THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 612/13
Reportable

In the matter between:

LODEWICUS ANDRIES MICHAEL KRUGER **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Kruger v The State* (612/13) [2013] ZASCA 198 (2 December 2013)

Coram: Lewis, Leach, Theron, Pillay and Petse JJA

Heard: 22 November 2013

Delivered: 02 December 2013

Summary: General Law – rape – statement of complainant implicating alleged offender made shortly after the incident – such statement and the emotional state of complainant at that time supporting conclusion that she had been raped.

O R D E R

On appeal from: North Gauteng High Court, Pretoria (Mavundla and Louw JJ sitting as court of appeal):

The appeal is dismissed.

J U D G M E N T

LEACH JA (LEWIS, THERON, PILLAY AND PETSE JJA CONCURRING)

[1] Arising out of an incident that occurred on 19 March 2008 in Danville, Pretoria the appellant was charged in the regional court with having raped the wife of a friend. Although it is common cause that the appellant had sexual intercourse with the complainant, he denied that he had raped her and alleged that she had consented to the act. The trial court disbelieved him. It convicted him as charged and imposed a sentence of eight years' imprisonment. The appellant appealed unsuccessfully to the North Gauteng High Court against both his conviction and sentence. The appeal to this court is with leave of the high court. The appeal was prosecuted solely against the conviction.

[2] Before dealing with the merits of the appeal, it is necessary at the outset to deal with the test applied by the high court in granting leave to appeal to this court. Despite dismissing the appellant's appeal, the high court concluded that it was 'possible' that another court might arrive at a different conclusion and that leave to appeal should not be 'lightly refused' where the person concerned is facing a lengthy sentence of imprisonment. This is an incorrect test. What has to be considered in deciding whether leave to appeal should be granted is whether there is a reasonable prospect of success. And in that regard more is required than the mere 'possibility' that another court might arrive at a different conclusion, no matter how severe the

sentence that the applicant is facing. As was stressed by this court in *S v Smith* 2012 (1) SACR 567 (SCA) para 7:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[3] The time of this court is valuable and should be used to hear appeals that are truly deserving of its attention. It is in the interests of the administration of justice that the test set out above should be scrupulously followed. In the present case, it was not, and this court has had to hear an appeal in respect of which there was no reasonable prospect of success.

[4] I turn to the facts. Late in the afternoon of 18 March 2008, the day before the incident giving rise to the charge, the appellant went to the home of the complainant and her husband in order to fetch a Wendy-house they had given to him. However the appellant, who is by occupation a tow-in/breakdown operator, received a call to attend to a breakdown and had to leave after making an arrangement that he would send one of his employees to fetch the Wendy-house the next morning.

[5] At about 9:30 the following day the appellant was alone at the house, waiting for the Wendy-house to be collected. According to her, she had been doing her washing in the kitchen but took her 11 month old baby to her bedroom to change his nappy. Having done so, she put the child down on the carpet. She then saw the appellant standing in the doorway leading to her bedroom. When she attempted to move past him, he grabbed her and forced her back into the room and onto her bed. He proceeded to forcefully remove her tracksuit pants and her lower undergarment, forced her legs apart and raped her. The complainant is a lightly built person (a medical report reflects her weight as 65 kilograms and that she is of small general

bodily build) while the appellant is a large man (he weighed 137 kilograms) and she was unable to offer effective resistance. Shortly after he had finished, he received a call on his cellphone to attend a breakdown, and immediately left.

[6] The complainant testified that she promptly telephoned her sister who lives nearby, and arranged to go and see her. However before she could leave, the appellant's truck, driven by Mr David Els, arrived to fetch the Wendy-house. She said that she forced herself to be calm and told Els to take the Wendy-house and to lock the gate behind him when he left. Taking her infant son with her, she then left and walked to the home of her sister.

[7] The appellant, on the other hand, testified that although he had not originally intended to go to the complainant's home that day, he suddenly decided to do so. On his arrival he went to the back door where he found the complainant doing her washing in the kitchen. She engaged him in conversation and offered him a cup of coffee. At this stage, the complainant started flirting with him and when she stumbled and almost fell, he grabbed her by the hand to steady her. With that she thrust herself against him and kissed him. One thing led to another and, at her invitation, he followed her into the bedroom where consensual sexual intercourse took place after the complainant had removed her lower garments. He confirmed that after the sexual act had taken place, he had received a callout on his cellphone and that he had left to attend to it before Els arrived.

[8] Crucial to a resolution of these conflicting versions was the evidence of the complainant's sister, Mrs Johanna Pretorius, who lived within walking distance of the complainant's home. She testified that at about 9:45 that morning she received a telephone call from the complainant who was in tears and in such a state of distress that it was difficult to make out what she was saying. She ascertained that the complainant wanted to see her and, after 15 minutes or so, the complainant arrived on foot, carrying her baby. She was crying and in a highly disturbed emotional state. Mrs Pretorius described how it was only after she had given the complainant a pill to calm her down that she had been able to inform her of the incident and had explained how the appellant had raped her. On hearing this, Mrs Pretorius took the complainant to her bedroom and made her lie down. She then telephoned her

husband and, on his recommendation, contacted Crisis-on-Call. Both the police and the complainant's husband were also informed of what had happened.

[9] The fact that the complainant informed her sister of what had happened immediately after the incident is not only admissible under s 58 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 but shows consistency on her part in regard to her complaint, a factor that serves to rebut any suspicion that she may have fabricated her allegations. Moreover, in a case such as this, where the complainant is in a state of distress and weeping almost immediately after the incident, her condition is also relevant and serves to rebut a defence of consent.[1]

[10] The appellant attempted to avoid the obvious consequences of Mrs Pretorius' evidence by relying upon the driver of the truck who went to fetch the Wendy- house, Els, who testified that the complainant did not appear to him to have been at all distressed when he arrived at her house. Els, however, was a witness of no great credibility. He insisted that the complainant had been wearing a dress whereas it was common cause that she had been dressed in a T-shirt and tracksuit pants. He also testified that he had been with the complainant for about half an hour, but this cannot be accepted in the light of the evidence of the complainant's sister that she had arrived at her home not long after she had telephoned her. In addition, Els testified that the complainant had left without her child. This, too, was wrong. And as I have mentioned, the complainant herself testified that she had tried to compose herself when dealing with Els. Taking that into account together with his limited opportunity for observation and his faulty recall of various details, Els's evidence really takes the matter no further.

[11] The appellant also sought to impugn the complainant's credibility by relying on the fact that she had no bruises when subsequently examined by a doctor, Dr Ribero, and that the latter, when called to testify and given a description as to how the rape had allegedly occurred, had ventured to suggest that such an assault was likely to have caused bruising. However, despite the fact that the appellant is a

[1] See: *Fletcher v S* [2010] 2 ALL SA 205 (SCA) para 13 and *S v R* 1965 (2) SA 463 (W) at 465D-E.

heavy man, without knowing the precise movements of his body in relation to that of the complainant and where and how he had pressed down onto her, it would be speculation to find that bruises would inevitably have been caused. Certainly, in my view, the fact that there was no bruising does not mean that the complainant was not raped, and I did not understand the doctor to contend to the contrary.

[12] It was further argued on behalf of the appellant that he had not departed from his version while being cross-examined and that there was therefore no reason to reject his version of the events as not reasonably possibly true. While the fact that an accused is consistent in his or her version is a factor to be taken into account, it does not in itself mean that an acquittal should follow. A court is required to have regard to all the evidence and to consider whether, in the light thereof and the inherent probabilities of the case, the version of the accused could reasonably possibly be true.[2] And in cases such as this, where no reason readily presents itself, or was even suggested to the complainant, as to why she would falsely cry rape, it seems wholly improbable that she would do so and expose herself to the humiliation flowing from reporting the matter to the police and having to undergo the resultant scrutiny of total strangers.

[13] I do not think it is necessary to analyse the evidence on record any further. While there may have indeed been certain unusual aspects of the complainant's evidence ─ such as her initial unwillingness to inform her husband what had happened (something which may be explained by the nature of their marital relationship or a state of emotional confusion after having been raped by one of his friends) ─ there is no reason to doubt the pith of her story. The trial court had the advantage of seeing her testify and concluded that she was a reliable witness. In the light of that finding, the inherent probabilities and the other factors that I have mentioned, there can in my view be no doubt that the appellant was guilty as charged. His appeal against his conviction was correctly dismissed by the high court.

[14] The appeal is dismissed.

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[2] See eg *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15 and *Fletcher v S* [2010] 2 All SA 205 (SCA) paras 9-11.

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L E Leach

Judge of Appeal

APPEARANCES:

For Appellant:	H L Alberts (Attorney) Instructed by: Pretoria Justice Centre, Pretoria Bloemfontein Justice Centre, Bloemfontein
For Respondent:	P W Coetzer Instructed by: The Director of Public Prosecutions, Pretoria The Director of Public Prosecutions, Bloemfontein