

SOUTH AFRICA / JUDGMENT

Choku v S (CA50/2015) [2018] ZANWHC 7 (14 June 2018)

[2018] ZANWHC 7

COURT

North West High Court, Mafikeng

BEFORE

Kgoele, Nobanda

CASE / FILE NUMBER

CA50/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CA

50/2015

In

the matter between:

TEBOGO
CHRISTOPHER
CHOKU Appellant
AND
THE
STATE Respondent
CRIMINAL APPEAL
KGOELE
J, NOBANDA AJ
DATE OF HEARING: 11
May 2018
DATE OF JUDGMENT: 11
May 2018
DATE
REASONS HANDED: 14 June 2018

COUNSEL FOR
APPELLANT:

Mr Setumo
COUNSEL FOR
RESPONDENT: Adv. Nontenjwa

REASONS FOR JUDGMENT

KGOELE J

[1] The appellant was convicted in the Regional Court Division of North West held at Itsoseng on a charge of rape and sentenced to Life Imprisonment. Leave to appeal against his conviction and sentence was refused by the trial Court and he successfully

petitioned this Court, hence this appeal.

[2] The appeal was heard by this Court on the 11th May 2018 and the following Order was granted:-

“1. The appeal against both conviction and sentence is upheld;

2. The immediate release of the appellant be and is hereby ordered;

3. Reasons will follow”.

[3] The reasons follow hereunder.

[4] The salient facts of this matter were that the appellant was charged with rape of the complainant, R S, a 12 year old girl at the time of the incident. It was alleged in the charge sheet that the rape took place on several occasions in 2007, but the dates thereof were not given.

[5] The State led evidence of three witnesses. The complainant, who was a single witness in as far as the rape is concerned, described how appellant, who was used to visit their place, raped her in a shack at the back of the house on the 23rd June 2007. This was after the appellant had suggested to the complainant’s mother, who was also present at that time, that

the complainant accompany him to go and buy some beers. The mother agreed to this request, according to the testimony of the complainant. Whilst they were at the back of the house with the intention to go and buy some beers, the appellant dragged her into the shack which was nearby and raped her. He gave her R10-00 afterwards. According to her explanation, this sexual intercourse took place whilst both were standing.

[6] It appears that the rape was, according to the complainant, interrupted by her aunt when she was passing by at the time she was going to the washing line to fetch some clothes. The aunt, who also testified, confirmed that when she passed next to the shack, she saw the complainant and the appellant in the shack. Although she could not see what they were doing in the shack, she decided to quickly run back to the house to call complainant’s mother. When the appellant saw the aunt and the complainant’s mother coming, he ran out of the shack. The appellant was thereafter chased but they could not catch up with him.

[7] According to the aunt's testimony, the complainant could not tell them what happened in the shack when she inquired except to report that the appellant was twisting her hands in the shack. Even though the complainant did not disclose to them that she was raped, she was nonetheless taken to the police station. From her testimony, the complainant did not want to open up regarding the rape allegation up until she threatened the complainant with the fact that the police will choke her if she does not tell them what the appellant did to her. It further appears from the record of proceedings (in the judgment of the Trial Court) that according to the complainant, she reported to her aunt and the police what happened after she chastised her. The record further reveals that it was only at the police station when the complainant was making a statement that she revealed that this was not the first time she was raped by the appellant. She was then taken to the hospital.

[8] The medical doctor who examined the complainant testified and indicated that his conclusion was that there were no signs of

penetration. He testified that this conclusion was informed by the shape of the hymen, including the fact that there were no physical

injuries, no trauma tears and/or lacerations on the genitalia of the complainant. He also indicated that there was some fluid like semen deposited at her vaginal opening.

[9] The appellant's version is to the effect that indeed on the 23rd June 2007, he was at the complainant's parental home when he was sent to buy liquor. Before he left for the liquor, he called the complainant and requested her to go fetch some empty beer bottles for him. By then, he was standing at the door of the main house and the complainant was in the shack collecting bottles. Whilst he was standing there, the complainant's aunt and her friends arrived. They made noise at the same time, shouting that he was with the child in the shack. After trying to stop them from shouting at him, he then jumped over the fence, with the intention to go to the next shebeen. They followed him. He denied the allegations that he raped the complainant. During cross-examination, he indicated that the aunt of the complainant forced the complainant to fabricate a story about him raping the complainant because he had terminated the love affair they had and she was jealous about the new girlfriend he was dating.

[10] The trial Court rejected his version and convicted him as charged and sentenced him to Life Imprisonment.

[11] As a first ground of appeal, the appellant's legal representative argued that the trial Court had taken it for granted

that the child witness understood the nature and import of being admonished and thus failed to conduct an inquiry to establish her ability to distinguish between truth and falsity, which determines whether or not the witness is competent to testify in the first place. Furthermore that, the trial Court failed to establish the witness' ability to understand the nature and import of the oath or affirmation, which would direct whether the witness should be admonished to speak the

truth, instead of taking an oath. He relied on *S v Matshivha* 2014(1) SACR 29 SCA to support this submission.

[12] He further referred this Court to the case of *S v Mangoma* [2013] ZASCA 205 (unreported SCA Case No 155/13, 2 December 2013) wherein the Court held that it was still required, at the very least, that there be some inquiry into whether the child witness understood the meaning of telling the truth. He contended that the absence of such an inquiry resulted in the inadmissibility of the evidence and a failure of justice. The other authority he relied upon was *Geallal Raghobar v The State* (148/12) [2012] ZASCA 188(30 November 2012).

[13] In expanding on his proposition, he placed much emphasis on the case of the Director of Public Prosecutions, *Transvaal v Minister of Justice and Constitutional Development & Others* 2009 (2) SCAR 130 (CC) wherein the following was said at para 166:-

“the evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused right to a fair trial were such evidence to be admitted. To my mind it does not amount to a violation of Section 28(2) to exclude the evidence of such child. The risk of conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify. This would indeed have serious consequences for the administration of justice.”

[14] His conclusion on this aspect is that no reliance can be placed on the evidence of the complainant in this case and as such, the conviction of the appellant cannot stand.

[15] The second ground of appeal is to the effect that the State did not prove the guilt of the appellant beyond reasonable doubt in that the element of sexual penetration was not proven by the State.

[16] Appellant’s legal representative submitted that the complainant is a child witness and the only witness of the State to testify about the allegation of the actual rape. His argument is that, although the child testified that it was not the first time the appellant had sexual intercourse with her, and further that she felt pains when the appellant penetrated her, the Doctor could not find any signs of sexual penetration, despite the fact that she was examined in less than five hours after the alleged rape. In addition, the medical report does not support or corroborate her evidence that she was sexually violated whether previously or on that day.

[17] He submitted further that the evidence of the second State witness did not add value to the complainant’s evidence. Although she claims to have seen the complainant in the shack with the appellant, she did not witness the rape. According to him the problem is exacerbated by the fact that the complainant did not report to her that she was raped. He maintained that it is clear that the complainant was coerced to say that she was raped as threats were made to her about the police choking her if she does not report.

[18] Therefore, his arguments continued, the reasoning by the trial Court that there could be penetration without injuries because of the elasticity of the hymen and further that, the slightest penetration is enough to prove rape, is misplaced in this matter. This is so,

according to him, because the reasoning ignores the evidence on record that the appellant had previously had sexual intercourse with the complainant and on various occasions. Further that, since penetration was painful on that night, the Doctor who examined the complainant four hours later, would have seen some scars (tears), whether fresh or old.

- [19] In his heads of arguments which were very short and economic as far as the answers to the grounds raised by the appellant, Advocate Nontenjwa, on behalf of the State, submitted that in light of the Doctor's uncertainty with regard to penetration, the judgment of the trial Court provides guidance and should be relied upon with regard to this aspect of penetration, and accordingly, the conviction cannot be faulted.
- [20] His heads of argument did not address the first ground that relates to the competency and/or oath inquiry that was raised by the appellant, including the grounds of appeal relating to sentence. He however made submissions from the bar and conceded that the trial Court did not make any competency inquiry at all. Nevertheless, he maintained that the inquiry that appears from the record of proceedings is an inquiry regarding the oath, which according to him, was sufficient, as the Court proceeded to admonish the complainant by reason of the fact that it was of the opinion that the witness does not understand the nature and importance of the oath.
- [21] To understand clearly the issues raised by the appellant in his first ground of appeal, it is important to quote verbatim what transpired in Court before the witness, who was at that time 15 years of age, and testified through the assistance of an intermediary after the State successfully applied in terms of Section 170A of the Criminal Procedure Act 51 of 1977. It was couched as follows:

"COURT: R S, how old are you?"

WITNESS: 15 years, your worship

COURT: Do you know the truth?

WITNESS: Yes

COURT: Do you attend school?

WITNESS: I attend school

COURT: What standard are you doing, or grade?

WITNESS: Standard 7

COURT: Ja, because of your youthfulness the Court is of the opinion that you do not know the nature of the truth or the oath and as a result you are admonished to tell the truth. Do you understand?

WITNESS: Yes, your worship, I understand

R S: (through intermediary / Interpreter)

COURT: Yes, admonished. You may proceed, Mr Prosecutor”

[22] The first problem with the above inquiry is that it is very superficial, comprises of only four questions which were very short

including the answers thereto. The second problem is that, it is not clear whether with these few questions, the presiding officer was trying to inquire into the competency of the child, or to establish whether the child understood the nature and importance of the oath, which are two distinct inquiries aiming at two specific purposes.

[23] The problems enumerated above were compounded by the following findings of the Court which in my view were ambiguous to say the least.

“Ja, because of your youthfulness the Court is of the opinion that you do not know the nature of the truth or the oath and as a result you are admonished to tell the truth. Do you understand? [Emphasis Added]

[24] The manner in which the finding was couched makes it difficult for this Court to establish whether this finding related to the competency inquiry or to the oath inquiry. Taking the finding as it is, it simply means that the Court was not satisfied that the complainant knows the nature of telling the truth. Put differently, that she could not differentiate between right and wrong. In terms of our law, if a child cannot differentiate between what is right or wrong, this means that the witness / child is incompetent to testify. Therefore, if this was the case, the presiding officer was not supposed to even begin to admonish the child witness if he has formed this opinion in his mind, as depicted in his finding.

[25] But the problem does not end there. It also appears ex facie the record of proceedings that this finding is in stark contrast with the answer that was given by the child / witness when she was asked by the same Court if she knows the truth, as she answered in the affirmative by saying “Yes”. It might have been true that she knew what is meant to tell the truth or distinguish between right and wrong, simply because of her age when she testified (15 years old), but the problem is the abstract manner of the question posed by the trial Court, coupled with its finding made thereafter, that is fatal to the purported inquiry.

[26] In as far as the second part of this finding is concerned, it presupposes that the trial Court was not satisfied that the child / witness understands the nature of the oath, hence the admonishment. The problem with this is that it is not clear from the record itself where the trial Court based this finding from. Certainly, it cannot be from the four questions that were asked by the trial Court in the purported inquiry because, not even a single question from the four related to the nature and/or import of the oath. One can assume that it stems from the trial Court’s own observation of the child, but this is also a quantum leap to make because the record is silent on this aspect.

[27] It is trite law that any child, irrespective of age, is a competent witness if the child can:-

- (a) Be able to tell their recollection of the events in a reasonably clear way;
- (b) Knows what it means to speak the truth.

[28] In as far as competency of young children is concerned, it is the duty of the Court to satisfy itself that the child is a competent

witness. Whether or not the child has the ability to distinguish between the truth and a lie (to speak the truth) is a factual issue which the judicial officer must determine. It is therefore the duty of the Court to enquire into the child's standard of intelligence, in order to ascertain whether he/she can draw a distinction between the truth and a lie and whether he/she

understands the dangers of telling lies. The usual procedure adopted is for the Court to question the child. The child's

answers during the examination will lay a foundation for the finding of the child's competency. Although no hard and fast rules have been laid down on the type of questions to be asked, it has been emphasised in numerous decisions of the High Courts that the examination of the child must be such that the judicial officer can make a positive finding that the child has sufficient intelligence to appreciate the distinction between right and wrong, truth and falsehood, and to recognise the danger of saying what is not true. It is of utmost importance that the inquiry should not be superficial. See:- S v Kondile 2003 (2) SACR 221 (CKH)

[29] The reason for giving evidence under oath (Section 162), affirmation (Section 163) or admonishment (Section 164) is to ensure that the evidence given is reliable. See: Director of Public Prosecution, Transvaal v Minister of Justice and Constitutional Development & Others 2009 (2) SACR 130 (CC) paragraph 166.

[30] I fully agree with the legal representative of the appellant that the evidence of the complainant is inadmissible. The inquiry held by the trial Court, despite it being ambiguous, was superficial. The questioning not only consist of elementary questions, but the admonishment also contained leading and/or compound abstract words put to the witness, and one cannot discern whether the complainant understood what the presiding officer wanted to convey and/or what the nature and import of the oath is, nor the consequences thereof, if she did not tell the truth after being admonished. On these aspects, I can do no better than quote the following remarks from the case of Geallal Raghubor (supra), which the appellant's legal representative referred this Court to, which remarks I find apposite in our matter:-

"The magistrate felt compelled to undertake an enquiry. No doubt on seeing the child in the witness stand she entertained certain doubts that caused her to embark upon that enquiry. What was required of her in embarking upon that enquiry has been spelt out by the Constitutional Court (per Ngcobo J) in Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others 2009 (2) SACR 130 (CC) paras 165, 167 and 168 as follows:

‘The practice followed in courts is for the judicial officer to question the child in order to determine whether the child understands what it means to speak the truth. As pointed out above, some of these questions are very theoretical and seek to determine the child's understanding of the abstract concepts of truth and falsehood. The questioning may at times be very confusing and even terrifying for a child. The result is that the judicial officer may be left with the impression that the child does not understand what it means to speak the truth and then disqualify the child from giving evidence. Yet with skilful questioning, that child may be able to convey in his or her own child language, to the presiding officer that he or she understands what it means to speak the truth. What the section requires is not the knowledge of abstract concepts of truth and falsehood. What the proviso requires is that the child will speak the truth. As the High Court observed, the child may not know the intellectual concepts of truth or falsehood, but will understand what it means to be required to relate what happened and nothing else.’

[Emphasis added]

- [31] Of critical importance about the whole inquiry is the fact that the presiding officer from his own words, did not make a positive finding that the complainant has sufficient intelligence to appreciate the distinction between right and wrong, truth and falsehood, and to recognize the danger of saying what is not true. The first ground of appeal by the appellant therefore has merit.
- [32] The next question is whether, in the absence of the complainant's evidence, the evidence of the other witnesses suffice to sustain a conviction of the appellant on the charge of rape, which question also addresses the second ground of appeal raised by the appellant. I am of the view that even if the evidence of the complainant could not have been rendered inadmissible by the considerations I made above, the conviction of the appellant could not be sustained on the strength of the evidence presented by the State.
- [33] Whilst it is accepted that the absence of the injuries on the private parts of the victim is not suggestive of non-penetration, the complainant in this matter was examined five hours after the purported incident and the Doctor could not find any signs of sexual penetration. This is so despite the fact that the complainant said that the penetration was painful and she was still feeling pains when she was examined. The fluid resembling semen found on the opening of the complainant's vagina could not be confirmed by the Doctor as semen either. The complainant, after being found in the shack with the appellant, did not tell her aunt and her mother that the appellant penetrated her. She instead said the appellant was twisting her hands. In fact, the record reveals that the issue of penetration was forced out by her aunt after threats and/or chastisement were perpetrated against her, when they were at police station. Unfortunately, this evidence tends to lend credence to the appellant's version that the rape allegation was a made up story forced onto the complainant and furthermore, creates doubt as to whether penetration actually took place.

- [34] On the other hand, the appellant does not deny that the complainant was in the shack at the time he was being confronted but gave an explanation that she had gone to fetch the empty beer bottles there on his behalf as he was sent to go and buy beers, after he had asked the complainant to accompany him. All these averments were not denied by the State as the complainant herself also confirmed that her mother had permitted her to go with the appellant to buy beers and further that, the empty bottles are kept in that shack wherein her uncle stays. It also appears from the record that the door of the shack, which was in close proximity to the main house, was not closed when they were allegedly seen inside. The mother, grandmother and uncle of the complainant were inside the main house and the complainant's mother was cooking in the kitchen. All these add up to create some doubt to the allegations of rape, which are denied by the appellant.
- [35] In my view, penetration was not proved beyond reasonable doubt. The appellant's story, including the fact that he ran away because they were shouting at him, at the same time accusing him of raping the complainant, cannot be said to be not reasonably probably true in the circumstances of this matter. He also gave a reason as to why the aunt of the complainant can falsely implicate him. The issue that the two had a previous relationship was not disputed. I do not see any reason why the evidence of the appellant was rejected by the trial Court. In any event, on either approach this Court embarked upon to analyse the evidence of the complainant, the conviction cannot stand. This also serve as a reason why this Court did not even consider exercising the wide powers accorded to it by Section 52(3) of the Criminal Law Amendment Act 105 of 1997. I am also of the view that by virtue of the conclusion reached as far as the conviction is concerned, the need to deal with the appeal against sentence also falls away.

[38] The above sums up the reasons why the Order on the 11th May 2018 was granted.

A M KGOELE

JUDGE OF THE HIGH COURT.

I agree

P.L. NOBANDA

ACTING JUDGE OF THE HIGH COURT

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