

SOUTH AFRICA / JUDGMENT

Bosogwe v S (CC 33/05) [2009] ZANWHC 19 (3 September 2009) [2009] ZANWHC 19

COURT

North West High Court, Mafikeng

BEFORE

Hendricks

CASE / FILE NUMBER

CC 33/05

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IN THE NORTH WEST HIGH COURT,

MAFIKENG

CASE NO: CC

33/05

In the matter between:

JOSEPH

BOGOSWE

Applicant

and

THE STATE

Respondent

APPLICATION FOR LEAVE TO APPEAL

DATE OF HEARING : 14

AUGUST 2009

DATE OF JUDGMENT : 03

SEPTEMBER 2009

COUNSEL FOR THE APPLICANT : ADV

ZWIEGELAAR

COUNSEL FOR THE RESPONDENT : ADV

RASAKANYA

JUDGMENT**HENDRICKS J****[A] Introduction:-**

- [1] The Applicant applies for leave to appeal to the Full Bench of this division or the Supreme Court of Appeal (SCA) against the conviction of rape and the sentence of seventeen (17) years imprisonment imposed on him. Coupled with the aforementioned application is also an application for condonation for the late filing of the notice of application for leave to appeal. At the hearing of the application condonation was granted and counsel for the Applicant was allowed to argue the merits of the application.

[B] Background:-

- [2] The Applicant who was accused number 2 during the trial in the Regional Court was together with his co-accused (accused number
- 1) convicted of rape. The matter was transferred to the High Court for sentence in terms of section 51 of the Criminal Law Amendment Act 105 of 1977. The conviction was confirmed and a sentence of seventeen (17) years was imposed on each of the two accused (Applicant and accused number 1). Hence the present application for leave to appeal against both the conviction and the sentence.

[C] Ad Conviction:-

- [3] Several grounds of appeal were raised by the Applicant and I will deal with those grounds highlighted by Mrs Zwiigelaar (on behalf of the Applicant) during argument of the application for leave to appeal, though cognizance are taken of all the grounds in order to arrive at my decision.
- [4] It is submitted on behalf of the Applicant that the learned Regional Magistrate erred in failing to appreciate that the circumstances of the matter, the nature of the complainant's evidence and the defence of the Applicant are such that corroboration for the evidence of the complainant is required.
- [5] Although there is no statutory provision that a witness's evidence has to be corroborated, there is independent medical evidence that the complainant was injured on her knee and had erythema in her vagina which according to the doctor's finding is consistent with forceful penetration.
- [6] The complainant was seen by the first state witness and Julia being emotional when she was making a report to them concerning the rape incident. There is no evidence contrary to her evidence regarding the finding of the doctor and the observation by the two witnesses that she herself inflicted those injuries on her person or pretending to cry.

- [7] The fact that the complainant was a single witness and a child during the commission of the offence does not necessarily render her evidence unreliable, incompetent and untrustworthy though caution should be applied in acceptance of such evidence.

See:- S v Sauls 1981 (3) SA 172 (A).

- [8] It was submitted on behalf of the Applicant that the report by Doctor Sinyanga John Lukugi that the complainant had (when he examined her on the 02nd day of November 2003 at 11H50) an erythema on the fossa noviculars which is like bruising which he attributed to sexual assault cannot serve as a corroboration for the complainant's claim that the Applicant raped her.
- [9] The evidence of Kelebogile and Julia regarding the report made to them by the complainant cannot serve as corroboration for the complainant's claim that she was raped but this serves as a first report and it also proved consistence on the part of the evidence of the complainant that she was neither coerced nor forced to lay a charge against the Applicant and his co-accused.
- [10] Likewise, does the evidence of Kelebogile that accused number 1 and the Applicant got hold of the complainant and dragged her not serve as corroboration that she was raped but it does show that she did not voluntarily and freely leave the company of Kelebogile but was forced to do so. This clearly indicates that she was not a willing party to her removal.
- [11] It is true that Julia did not corroborate the evidence of the complainant and Kelebogile concerning the pulling, grabbing, screaming and crying of the complainant and further that Kelebogile did not seek assistance but went to sleep. The fact that Julia did not corroborate this evidence does not mean that it didn't take place. It was testified that Julia was ahead of the victim and Kelebogile when the grabbing and screaming happened. The possibility of her not hearing the victim cannot be excluded. As regards to Kelebogile's failure to seek help the same depends on how a person reacts to a situation. She was told by the Applicant and his co-accused not to interfere in business she does not know.
- [12] It was submitted on behalf of the Applicant that Kelebogile did not testify or see when the complainant sustained an injury on the knee which Doctor Lukugi testified about that he saw when examining her, which injury the victim testified that she sustained when she was dragged on the ground by the Applicant and his co-accused after falling and that the Magistrate should have rejected the complainant's evidence and that of Kelebogile.
- [13] This is not a contradiction. It is not even material to these proceedings because when Kelebogile left the victim and the Applicant together with his co-accused, the pulling and dragging had not yet ceased. The injuries sustained by the victim were corroborated by the doctor in the J88 and his testimony. The falling could have happened after Kelebogile left the victim with the Applicant and his co-accused and Kelebogile did not examine the victim medically as the doctor did. This contradiction (if it is a contradiction) per se or conflict is not sufficiently material to warrant a rejection of the version presented on behalf of the

state.

See:- S v Mafaladiso 2003 (1) SACR 583 (SCA).

[14] It was submitted on behalf of the Applicant that the conduct of the victim is not consistent with the conduct of a rape victim because she did not make any attempt to escape or to obtain assistance through the window after Applicant had sexual intercourse with her and locked her in the room before his co-accused could come in and also rape her. Sight should not be lost of the fact that before the victim could reach the place of accused number 1, she was never left alone by the Applicant and his co-accused and there is no indication that there were people who were moving around the place where the victim and her assailants were moving so as to assist her. There was no indication that the room was having windows which were not burglar proofed. The victim did not even know how far accused number 1 was at that stage. According to her testimony accused number 1 came immediately after Applicant had left. While she was with Kelebogile she managed to run but she was caught and threatened. She was crying but the Applicant

and his co-accused did not withdraw their intentions of taking her to where they wanted to take her.

[15] The fact that she undressed herself does not necessarily mean that she was at that stage consenting to sexual intercourse because she was ordered to do so. She was a child who could not have overpowered the Applicant because the Applicant and his co-accused had prior the rape dragged her on the ground after falling and resisting to go with them. It is understandable that because of the force that was applied on her prior to the rape she could have undressed herself when faced with this situation in order to avoid further harm or possible assault.

[16] It is submitted on behalf of the Applicant that there is a reasonable possibility of a finding on appeal that the learned Magistrate erred by rejecting the Applicant's version of consensual intercourse between him and the victim as false beyond reasonable doubt, and that the victim did not deny that she was sexually active when the doctor testified that the cleft in her hymen is an indication that she was sexually active, and also that she had a love affair with the Applicant prior to the incident but which was no longer existing at the time of the rape should not have been believed by the court a quo and her evidence should not have been treated as honest.

[17] Consent to sexual intercourse can never be obtained by inducing fear, violence or a threat to the victim.

See:- CR Snyman Criminal Law Fourth Edition page 447 where the learned author states:-

"... that if Y ostensibly 'consents' to intercourse but such 'consent' is in fact as a result of violence or threats by X, the law does not regard such consent as a valid consent."

And also:- S v Swiggelaar 1950 (1) PH H619 (A):-

“If as a result of violence or threats thereof she decides simply to acquiesce in her fate, there is no consent, because there is a substantial difference between mere submission and real consent.”

[18] The fact that the learned Magistrate rejected the evidence of accused number 1’s brother when he testified that he saw the Applicant in the morning leaving his place with the complainant which exclude the possibility of accused number 1 raping the complainant has got nothing to do with the conviction of the Applicant because:-

[18.1] Applicant does not deny having had sexual intercourse with the complainant and the brother cannot specifically say that he overheard the complainant consenting to sexual intercourse.

[18.2] He was trying to exempt his younger brother from the commission of this offence because Applicant testified that he left accused number 1’s place alone leaving the complainant there sleeping and this was also confirmed by the complainant that Applicant left her in the room and he never came back while she was with accused number 1.

[18.3] The only reasonable inference is that the Applicant after raping the complainant left her in the locked room. He then gave the key to accused number 1 so that he also can have his turn of raping the complainant.

[19] The fact that Applicant was not correctly represented because he was not given the opportunity to cross-examine the brother of accused number 1 and has resulted in a conflict of interest has nothing to do with the conviction of the Applicant because Applicant does not deny having sexual intercourse with the complainant. The fact that Applicant was once in love with the complainant does not give him the right to have sexual intercourse with the complainant without her consent.

[20] I am of the view that the application for leave to appeal against the conviction should be dismissed. No other court can come to a different conclusion on the facts than the conclusion that was reached by the trial court. The Applicant and his co-accused gang raped the complainant and they acted with a common intent in doing so.

[D] Ad Sentence:-

[21] It is submitted on behalf of the Applicant that the following misdirections were made by the trial court in imposing the sentence of seventeen (17) years:-

[21.1] in over-emphasizing the seriousness of the offence, the prevalence thereof and the interest of society at the expense of the personal circumstances of the Applicant;

[21.2] in finding that the seriousness of the offence and the aggravating circumstances thereof outweigh the Applicant’s mitigating personal circumstances;

[21.3] in failing to take the fact that the Applicant and the complainant had a sexual relationship with each other into account;

[21.4] in failing to find in favour of the Applicant that he might have mistakenly accepted that it was a case of consensual sexual intercourse.

[22] Having considered the judgment on sentence afresh and having taken all the relevant factors of sentencing into consideration, I am of the view that there are no reasonable prospects that another court may come to a different decision with regard to sentence than what this court had arrived at. None of the sentencing factors was either over or under emphasized. The sentence of seventeen

(17) years is a carefully balanced sentence. Consequently, the application for leave to appeal against the sentence should also fail.

[E] Order:-

[23] Therefore, I make the following order:-

The application for leave to appeal to either the Full Bench of this division or the Supreme Court of Appeal against the conviction and the sentence is dismissed.

R D HENDRICKS

JUDGE OF THE HIGH COURT

ATTORNEY FOR THE APPLICANT: H H SCHOLTZ

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Prepared on 10 October 2026 · Esheria