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IN THE HIGH COURT OF SOUTH AFRICA

CASE NUMBER: A145/2008

NOT REPORTABLE

DATE: 11 DECEMBER 2009

In the matter between

**YOUSUF MOHAMED
AND
THE STATE**

**APPLICANT

RESPONDENT**

JUDGMENT

TLHAPI, V

[1] The appellant appeared before the Regional Magistrate in Pretoria on a charge of indecent assault. He was sentenced to R10 000.00 or 12 months imprisonment and a further 12 months imprisonment suspended for five years on condition that he is not convicted of indecent assault, committed during the period of suspension. He appealed against his conviction and sentence.

[2] The appellant and Ms D. T. (complainant) worked for the same employer Esquire Technologies. The former was employed as the financial manager and

the latter as human resource officer. The complainant testified that on 10 February 2007 a day before the commencement of her leave, while at her desk having a conversation on the phone with another co-employee, the appellant approached her from behind, informed her that he was leaving and instructed her to lock the door. He came closer to her touched her breast and squeezed it. She stopped talking to the person on the phone. She pushed his hand aside He asked if he could take her out that night, she shook her head in disapproval. He wanted to know why she refused, she again shook her head in disapproval. She removed the receiver from her ear after the Incident She was shocked by the incident, she cried. Jean from the legal department entered her office to ask for something and realized that she was crying and M. from the computer division followed. Without going into detail she reported the incident to them. She had a good working relationship with the appellant. He had never touched her before.

[3] She never went back to work. However, during the second week of her absence, that is, the week during which she had to resume duty, the appellant called her to work to do the salaries. On her arrival she requested a colleague, whose name she had forgotten, to fetch the keys from the appellant. He insisted that she fetch them. Before she could do so she fell ill suffered of nausea, went to the toilet and vomited blood A notice informing her to attend a disciplinary enquiry was received by her two days after the scheduled date. She was not sure whether she had been dismissed at the enquiry.

[4] The complainant conceded in cross examination that she discussed her leave application with the appellant that morning. The 10th was supposed to be her last working day and her application for two weeks leave had not as yet been approved because it had not been signed by the appellant. Her leave was then approved from 10 to 19 February 2007. She had applied for two weeks because her birthday was on the 24th. When the two weeks were not approved she asked for a day off on the 22nd the appellant told her that they would discuss it later. She understood that she had to return to work on the 19th to do the salaries. She

failed to report for duty on the 19th . During the first week she was referred to a lady doctor by her sister and in the second week she went to see her doctor. She had tried to obtain an interdict against the appellant but finally reported the incident to the police. She had in the past been under stress due to incidents not related to her employment and had experienced outbursts one which caused her to collapse. Sometimes this occurred at the workplace.

[5] The appellant denied that he had touched complaint's breast. He testified that he went down to request her to close the unit for him. He usually drove himself to work on Saturdays and left earlier to avoid traffic. Due to his diabetic status and an operation which followed he had lost 60% of his eyesight which hampered night driving. Day driving had become a problem. Complainant's office overlooked an open area shared by five employees. The complainant enquired about her application for leave. He informed her that only one week had been approved because she had to be back to process the salaries. Furthermore, he told her that the approval of her leave was subject to her completing all the work that she had to for him, the managing director and chief executive officer.

[6] She confirmed that she had completed the manuals and other work. The complaint told him that her birthday fell on the 24th of that month and enquired if she could take the day off. He told her that if she had made plans for that day she had to change her leave application. Before he left he went to check on everyone in the open office. On his way out complainant informed him that she too was leaving and he told her to ensure that she had completed the details of the disciplinary hearing which was scheduled for the following Tuesday. Before leaving the premises he called her on the office phone and requested her to leave the documents on her desk. These related to a disciplinary hearing for another employee. He had a key to her office and would collect the documents.

[7] The complainant did not return to work on the 19th but sent a sick note which was received by the appellant. The complainant had been booked off till the 24th.

She had not completed the payroll. He requested her to report for duty on the 21th to complete it. They worked together in her office and everything was normal. They discussed her health. She was under stress due to work and financial problems and had confided in him. He was aware that she had been on medication. Prior to the 10th he had on many an occasion witnessed episodes of crying and shaking. She had on one occasion accused him of wanting to dismiss her. He had allayed her fears. Despite the presence of a sexual harassment policy and procedures at the workplace, the incident was not reported to her employer. She lay a charge against him after the 3 March 2007.

[8] Ms M. d. J. ('M.') was called as a defence witness and she was also a friend of the complainant. She testified that she received a call from the complainant and on her arrival at complainant's office she found her alone and crying. This contradicted the testimony of the complainant that she was found in the company of one J. Complainant reported firstly, that the appellant had asked her to close down the unit when M. responded that it was nothing to cry about only then did complainant report that appellant had touched her breast. Madeline had to call one A. to assist in calming down the complainant because she was in an uncontrollable state. M. testified further, that this had not been the first time she had burst out in tears. She had witnessed one at the workplace when complainant had domestic problems and another at her home on a New Year's day. M. testified that the complainant had requested for a two weeks leave, because she was expecting a friend from Iraq and, that they had planned to spend some time on the farm. She knew that complainant had been very upset when her leave was not approved.

[9] The grounds of appeal are incorporated in the following submissions for the Appellant:

1. The complainant lay false charges because her leave for two weeks had not been approved;

2. The medical certificate of the 19th had no value in that it stated only what the complainant told the doctor;
3. Despite the complainant's denial the charges were promoted by the complainant's stressful condition and, her condition had been confirmed by M.;
4. It was unlikely that appellant would touch complainant's breast in the proximity of her co-employees who occupied the adjoining open office;
5. Though the cautionary rule was no longer part of our law, in cases involving sexual assault it was necessary to urge caution, where complainant had lied or shown to have made previous false complaints or bore some grudge;
6. Complainant was an unreliable witness she had lied about the status of her employment after the incident;

For the respondent.

7. The complainant's emotional state prior to the incident the fact that her leave had not been approved or that the sexual harassment guidelines at the workplace had not been followed, were not relevant to the determination of the appellant's guilt;
8. The court was entitled to make adverse inferences where the appellant failed to put his version to the state witnesses or where his version differed from the version put to the state witness or where he gave evidence 'which was not put for commentary to the state witness';
9. The complainant's version was corroborated by the defence witness;

10. Aggravating circumstances were present and a court of appeal was limited in interfering with the discretion of the court on sentence;

11. The court is expected to protect the integrity of a woman's body

[10] Although the cautionary rule in as far as it related to complainants in sexual assaults was no longer part of our law, a cautionary approach was in certain circumstances recommended S v M 2000 (10) SACR 484 at 500 H-J and at 501 A-E At 501 F Shakenovsy AJ states:

I do not, as has been enjoined in the Jackson case, supra apply any general cautionary rule to the complainant merely because this is a rape case. I look at the evidence as a whole and the reliability of what has been placed before me" (my underlining)

[11] According to the complainant the appellant walked into her office while she was conversing with another employee to check on who had not reported for duty that day. She did not stop the conversation or drop the receiver when the appellant touched her and offered to take her out that night. She could not recall whom she had spoken to over the phone. She had a good working relationship with the appellant and he had never before made any advances on her. There is no explanation why the appellant, who had not displayed such behaviour before, would have been so bold as to touch her in that way irrespective of the possibility that she may have reacted in such a way as to expose him to the person on the other end of the line.

[12] She made no reference in her evidence in chief about her conversation with the appellant regarding the approval of her leave that morning. She conceded in cross examination that they discussed her leave application. Appellant stated that the conversation took place in her office when he gave instructions to lock up the unit. The complainant seemed to be uncertain about when this conversation took place. At page 16 of the record lines 9-20:

‘Met ander woorde u oorspronklike aansoek net beftrende twee weke was afgekeer en 'n week was aan u toegelaat, is dit korrek? Die beskuldigde se dit is wel, dit is wat die gesprek oor gegaan het in jou kantoor op die 10de voor jy geloop het-Nie voor die incicent, dit was die tweede keer.

Was dit nie voor die incident me? - Dit was voor die incident ja, vroeer die oggend

Het julle enige ander gesprek gevorm teen opsigte van hierdie aansoek van jou was betreffende jou verlof- Die rede hoekom ek twee weke wou gehad het was want die volgende week sal my verjaardag wees en ek wou graag daardie twee weke gehad het. Hy net dit afgekeur, toe het ek weer gevra 'kan ek die 22ste nog steeds af he, hy se ons sal later oaaroor praat.

Taking the versions of the complainant and appellant into consideration, it seems to me, that this was the only time when complainant and appellant had a conversation in her office that morning it is also the time when she was made aware that her application for two weeks leave had not been approved. She testified that she tried for the 22th in consideration of her birthday appellant said he they would discuss it later. Appellant on the other hand testified that she requested leave for the day of her birthday the 24th he responded by telling her to change her leave application if she had already made arrangements for that day. It was difficult to conceive that these discussions were followed by the indecent assault.

[13] It is common cause, as the magistrate found that the complainant was corroborated by her friend M. What the magistrate failed to consider were the contradictions on how the report was made and M's surprise and disbelief at such conduct being levelled against the appellant. According to the complainant one Jean entered her office to took for something and M. followed shortly thereafter

and she made the report about the indecent assault to both of them. In cross examination she conceded that she called M. to her office but she said it was earlier on to sort out a personal issue between them but she could not recall what it was about M. on the other hand testified that she was called by the complainant over the phone and, when she entered complainant's office she could see that complainant was crying and was visibly upset. When questioned complainant reported first that she had been instructed to lock up the unit when M. raised her eyebrows complainant mentioned the indecent assault. M. had to call one A. to assist in calming her down J. was not present. It does not appear from the record that complainant reported to M. and Archie that the incident had been preceded by a discussion with the appellant on her leave application. However, in cross examination M. informed the court that complainant had been very upset because the two week leave had not been approved. I can only conclude that such knowledge came by because as friends they had discussed the matter.

[14] The fact that complainant failed to follow internal procedures at the workplace in my view, could raise suspicion about the indecent assault charges I am not saying that she should not have instituted criminal proceedings, however, she was not just an ordinary, ignorant employee at the workplace, she was the human resources officer for a number of years, who had assisted the employer in the administration of the disciplinary processes at the workplace. She should therefore not have been confused about the process she needed to follow against the appellant.

[15] It was submitted for the respondent that the appellant could not discredit the complainant on versions not put to her in cross examination, *S v Van As* 1991(2) SACR 74 108 B-G. Indeed, such instances were present, but were not material to the determination of the matter and not a reason to disbelieve the appellant's version.

Having regard to the evidence as a whole, and for the reasons above, I am of the view that the magistrate misdirected himself in finding that the version of the

appellant was to be disbelieved and that the state had proved its case beyond a reasonable a doubt.

[16] In the premises, I give the following order:

1. The appeal is upheld with costs

TLHAPI, V V

(ACTING JUDGE OF THE HIGH COURT)

I, agree

MOLOPA, L M

(JUDGE OF THE HIGH COURT)

**FOR THE APPELLANT : F VALLY ATTORNEYS,
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