room was attached to the flat and the two rooms were separated by a kitchen measuring two by three metres. The complainant's room was situated

approximately two metres from the flat and approximately ten metres from the nearest room in the main house. The nearest room of the main house was occupied by one of the appellant's children. The child's room nearest to the complainant was directly next to a bathroom and then there was the main bedroom. The complainant's room was approximately two metres from the neighbouring wall. On the neighbour's property, the neighbour's domestic worker's room was the closest to the complainant's room. Her room was approximately two metres from the wall, then another two metres from the wall to the complainant's room. The neighbour's main bedroom window was approximately nine metres from complainant's room. The neighbour's domestic worker was working on the night of the incident. This evidence on the lay-out remained unchallenged except in relation to whether there was a garage or not. According to the complainant there was a garage. According to the appellant, whose version was corroborated by his wife, by the time that the alleged rape took place the garage had been converted into a flat in which his eldest son was sleeping.

[3] The complainant was a single witness in regard to the rape. She testified that during the early hours of 30 January 2000 at approximately 01h40, while she was sleeping in her room the appellant knocked on the door of her room and called her name. She quickly put on a T-shirt and skirt. She opened the door and the appellant came in carrying a small fire-arm wrapped in a T-shirt and a 2 litre coke. His upper body was naked and he wore short pants and slippers. The appellant then instructed her not to make a noise, but to obey his instructions. He placed the 2 litre Coke on top of the table together with the firearm. He locked the door and told her that he wanted to have sexual intercourse with her. She asked him why he wanted to sleep with her as he had a wife. The appellant told her that his wife was drunk. She told him that she would not be in a position to do so because she did not come there to work for him and to sleep with him as well. He then ordered her to lie on top of the bed, he put on a condom, took off her panties and lifted up her skirt and started having sexual intercourse with her. While he was having sexual intercourse with her, he heard the garage door open and the appellant said he would go and check who was opening it. The appellant went outside and she locked the door. After a while he came back, knocked, shouted her name and asked her to open the door. She did not do so and kept quiet.

[4] The following morning at 07h30 he returned and asked her to open the door which she did. She noticed that his slippers were still there. He asked her if she was alright and told her that she should not tell anybody what had happened earlier that morning. He came back for a second time and requested her politely to go to the kitchen to clean the dishes and sweep the floor. He returned for a third time and borrowed R20 from her because he wanted to go to a doctor. She gave him the R20 and he again told her never to tell anybody of what had happened. She did what he had requested her to do in the kitchen and after she had taken a bath, went to Atteridgeville to ask her younger sister to show her where the police station in Pretoria West was. Her sister accompanied her to the police station where she laid a charge of rape against the appellant. The police sent her for a medical examination.

[5] A completed report by an authorised medical practitioner on the completion of a medical legal examination form (form J88) was handed in by agreement and the doctor who had completed it was not called to testify. On the J88 the doctor described the injury to the complainant's labia minora as an 'abrasion 5 o'clock position' and concluded that her genital injuries were 'compatible with forcible penetration of vagina with large object like penis'. The schematic drawing of the findings section of the form reflects a single abrasion as described. No further injuries were noted and no other substantial medical conclusions can be gleaned from the J88. The magistrate dealt with these injuries in the following manner:

'The evidence of the complainant is furthermore supported in some respects by the medical evidence. The medical report showed swelling on the private parts as well as abrasions. The doctor's comment was that the injuries were compatible with forceful penetration of the vagina with a large object like a penis.'

This summation of the doctor's findings by the magistrate is inaccurate. The medical report makes no mention of 'swellings' on the private parts and refers to 'abrasion' and not 'abrasions' as stated by the magistrate. The magistrate also does not state in what respects the evidence of the complainant is supported by the medical evidence. It was common cause that sexual intercourse had taken place. The doctor's conclusion is not that the injury she found was only compatible with forceful penetration.

[6] The version of the appellant was that he went to the complainant's room late in the

evening of 29 September 2000 after his wife and youngest son had gone to bed. They started chatting, which was not unusual between them because on occasions when he worked night duty, he would be at home during the day and they usually sat together watching television whilst his wife was at work. Whilst they were chatting that evening he saw her breasts through her blouse which was not buttoned up and asked her whether she did not want to have sexual intercourse. He stated that such a thought had previously occurred to him whilst they were alone in the house. She responded that she was afraid of his wife. He told her that she was asleep and offered to give her money. She agreed on condition that they used condoms because she was not on contraceptives. He stated that the complainant had condoms in a margarine container but he decided not to use them because some of them had already been used. He told her he had condoms and would go and fetch them from the house. He asked if she wanted anything from the house and she said that she only wanted cooldrink. He came back with the cooldrink and a condom and they had sexual intercourse. At some stage he informed her that he was tired. They changed positions and he climbed on top and they continued. He again told her he was too tired to continue and they ended the intercourse before he ejaculated. He took a sip of the cooldrink, took off the condom, put on his clothes and left, leaving his slippers and the condom behind.

[7] The following morning he went back to her room and knocked. She opened the door for him and he borrowed R20 from her to buy milk. He told her that he would go to the garage to buy milk. She gave him his slippers. After he had coffee he again went to the room to tell her that he was going to the bank to withdraw money. He asked her if she was fine and whether she was cross with him and she said she was not. When he came back at approximately 13h00, the complainant had left.

[8] The version of what happened in her room the following day is for the most part common cause. On either version, it is clear that when the appellant came to her room the following morning she opened for him without resistance. It is also not in dispute that she gave him a loan of R20 willingly. The complainant came back to his home the following Tuesday in the company of three police officers. He stated that on this day he could not pay her salary because he did not have enough money but only paid her R70; comprised of R50 for the sexual intercourse and R20 for the loan. The payment of R50 and why it

was paid became a bone of contention because the complainant denied that she accepted the R50 and also denied that there was an agreement to pay it in exchange for the sexual intercourse. The appellant's wife corroborated his version that they paid the R50 to the complainant. Although his wife could not testify that this was indeed paid in consequence of an agreement between the appellant and the complainant; her testimony was that according to her this money was paid for the sexual intercourse.

[9] The magistrate rejected the appellant's version that the R50 was for sexual intercourse, and stated that she was of the 'opinion' that the money was for 'her duties not for sex.' It is not clear on what basis the magistrate formed this opinion as it was neither the complainant's nor the appellant's version.

[10] Related to the divergence pertaining to the payment of R50 is a document produced at the instance of appellant during the course of the trial. This document was produced after the complainant had been excused after leading her evidence. She was recalled and the appellant through his legal representative produced the document that was written by his wife on his instructions and given to the complainant to sign as an acknowledgement of moneys she had received. This document specifies that the complainant was given an amount of R670 – 'Januarie se salaris van R350 plus R250 vir Desember plus R50 wat hy haar ekstra gee plus R20 wat hy haar geleen het.' Both the appellant and his wife were cross-examined at length on this document and the reason why this document does not specify that the R50 was for sexual intercourse. His explanation was that the document was given to the complainant to sign as proof that she had been paid her full salary. The failure to specify the reason for the payment of the R50 seems to have influenced the court below in rejecting the version of the appellant with regards to the reason for its payment. The court below found it strange that the appellant's wife did not specify in the document signed by the complainant that the R50 was for sex. The learned Judge's reasoning was that the appellant should have found it prudent to specify that the R50 was for sex because at that stage he had already been arrested on rape allegations. This conclusion by the court below loses sight of the fact that the purpose for which the document had been prepared was to prove that the complainant had been paid her salary and all her outstanding moneys. On either version, it is clear that the R20 was for the loan and that the R50 was not part of the complainant's salary. If the version of the appellant that the

R50 was for sexual intercourse is rejected on the basis that it is not true, it is inexplicable why the appellant would decide to give the complainant R50 extra for no reason; a few days after she had laid a charge of rape against him. In my view therefore nothing turns on this omission. For the same reasons, it is irrelevant that the appellant's wife was the scribe of the document.

[11] When evaluating the evidence of the appellant, the magistrate stated that it was riddled with contradictions and inconsistencies and that it could not be reasonably possibly true. The magistrate found the complainant a satisfactory witness in all material respects. In reaching that conclusion she relied on her performance in court; supposedly her demeanour and the medical evidence. It is therefore necessary to deal with these findings by the magistrate, and to the extent of their relevance, how the court below approached this evidence and the findings by the magistrate in dismissing the appeal.

[12] As stated above, the magistrate's description of the injuries appearing in the J88 was inaccurate. Her conclusion that the medical report supports the version of the complainant was also wrong because the medical conclusion does not isolate forcible penetration as the only cause for the abrasion. It is therefore not surprising that she came to a wrong conclusion and thereby misdirected herself in this regard. The version of the appellant on the other hand is consistent with the findings in the J88 and gives a probable explanation for the clinical findings in that the appellant described the sexual intercourse as 'rof' and further stated that after he told the complainant that he was tired she climbed on top of him until he informed her that he was tired. His version suggests that they had wild intercourse for a lengthy period of time. Sheer logic dictates that a single abrasion can not be unexpected under these circumstances.

[13] It is inconceivable on what basis the magistrate found the evidence of the complainant honest and reliable in the midst of the following improbabilities:
The layout of the yard shows that the complainant's room was a mere two metres from the room in which the appellant's son was sleeping, two metres from the neighbour's wall and ten metres from the nearest room in the main house. The appellant's wife and his children were all at home that night. If the complainant's version regarding the time of the rape is accepted; then it means that the appellant's son was in a flat two metres from the

complainant's room sleeping. It is improbable that the appellant went out of his bedroom carrying a fire-arm, knocked on her door and raped the complainant in her room at that time of the night, because in so doing he would be taking a huge risk that the complainant would not react nor act in such a manner as to wake up his son who was a mere two metres away from them; or his other family members who were in the main house. It is further improbable that when the appellant heard a noise from the garage; appreciating a possibility that it could be his son; would go out of his domestic worker's room during the early hours of the morning without fearing that his son would see him or find his behaviour bizarre. That, according to her, he then came back and knocked and shouted her name, with no regard for the son on whose account he had interrupted the sexual intercourse is more astounding. The same applies to her evidence that he came back expecting her to open her room for him again; a few minutes after he had just raped her. What makes far more sense is the appellant's version that he went to her room and engaged in sexual intercourse with her by consent clearly with no fear that the complainant would do something to wake up his family. There is also nothing improbable in his version that he interrupted the sexual intercourse because he was tired.

[14] The other missing piece in the puzzle of her evidence is the reason why the appellant was carrying a bottle of 2 litre coke when he came into her room. There is no cogent reason for the possession of the 2 litre Coke on her version. However the evidence of the appellant that he brought the 2 litre Coke because she asked for it explains this. According to the complainant, he was carrying both a fire-arm and the 2 litre coke. It could be inferred from her testimony that the purpose for carrying the fire-arm was to threaten or intimidate her. Even so, her evidence that the appellant was carrying a fire-arm falls to be rejected because of the contradictions on whether she was indeed threatened or not with the fire-arm. In response to a question by the defence during cross-examination on why she did not scream, she stated that she did not scream because she saw the fire-arm and had been told not to scream. When asked to explain her testimony in that regard she gave a meaningless response. She was then specifically asked whether the appellant had said he would shoot her if she screamed and she responded that indeed the appellant had mentioned that. She was then asked to state what the appellant said exactly thereafter and the cross-examination proceeded as follows:

'Wat het hy gesê mevrou? – He told me: "Mary you should not shout, you should not make a noise

or anything, get on top of the bed and I should sleep with him, if not so, here is the firearm." As a result of this worship I did as he commanded me to.

Dit is baie interessant, want u sê dit nie in u verklaring nie en u het ook nie in u getuienis in hoof gesê nie, waarom nie? – The reason why I did not mention it, maybe the last portion, I mentioned it above my sta tement that I should not shout, I should just remain silent.

Mevrou u antwoord nie my vraag nie. Waarom het u dit nie in u verklaring gesit nie en waarom het u nie vandag in die hof voordat ek vir u vrae gevra het dit vir die aanklaer en die hof gesê nie.? Hoekom steek u dit weg? – The reason why I did not mention it is because I have mentioned it already in my statement.

Watter "statement?" – Your worship the statement that has been handed in as an exhibit, I only mentioned that he had a firearm.

Mevrou kom ons vergeet dit, dit is nie my punt nie. U sê,'

Then the court interjected and the following exchange took place:

'Listen they say, at no point in time in the statement, in your evidence in chief and up to so far you never made mention of the fact that accused person threatened you with the firearm and promise to kill you, now why is that? – Your worship I did not explain, because in my statement I explained that he had a firearm.'

On being questioned further on this aspect by the defence the following exchange took place:

'Mevrou baie mense dra net vuurwapens by hulle, niemand raak ook net sommer bang omdat iemand 'n vuurwapen dra nie, 'n mens raak eers bang as iemand jou dreig. – I was shocked and I was afraid because he was in possession of this firearm and he was in my bedroom.'

' Maar hy het u nie gedreig nie, is dit korrek? – He did not threaten me he only said: "Do not make anything, here is the firearm."

U het dit nie so gesê nie u het net gesê in u verklaring hy het 'n vuurwapen gehad, u probeer nou die indruk skep by hierdie hof dat hy u gedreig het met die vuurwapen. – That is what I said, that he had a firearm in his possession when he came to my bedroom.

En dit beteken eintlik maar niks nie. – I know that the duty of a firearm is to kill a person, and I was shocked and afraid when I saw this firearm.'

It can be inferred from her contradictions on whether she was indeed threatened with the fire-arm that the complainant fabricated her evidence in an attempt to bolster her version that she was coerced to engage in sexual intercourse. The court a quo misdirected itself by finding that the complainant 'did not in any way contradict herself' in regard to her

version as to the fire-arm. The appellant on the other hand was truthful in that he did not deny that he owns a fire-arm. He in fact testified that he owned several fire-arms and that he kept his fire-arms in a safe in his bedroom. He stated that the safe was very close to his bed in which he slept with his wife and that the door of the safe made a loud noise when it is being opened. He testified that if he had tried to remove the fire-arm from the safe that evening, his wife, who was already asleep in their bed would have heard the noise. His wife confirmed that she would have heard him if he tried to open the door of the safe that evening because it makes a loud noise and she is a light sleeper. The court a quo said it was 'not convinced' by the denial of the appellant that he had a fire-arm as he could have taken the fire-arm out of the safe earlier without his wife knowing. The correct approach would have been to consider whether the appellant's version that he had no fire-arm could reasonably possibly have been true, particularly in the light of the complainant's contradictory evidence which I have quoted at some length because of its importance.

[15] The behaviour of the complainant the following day is inconsistent with her version that she was raped. The complainant woke up the following day and continued with her normal duties as if nothing had happened until she completed what was necessary. Nothing prevented her from leaving at the earliest available opportunity that morning to go and report her rape as she claims she intended to. There is absolutely no reason why she would lend an amount of R20 to a man who had just raped her carrying a fire-arm, a few hours before. The version of the appellant on the other hand explains his behaviour the following day. As stated above his behaviour shows that he had no fear that he would be caught. It is also not surprising that he would go to her room, early in the morning to ask if she was alright. This behaviour would indeed be nonsensical if he did so after having raped her a few hours previously. It is also not unusual that he would ask her for a loan of R20 under the circumstances testified to by him, but not remotely probable that she would lend him money after he had raped her earlier that morning.

[16] The appellant proferred an explanation as a probable reason why the complainant laid a charge of rape against him. The appellant stated that he thought that the complainant incriminated him falsely because of a conflict between him, his wife and the complainant, involving his child, a few days before. When the complainant was asked whether he had encountered any problems with the appellant, she stated that there were

no problems. During cross-examination, she was confronted about an incident that has had occurred a few days earlier when she was confronted by the appellant and his wife because their youngest child was found outside the yard, and she was threatened with dismissal. She admitted the incident thereby contradicting her earlier evidence to the contrary. It is worth commenting on the approach adopted by the court below in dealing with this incident. The court below stated that it was suggested that this incident was a possible motive by the complainant to incriminate the appellant falsely. The court found that such a motive was too remote and that this was so because the dispute was resolved amicably. The court therefore concluded that the complainant had no motive. It is doubtful that the court was correct in simply ruling out this incident as a possible motive. The complainant admitted that the incident occurred. She was not only confronted by both the appellant and his wife but was also threatened with dismissal. It is trite that an accused may tender an explanation why he believes he has been falsely implicated and it may turn out another reason unknown to him exists or is more probable. The accused is called upon to speculate, not testify on a matter of fact. In such circumstances he cannot be blamed if it turns out that his explanation is found to be wanting.[1] It would therefore be wrong to criticise the appellant if it turned out that this was not the reason. What is important is that the appellant was truthful when he relayed the incident to the court and the incident cannot be ruled out as a possible reason why the complainant laid false charges against him.

[17] In an attempt to bolster her evidence, the complainant testified that there was a garage outside and that it was as a result of noise emanating from the garage that sexual intercourse had been interrupted. This evidence was a clear fabrication. The appellant's evidence of his yard was not disputed and was further corroborated his wife, who also

[1] *R v Mthembu* 1956 (4) SA 334 (T) at 335H-336B; *S v Kubeka* 1982 (1) SA 534 (W) at 536D-537D and cases there cited; *S v Ramochela* 1997 (2) SACR 494 (O) at 496a-e.

denied that there was a garage at the time. The appellant's son also corroborated this evidence in as far as he confirmed that he slept in a room outside the main house (which could only have been a flat). The court *a quo* found that the presence of the garage was immaterial because the real issue was whether or not there was noise in that direction. In my view the existence or not of the garage is material because it deals with the reason advanced by the complainant on why the sexual intercourse was interrupted. She repeatedly said that the appellant had referred to 'the garage door.' He could not have done so. There was no garage. This in turn affects the credibility of the complainant. It follows that if there was no garage, then it can be inferred that there was no noise coming from a garage and that this version was fabricated by the complainant.

[18] The other clear fabrication found in the complainant's evidence relates to the alleged alcohol consumption by the appellant's wife. The appellant denied that he said this to the complainant. His wife stated that she is and had always been a teetotaler. This was not challenged during her cross-examination. No reason comes to mind on why the appellant who admitted that he had sexual intercourse with the complainant on his request and who further admitted that he allayed her fears pertaining to his wife by telling her that his wife was asleep, would deny that he had instead said that she was drunk. A denial of this is of no moment.

[19] The magistrate concluded that the appellant's evidence was full of contradictions. Apart from the fact that such contradictions are blatantly absent from her judgment, this conclusion is unfounded and amounted to a clear misdirection. In support of this wrong conclusion, the magistrate further stated that the appellant stated that 'the complainant consented to the sexual intercourse, but could not explain why she was injured. Then later he said it was because she was rough'.

This probable explanation by the appellant for the injuries of the complainant was not an afterthought nor a contradiction by the appellant. On the contrary it was consistent with his earlier version during his evidence that the sexual intercourse was wild.

The appellant was a truthful witness who admitted that sexual intercourse had taken place to which there were no witnesses in spite of the possible problems this would probably

cause between him and his wife.

[20] The magistrate's criticism of the evidence of the appellant's wife is also unfounded and was based on wrong assumptions. The appellant's wife did not testify that she would do anything to keep her husband out of jail. She said that she would do anything to protect him, but immediately added that she believed that what he said was the truth. It was also incorrect for the magistrate to find that she could not testify about what had occurred at night because she had gone to sleep. Her evidence in this regard was that she would have heard her husband if he woke up as she was a light sleeper and because they slept together like spoons. She also stated that she would have heard him if he opened the gun safe because it made a lot of noise when it was being opened. In *S v Gentle*[2] Cloete JA stated:

' 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 emphasised 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 consent, and the appellant's version less likely that it did not.'

The appellant's wife was truthful and her corroboration of the appellant's testimony should have been taken into account in evaluating the evidence.

[2] 2005 (1) SACR 420 at 421 para [18].

[21] The court below also criticised the appellant's evidence. He was criticised for a failure to give an explanation as to why he left his slippers in the room. The court below's reasoning is premised on a conclusion that he would not have wanted to leave any tracks in the complainant's room. This finding does not take into account the converse inference that the appellant may have left his slippers there because he did not fear that the complainant would use them against him because there was consent. Of course if the appellant had indeed raped the complainant, he would have ensured, as stated by the court below, that he left no track in the complainant's room.

[22] In criticising the evidence of the appellant, the court a quo made a further factual error in stating that the appellant testified that he watched pornographic movies with the complainant. His evidence was that the movies were 'rof'. When he was cross-examined further, he stated that they watched M-Net stories but did not discuss sex; although the thought had occurred in his mind. It is this factual error that led the court a quo to conclude that it is very uncommon that a female domestic worker will watch such movies with her 'master' male employer, unless there are some sort of emotional feelings. Apart from the fact that this Court has in the past criticised such bald generalisations,[3] this conclusion was based on an incorrect factual summation of his evidence.

[23] The test applicable in criminal proceedings is that the State ought to prove the guilt of an accused beyond a reasonable doubt. The trial court must accept the version of an accused unless it is found that this is not reasonably possibly true. In light of the improbabilities and contradictions in the complainant's version, the magistrate and the court a quo misdirected themselves in accepting her version and rejecting the version of the appellant. There is no basis for rejecting the version of the appellant.

[24] I therefore make the following order:

1. The appeal is upheld.
2. The order of the court a quo is set aside and substituted with the following:

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[3] *S v Scott Crossley* 2008 (1) SACR 223 (SCA).

‘The appeal is upheld. The conviction and sentence are set aside.’

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Z L L TSHIQI
JUDGE OF APPEAL

APPEARANCES:

APPELLANT:	L Augustyn Instructed by Pretoria Justice Centre, Pretoria; Bloemfontein Justice Centre, Bloemfontein
RESPONDENT:	R T Mareume Instructed by Director of Public Prosecutions, Pretoria; Director of Public Prosecutions, Bloemfontein