THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 144/08

In the matter between:

GERHARD SMIT Appellant

and

THE STATE Respondent

Neutral citation: *G Smit v The State* (144/08) [2010] ZASCA 84 (31 May 2010)

Coram: MTHIYANE, VAN HEERDEN, PONNAN, MHLANTLA and LEACH JJA

Heard: **19 May 2010**

Delivered: **31 May 2010**

Summary: Criminal law – rape and attempted rape - evidence – assessment of – complainant's evidence lacking credibility - convictions of rape and attempted rape set aside.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Seriti J and Ramagaga AJ sitting as court of appeal):

1. Leave to appeal is granted and the appeal is enrolled.
2. The appeal is upheld, and the order of the high court is set aside and substituted with the following:
   ‘(a) The appeal is upheld.
   (b) The appellant’s convictions and sentences are set aside.’

JUDGMENT

LEACH (MTHIYANE, VAN HEERDEN, PONNAN and MHLANTLA concurring)

[1] On 24 February 2005, Gerhard Smit of Pretoria (‘the appellant’), was convicted in a regional court on a count of attempted rape and a further count of rape for which he was, respectively, sentenced to three years’ and ten years’ imprisonment, such sentences to run concurrently. A subsequent application on his behalf to lead further evidence as well as an application for leave to appeal was refused by the trial magistrate. Subsequently, the appellant was granted leave to appeal by the North Gauteng High Court but on 6 August 2007 that court (Seriti J and Ramagaga AJ) dismissed the appeal. A delay then ensued, largely as a result of various financial and logistical difficulties that are not necessary to detail on the part the appellant in lodging his application with the High Court, for leave to appeal to this court. On 12 February 2009 the High Court dismissed that application. The appellant then applied to this court for leave to appeal and to adduce further evidence in

terms of s 309 of the Criminal Procedure Act 51 of 1977. On 25 February 2009 this court issued the following order:

'The application for leave to appeal and to adduce further evidence is referred for oral evidence in terms of s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959.

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

[2] Because the success or otherwise of the application for leave to appeal depends on the prospects of eventual success of the appeal itself, the argument on the application had to address the merits of the appeal. For this reason the parties were requested to argue the appeal as if the application for leave to appeal had been granted. (See *S v Boesak* 2000 (1) SACR 633 (SCA) paras 10, 11 and 12.)

[3] The charges against the appellant arose out of events which occurred at his home in Pretoria during the night of 3 to 4 September 2003. Both the charge of attempted rape (count 1) and that of rape (count 2) involved the same complainant, a 16 year old school girl, who was at the time living with the appellant's family. The appellant used an outside room described in the evidence as a 'Wendy house' as his bedroom while the complainant shared a bedroom in the main house with the appellant's sister, Jolindi, and his 11 year old brother. His mother and her partner slept in an adjoining bedroom. The State alleged that the appellant had unsuccessfully attempted to rape the complainant in the Wendy house and, some time later, had succeeded in doing so in the bedroom that she shared with his two siblings.

[4] The appellant denied his guilt. Although he admitted having had intimate contact with the complainant in the Wendy house and that he had thereafter had sexual intercourse with her in the bedroom, he alleged that this had all taken place with her consent. Unfortunately for him, his version was rejected and he was convicted on both counts as charged. As there is a material conflict of fact, a resolution of which involves the credibility of the witnesses, it is necessary to deal with the evidence in some detail.

[5] At the time of the incident, the complainant was attending a school in Pretoria. As her home was in Witbank it had been necessary for her to board at the school but, for reasons not disclosed in the evidence, there had been a problem at the school and she was required by the school to leave the boarding house. Her teacher, a Mr Bruwer, had a son who was at the time romantically involved with the appellant's sister, Jolindi, and this led to arrangements being made for the complainant to board with Jolindi.

[6] On the night in question, although the complainant had already prepared for bed, at Jolindi's suggestion she slipped a track suit over her night clothes and the two of them went out at about 9 pm to purchase cold drinks. They ended up at the Bergsig Hotel where the appellant was playing pool with his friends. Although the complainant had lived with Jolindi's family for a few weeks, she claimed not to know the appellant who was much older than her. It is common cause that despite it having been a school night, the complainant and Jolindi spent several hours playing pool with the appellant and his friends and only left the hotel in the early hours of the next morning. They proceeded home in a motor vehicle driven by Jolindi with the complainant and the appellant seated in the rear and one of his friends seated in the front passenger seat. After dropping the friend at his home, they went home.

[7] According to the complainant, when they arrived at the house the appellant said he wanted to talk to her and asked her to accompany him to the Wendy house. She did so, but when they entered the room the appellant closed the door, turned off the light and asked her to remove her clothes. When she refused to do so, he pushed her onto the bed and again asked her to undress. She told him that she was not prepared to do so as she had a boyfriend and he had a pregnant girlfriend. When she again refused, the appellant proceeded to strip down to his underpants, and again asked her to disrobe. When she persisted in her refusal, he pulled a blanket over them, fondled her breasts and put his hand between her legs. However when he sat up, apparently in order to play some music, she was able to free herself and flee to the main house. As she did so, she looked back and saw the appellant, now fully clothed, following close behind her. Once in the main house, the

appellant went to the sitting room to watch television while she went to the bedroom she shared with Jolindi and the latter's 11 year old brother. She alleged that when she told Jolindi what had happened, she was unsympathetic and told her it had all been her own fault.

[8] The complainant alleged that she had then removed her track suit and climbed onto her bed, but that she found it impossible to sleep. She was awake and lying on her stomach when she felt someone climbing onto the bed, who pulled the panty she was wearing to below her buttocks and then had sexual intercourse with her by penetrating her vagina from behind. She alleged that after penetration had occurred she looked around and saw that it was the appellant. She asked him what he thought he was doing. He immediately climbed off her and left the room. She alleged that the next day she had informed her teacher, Mr Bruwer, what had happened to her.

[9] The appellant told a materially different story. Although he confirmed that the complainant and Jolindi had joined him and his friends in playing pool at the hotel, he alleged that she had flirted outrageously with both his friends and him. She had repeatedly squeezed his behind, had sat on his lap and had kissed him. He alleged that while he and the complainant were seated in the rear of the vehicle on the way home, they engaged in heavy petting during which he fondled her breasts and she fondled his private parts. On their arrival home, he suggested to her that they go to the Wendy house, to which she willingly agreed. Once in his room, the complainant removed her track suit and lay on the bed dressed in her night clothes. He took off his pants and shirt and joined her. They petted intimately, during the course of which they fondled each others private parts. But when he attempted to remove her panty, she said that they should rather go into the house. They dressed together and when he asked whether he should bring a condom with him, she replied that it was unnecessary as she was using an oral contraceptive.

[10] The appellant described how he and the complainant had then gone to the main house where he sat in the sitting room while the complainant, after having said that she would call him when Jolindi was asleep, went to her

bedroom. She returned shortly thereafter, bringing him a duvet. She sat on his lap and they kissed. The complainant said that he should wait a few minutes before joining her in bed. She returned to the bedroom and, after a short while, he joined her as she had said. They petted intimately for a while before he removed the complainant's panty and they had consensual sexual intercourse, during which he penetrated her vagina from behind. The act was brief, and the two of them then repaired to the bathroom together to clean themselves. After the complainant had kissed him again, she returned to the bedroom while he went and slept in the sitting room, something he commonly did. He did not see the complainant the next morning before she went to school and was shocked to later hear that she alleged that he had raped her.

[11] Before dealing with whether the appellant's version was correctly rejected as not being reasonably possibly true, I should interpose that there can be no doubt that the State's case fell far short of proving an attempted rape in the Wendy house. The high court never dealt with this issue and appears to have confirmed the conviction on the count of attempted rape solely because it was not persuaded that the trial court had erred in accepting the complainant's version. However, while on the complainant's version the appellant had intimately fondled her, he at no stage attempted to have sexual intercourse with her and, indeed, at all times she had her panty on and the appellant had never removed his underwear. At best for the State, the appellant may have been guilty of indecent assault but he certainly did not attempt to insert his penis into the complainant's vagina. That being so, even on the State's case considered in isolation, the appellant's actions in the Wendy house cannot be construed as an attempt at rape and in this court counsel for the State correctly conceded that the conviction on this count cannot stand.

[12] But the more important issue is whether both the trial court and the high court erred in accepting the version of the complainant as true beyond a reasonable doubt and rejecting that of the appellant as being inherently improbable. The rejection of the appellant's version as inherently improbable was based primarily on two issues. First, that if the complainant had wanted to

have sexual intercourse with the appellant, she would have done so when they had the opportunity of doing so in private in the Wendy house (and it was thus inherently improbable that she would have suggested to the appellant that they should go to the main house for that purpose) and, second, that the complainant would have suggested having sexual intercourse in a bedroom which she shared with two other people.

[13] The allegation that the appellant and the complainant did not avail themselves of the opportunity to have sex in the Wendy house and only did so later in the bedroom is not so improbable that it can be rejected as false beyond a reasonable doubt. The fact that the sex act took place in the bedroom without the complainant crying out for assistance is far more likely to have occurred if the act was with her consent than without it. And the appellant was hardly likely to have run the risk of attempting to rape the complainant in the same room as his sister and younger brother after she had successfully fought off his initial attempt to do so in the Wendy house as to do so would have invited discovery in a compromising position should the complainant have again resisted his advances. Plainly, if the appellant intended to have forcible intercourse with the complainant in a house with four other occupants, without knowing how she would react, he ran the risk of her raising the alarm and him being found out. It would have been far less risky, if he was intent on such conduct to have done so in the Wendy house, where the opportunity clearly presented itself. If anything, the fact that the sexual act took place where it did is more consistent with the appellant's version than that of the complainant, and the appellant's version is not so inherently improbable in that regard to warrant rejection. Or rather at best for the State it is a neutral factor that does not tip the scales in its favour.

[14] The fundamental difficulty that I have with the State's case is that it rested solely upon the credibility of the complainant herself. The trial court did not evaluate her evidence in detail while the high court concluded that it was 'satisfactory in every material respect and is also credible'. This is a startling statement as a detailed examination shows the complainant to have been anything but a credible witness whose testimony was inherently unreliable

and as appears from what follows, her evidence is riddled with inconsistencies and improbabilities.

[15] In her evidence in chief, the complainant made no mention of any improper advances made by the appellant until such time as the two of them had entered the Wendy house. In cross-examination, however, a very different version emerged. She then alleged that while at the hotel the appellant had forced her to sit on his lap and that, while returning home, the appellant had not only forced her to sit in the back of the vehicle with him but, despite her protestations, had forced her hand onto his private parts. Had these events occurred as she alleged in cross-examination, it was surprising to say the least that she only volunteered this information at that stage. Her failure to do so smacks heavily of an attempt to gild the lily.

[16] It is also surprising that if the complainant had been obliged to physically resist the appellant's advances, both at the hotel and while seated in the motor vehicle, she would have voluntarily accompanied him to the Wendy house. Importantly, she also admitted having willingly kissed him in the Wendy house. This was hardly the conduct of a person who had just been obliged to fight off a sexual predator, and the fact that she went with the appellant to his room and kissed him there is far more consistent with the appellant's version that she had consented to the sexual contact which had taken place between the two of them earlier that evening. Furthermore, the complainant admitted during her evidence that she was taking an oral contraceptive at the time, information that the appellant would hardly have known unless she had imparted it to him as he said she had done. This further corroborates the appellant's version of the events. Why else, it must be asked, would she have volunteered that information, unless there was a discussion between them about sexual intercourse. It strikes me as implausible that she would have imparted that information to him had she felt threatened by him.

[17] The complainant's description of events after she had left the appellant's room is also unsatisfactory. She alleged that after she had freed

herself from the appellant, she fled from the Wendy house and, on looking back, saw him fully clothed following directly behind her. However, it is common cause that the appellant had stripped to his underpants and it is difficult to see how on the complainant's version he would have had the time to dress and to follow so closely behind her. Not only is her version thus improbable in this regard but the fact that the appellant was fully clothed at that stage is consistent with his version that they had both dressed themselves before they left the Wendy house together.

[18] Then there is the appellant's allegation that the complainant had taken him a duvet while he was waiting in the sitting room for Jolindi to fall asleep. The complainant denied doing so but Jolindi confirmed that she had. Not only did Jolindi's evidence contradict the complainant's on this score but she also confirmed that the complainant had flirted with the men present at the hotel and had sat on the appellant's lap. She also testified that after the complainant had returned from the Wendy house she had said that she and the appellant had just played with each other. Jolindi took the complainant to school the next morning. It was undisputed that notwithstanding the complainant then having the opportunity to do so, she had not complained about the appellant's behaviour. Indeed Jolindi testified that the complainant had told her that she had enjoyed her evening playing with the appellant. It was only later in the day, according to Jolindi, that she had heard that the complainant had alleged that the appellant had raped her.

[19] Jolindi's evidence was thus inconsistent with that of the complainant in several respects. She was not shaken in cross-examination and there is no reason to doubt her truthfulness. However, the trial court did not mention her testimony and while the high court briefly mentioned her evidence, it neither evaluated nor considered its effect upon the credibility of the complainant. It erred in doing so as Jolindi's evidence, much of which was unchallenged, throws considerable doubt upon the version of the complainant.

[20] The complainant's description of the sex act itself is also distinctly unconvincing. As I have said, she alleged that the appellant had entered the

room, climbed on her bed, pulled down her panty to just below her buttocks and then penetrated her vagina from behind, all of which took place without her offering any resistance or even looking around to see who it was. Not only is it improbable that he would have been able to achieve penetration if she was lying in the position she described but, according to her, it was only after penetration that she looked around and asked him what he was doing. If she was awake, as she alleged was the case, it is difficult to accept that the appellant could have done all of this without her consent. The trial court appreciated this difficulty and found that the complainant must have been asleep at the time and was thus not only unaware of the removal of her panty and the appellant's initial penetration of her, but that she had therefore been incapable of giving her consent. But this finding flies in the face of the complainant's own evidence that she was awake at all times, and constitutes a material misdirection.

[21] Had the complainant been raped, one would have expected her to have immediately cried out for assistance, particularly knowing that Jolindi was present in the room. She did not do so. Nor after the act did she wake Jolindi. When pressed on this, the complainant alleged that she had attempted to awaken her but that Jolindi had been so drunk that she continued sleeping. Jolindi denied having been drunk and said that she had merely had a single brandy and coke during the course of the whole evening, and her evidence in this regard was not challenged. The complainant's evidence in regard to what she told Jolindi the next morning was also unsatisfactory. Initially she said she did tell Jolindi of the rape, but went on to say that she could not remember if she had done so. As I have said, Jolindi's evidence has not been shown to be unreliable and is wholly inconsistent with the complainant doing anything else but expressing her pleasure at the events of the preceding evening.

[22] Moreover, the complainant said that she did not report the incident to Jolindi's mother as she did not know her well enough, and that she therefore decided to wait until school to report the incident to her teacher, Mr Bruwer. When Mr Bruwer testified, he made no mention of the complainant reporting

that she had been raped. Instead he stated that she had shown no signs of being at all upset during the course of the morning classes which is hardly what one would expect of a young girl who had been raped. However he did state that the complainant had told him that she did not want to return to Jolindi's house and that, as a result, he arranged for the complainant's mother to come to school and met with her and the complainant that afternoon when the complainant's mother reported to him that the complainant had been raped.

[23] It is clear from this that the complainant did not complain immediately after the incident to people that she could trust in circumstances where it would have been that expected she would have done so. The first person to whom she appears to have reported that she was raped was her mother but the circumstances under which that report was made are not clear. There is a conflict on the evidence as to the precise events that occurred, but it is apparent from her mother's testimony that the first issue that arose was whether the complainant had been at the hotel the previous evening. It was only after the complainant's mother, who was angry about her daughter having possibly been at the hotel, made enquiries and learned from another witness that the complainant had been at the hotel that the allegation of rape was first mentioned.

[24] Precisely how she had come to make the report was not explored in the evidence, but the fact remains that the complainant's allegation of rape appears only to have emerged after a confrontation with her mother about her having been at a hotel on a school night. In the circumstances that prevailed, there is a very real suspicion that the complainant's report of rape was made in an attempt to deflect her mother's anger.

[25] In the light of all these factors, I have grave reservations about the credibility of the complainant and in turn her reliability I am thus not persuaded that the State discharged the onus of proving beyond a reasonable doubt that the appellant's version of the material events was false. Ultimately counsel for

the State was constrained to concede that this conviction as well could not stand.

[26] In the light of this conclusion, it becomes unnecessary to deal with the application for leave to lead further evidence.

[27] The following order will therefore issue:

1. Leave to appeal is granted and the appeal is enrolled.
2. The appeal is upheld, and the order of the high court is set aside and substituted with the following:
   ‘(a) The appeal is upheld.
   (b) The appellant’s convictions and sentences are set aside.’

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L E LEACH
JUDGE OF APPEAL

APPEARANCES:

APPELLANT: J Hollland-Müter

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