

SOUTH AFRICA / JUDGMENT

Draghoender v S (CA24/12)

[2013] ZAECHGC 55 (7 June 2013)

[2013] ZAECHGC 55**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

C Plasket, Z Nhlangulela, M Lowe

CASE / FILE NUMBER

CA24/12

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IN THE HIGH COURT OF**SOUTH AFRICA****(EASTERN CAPE,
GRAHAMSTOWN)****Case No. CA24/12****Date Heard: 3 June****2013****Date Delivered: 7 June****2013****Not Reportable**

In the matter between:

JOHN DRAGHOENDER

.....Appellant

and

THE STATE

.....Respondent

Summary: Criminal law

– sufficiency of evidence – trial court using inference

drawn from common cause and undisputed

facts to corroborate direct

evidence of complainants that they were raped by the appellant –

no misdirection in so doing

– whether inference drawn was only

reasonable inference.

JUDGMENT

PLASKET, J

- [1] The appellant was convicted of two counts of rape as defined in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 by Roberson J sitting in the Midlands Circuit Local Division of this court in Graaff-Reinet. He was sentenced to life imprisonment in respect of each count. He now appeals against conviction only, and he does so with the leave of Roberson J.
- [2] The appellant pleaded not guilty to both counts. He admitted, in his plea explanation, that on the afternoon of Saturday 7 August 2010 he had been accompanied by the two complainants – girls of five and ten years of age – from Atesta farm, where he had been drinking with their parents and other farm workers, to Beenleegte farm, where he worked. He also admitted that the girls spent the night with him in his house. He denied having raped either of them.
- [3] I do not intend to identify the complainants by name. I shall refer to them as the ‘younger complainant’ and the ‘older complainant’ where it is necessary to differentiate between them. I also will not name their mothers and the grandmother of one of the complainants, who all feature in the narrative, but will identify them with reference to one or the other of the complainants. In adopting this impersonal form, my intention is not to render impersonal their traumatic experiences but rather to protect their identities and right to dignity.
- [4] The facts are largely common cause. When the appellant left Atesta, he was accompanied by the complainants. (It is not necessary to decide whether the appellant invited them, or instructed them, to accompany him, or whether they asked him to allow them to accompany him.) Neither he nor the complainants told their parents that they were going to Beenleegte with him. This farm is some six kilometres away from Atesta. About two kilometres from Beenleegte, its owner, Mr Phillipus Nel, stopped his vehicle next to the appellant and the complainants. He asked the appellant where they were going and when the appellant told him that their destination was Beenleegte, Nel gave the complainants a lift there, leaving the appellant to follow on his bicycle.
- [5] After darkness fell, the appellant left the complainants in his one-room house. He went to drink with a co-worker. When he returned, he slept in the same bed as the complainants. The complainants alleged that on his return he raped the older complainant first and then raped the younger complainant directly thereafter. He denied having done so. In the morning he got up and left the house to attend to work on the farm. When he returned, the complainants were playing outside with Nel’s children.

- [6] Later that day, the older complainant's mother arrived, followed shortly thereafter by her grandmother. They had come to look for the complainants and to take them home. The mother scolded them for having left home without informing anyone and the grandmother gave them both a hiding.
- [7] At that stage, neither of the complainants had reported to anyone what had happened to them. After returning to Atesta, the younger complainant remained there while the older complainant returned to school at Greylingskraal, where she was a weekly boarder. A few days later (on Wednesday 11 August 2010) the younger complainant complained to her mother about experiencing a burning sensation when she urinated. On examining her, her mother noticed a yellow discharge from her vagina and that her labia and the inside of her vagina were red. At that stage, the complainant told her mother, after being spoken to sternly, that the appellant had interfered with her.
- [8] The younger complainant was taken to hospital where she was examined. The examination revealed injuries that, the examining doctor testified, were consistent with sexual penetration, most likely by a penis. On the following day, the older complainant was examined medically. The doctor who examined her found injuries that were, he said, consistent with a sexual assault upon her by an adult man.
- [9] I do not intend traversing the evidence in any detail. Suffice it to say that a number of significant contradictions emerged in the evidence of the complainants and their respective versions were not always in harmony. There were also contradictions between the evidence of the complainants and certain other witnesses as to what, for instance, the complainants had recounted to them. Some of the contradictions are immaterial while others are certainly material. For instance, the evidence of the younger complainant as to how the appellant raped the older complainant and her, and where in the room this took place, was contradictory in itself, differed in important respects from the older complainant's evidence of the same event and from what other witnesses said they were told by the younger complainant. This certainly is material as it bears directly on the acts of rape that the State alleged the appellant committed.
- [10] Roberson J was alive to these and other weaknesses in the State's case. She was also alive to the need to approach the evidence of the complainants with caution on account of them being children. Having considered both the strengths and weaknesses of the evidence of the complainants, and having warned herself against too glib an acceptance of their evidence in the light of Jones J's observations on the reasons for the cautionary rule concerning child witnesses in *S v Dyira*,¹ Roberson J said:

'In addition, it must be borne in mind that the complainants' evidence was accurate and detailed in relation to common cause events. Be that as it may, the contradictions in the complainants' evidence were material and would be problematic for the State if it were not for certain objective factors.'²

[11] She proceeded to list the following factors: (a) after the complainants had been playing at Atesta while the adults drank, they were exclusively in the company of the appellant until the next day (except for when Nel gave them a lift); (b) they and the appellant all slept in the same bed on the Saturday night; (c) they returned home on the afternoon of Sunday 8 August 2010; (d) the older complainant went back to school in Greylingskraal; (e) on Wednesday 11 August 2010, the doctor who examined the younger complainant found injuries that were consistent with her having been sexually penetrated, most likely by a penis; (f) the doctor who examined the older complainant on Thursday 12 August 2010 (as a result of the allegations of rape having been made by the younger complainant) found that she too had injuries that were consistent with her having been sexually assaulted.

[12] Roberson J, on the basis of the above, concluded:

‘In the light of these objective facts, in my view the only reasonable inference that can be drawn is that only the accused could have caused these injuries to the complainants. It was submitted on behalf of the accused that the injuries could have been caused in a manner other than sexual assault. I believe that such a theory is highly improbable. It would be stretching coincidence too far that both complainants during the same timeframe were injured in some or other manner, especially considering the doctors’ conclusions.’

[13] She also rejected as ‘highly improbable’ the suggestion that someone other than the appellant could have raped both complainants on Sunday 8 August 2010 after they had returned to Atesta (but before the older complainant returned to boarding school), stating that it was only incumbent on the State to prove the appellant’s guilt beyond reasonable doubt, not ‘any doubt’, and that it did not have to ‘seal off remote gaps in the surrounding circumstances’.

[14] Ms Crouse, who appeared for the appellant, raised three arguments. The first is that Roberson J misdirected herself in relying on circumstantial evidence when direct evidence was available to her. The second argument is that, if she was entitled to rely on the circumstantial evidence, she erred in drawing the inference from it that the appellant had raped the complainants. The third argument is that the appellant’s version is reasonably possibly true and so he should have been acquitted.

[15] As for the first argument, there are, it seems to me, two principal problems with it. The first is that it is based on an incorrect reading of Roberson J’s judgment. When she spoke of certain of the contradictions in the evidence of the complainants being material – which she did in the context of the cautionary rule – and that this created a serious difficulty for the State, what she meant was this: if it was simply a matter of the evidence of the complainants being considered, the State would not have proved its case beyond reasonable doubt, but when their imperfect direct evidence was bolstered by the inference drawn from the undisputed and common cause facts – what she described as the objective facts – the State discharged the onus that rested on it. This is clear from the passage of her judgment that I quoted in paragraph 10 above.

- [16] She consequently relied on both the direct evidence of the complainants and the inference drawn from the undisputed and common cause facts that I have listed in paragraph 11 above. She did no more than consider the evidence as a whole, as she was required to do.³ She concluded that the direct evidence of the complainants that they were raped by the appellant at his house on the night of 7 August 2010 was corroborated by the inference that could be drawn from the undisputed and common cause facts, namely that it was the appellant who had raped the complainants. In this way too, she satisfied the rule that required her to treat the evidence of child witnesses with caution,⁴ and she did so in a practical, common sense way.⁵ I wish to stress that Roberson J did not rely on the undisputed and common cause facts to corroborate the direct evidence of the complainants and thus satisfy the cautionary rule. This would have been impermissible.⁶ Instead, she relied on the inference to be drawn from those facts. That inference is corroboration because, to borrow from (and adapt to meet the facts of this case) Cloete JA's judgment in *Gentle*, it is 'credible evidence' that renders their version 'more likely that sexual intercourse took place . . . and the appellant's version less likely that it did not'.⁷ I can, accordingly, see no misdirection in Roberson J's approach.
- [17] A further problem with Ms Crouse's first line of attack is that I am unaware of any case law (and we were referred to none) to the effect that when a trial court is faced with direct evidence and circumstantial evidence, it may only base its verdict on the direct evidence and must ignore the circumstantial evidence. That flies in the face of the duty of a trial court to consider all of the evidence. Deciding on the guilt or innocence of an accused is, generally speaking, a practical matter of considering and weighing all of the admissible evidence, irrespective of whether it is direct or circumstantial. It is easy to foresee the injustices that would result from the formalistic approach that we are urged to adopt but, given my conclusion on the first issue that I have dealt with, there is no need to say more on this issue.
- [18] Ms Crouse's second line of attack is that the inference that Roberson J drew from the undisputed and common cause facts – that it was the appellant who raped the complainants – is not the only reasonable inference that can be drawn. In developing this argument, she took us to each fact and pointed to other possible inferences which, she said, were reasonable inferences that could be drawn from each. This is an incorrect approach. In *S v Reddy & others*,⁸ a case, incidentally, in which direct evidence implicating the appellants was rejected and their convictions were confirmed on the basis, exclusively, of circumstantial evidence, Zulman AJA said:

'In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in *R v Blom* 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference

sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such “that they exclude every reasonable inference from them save the one sought to be drawn”.

[19] When all of the undisputed and common cause facts that I have mentioned are taken together, I cannot see any other reasonable inference that can be drawn but that it was the appellant who raped the two complainants in his house on Beenleegte on the night of Saturday 7 August 2010. I agree with Roberson J that the suggestions that the complainants may have injured themselves or have been raped at some other time by someone else are so improbable that they cannot be regarded as reasonable inferences to be drawn from the facts. In any event, as was confirmed by the Supreme Court of Appeal in *S v Phallo & others*,⁹ it is not incumbent upon the State to close every possible avenue of an accused’s escape, no matter how fanciful.

[20] Finally, Roberson J was criticised for not expressly rejecting the version of the appellant and it was argued that he should have been acquitted because his version is reasonably possibly true. It is clear from her judgment that Roberson J did reject the appellant’s version, albeit implicitly. The appellant’s version and the version of the complainants, bolstered by the inference drawn from the undisputed and common cause facts, were completely incompatible. By accepting as true beyond reasonable doubt the latter version, she implicitly rejected the appellant’s version as being false beyond reasonable doubt (or, put differently, not being reasonably possibly true).

[21] It is not a correct approach to consider an accused’s evidence in isolation and then to conclude that, on its own, it may be reasonably possibly true. It has to be evaluated within the context of all of the evidence.¹⁰ When that is done in this case, it seems to me, the appellant’s version is wanting because it cannot explain how the injuries the complainants suffered while in his company came about. So, while it may be said that the appellant was not that bad a witness that his version could be rejected because of a general lack of credibility, his denial that he raped the complainants cannot in the light of all of the evidence be reasonably possibly true. When, therefore, all of the evidence is taken into account within the context of the onus that rests on the State,¹¹ the evidence of the complainants (imperfect as it was) and the circumstantial evidence implicating the appellant, together, overwhelmingly point to his guilt beyond reasonable doubt, and it follows that his version cannot be reasonably possibly true. In my view, Roberson J’s conclusion that the appellant was guilty as charged was correct.

[22] In the result, the appeal is dismissed.

C Plasket

Judge of the High Court

I agree.

Z Nhlangulela

M Lowe

APPEARANCES

APPELLANT: Ms L Crouse

Port Elizabeth Justice Centre,

locally represented by Grahamstown Justice Centre

RESPONDENT: Ms W Packery

Office of the Director of Public Prosecutions,

Grahamstown

1S v Dyira 2010 (1) SACR 78 (ECG) at 84f-g.

2In this passage in the unsigned, and hence uncorrected, judgment, the word ‘immaterial’ appears to describe the contradictions

in the complainants’ evidence. From the context this is clearly incorrect and should read ‘material’. I have

therefore corrected the quotation. See the record, volume 5, page 476, lines 5-10.

3See S v Van der Meyden 1999 (1) SACR 447 (W).

4See, for example, S v V 2000 (1) SACR 453 (SCA) para 2.

5See P J Schwikkard, S E van der Merwe, D W Collier, W L de Vos and E van der Berg Principles of Evidence (3 ed): 2009 at 546: ‘It has often been stressed, however, that the exercise of caution should not be allowed to displace the exercise of common sense.’

6S v Gentle 2005 (1) SACR 420 (SCA) para 18.

7Para 18.

8S v Reddy & others 1996

(2) SACR 1 (A) at 8c-e. See too R v De Villiers 1944 AD 493 at 508-509 (cited with approval in Reddy at 8e-g).

9S v Phallo & others 1999

(2) SACR 558 (SCA) para 10.

10S v Van der Meyden (note 3) at 449g-i; S v Van Tellinghen 1992 (2) SACR 104 (C) at 106b-h; S v Bruiners & ‘n ander 1998

(2) SACR 432 (SE) at 439g-440c.

11S v Trainor 2003 (1) SACR 35 (SCA) para 9.

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