

SOUTH AFRICA / JUDGMENT

Kalumwaga v S (A589/16) [2018] ZAGPPHC 391 (16 April 2018)

[2018] ZAGPPHC 391

COURT

North Gauteng High Court, Pretoria

BEFORE

C Swanepoel, S A M Baqwa

CASE / FILE NUMBER

A589/16

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**IN THE HIGH COURT OF SOUTH
AFRICA**

GAUTENG

DIVISION, PRETORIA

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER

JUDGES

(3)

REVISED.

APPEAL NO: A589/16

16/4/2018

In the appeal of:

PONSIANI
SAIMON
KALUMWAGA
Appellant
and
THE
STATE
Respondent

JUDGMENT

SWANEPOEL AJ:

1. The appellant was charged in the Pretoria Regional Court with one count of contravention of section 3, read with section 1, 55, 56 (1), 56 A, 57, 58, 59; 60, and 61 of The Criminal Law Amendment Act (Sexual

Offences and Related Matters) Act, Act 32 of 2007, read with the provisions of section 51 and 52 and schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997, and sections 92 (2) and 94 of the Criminal Procedure Act, Act 51 of 1977.

2. It is alleged that on or about 14 March 2011 and at Pretoria, the appellant unlawfully and intentionally raped G K a five year old girl.
3. Appellant pleaded not guilty, and did not give a plea explanation.
4. The complainant testified through an intermediary. The complainant testified that during this incident she resided with her mother S K, her father G K, and her baby sister, in a flat in Sunnyside, Pretoria. Her uncle, the appellant, was visiting the family.
5. At the outset the complainant, who was seven years old when she testified, was asked whether she could identify her uncle. She said she had forgotten what he looked like, but upon being taken into court, she pointed out the appellant as being her uncle.
6. She testified that on 14 March 2011 she did not go to school because she

was ill. Her parents had gone to work and had left her and her sister with the appellant. She was sleeping in her bed when appellant

noticed that she was coughing and he asked if she was ill. Appellant then told her to lie on the couch. She was lying on her back.

Appellant took off both his and her clothes, put vaseline and oil on himself and proceeded to rape her.

7. After appellant started raping her, he heard the complainant's parents at the door to the flat. Her mother was asking her father for the keys to the door. Appellant dressed himself quickly and went to watch television. The complainant testified that when her mother entered the house she told her what had happened. At that stage the appellant was sitting on the couch. Her mother in turn told her father about the incident. She was taken to a doctor and her parents went to the police to report the matter.
8. Appellant's counsel put it to the complainant that her father had told her to tell this story. She denied this. In cross-examination she testified that the incident had happened in the morning, and that her parents had come home early from work.

9. S K, complainant's mother, had passed away by the time that the trial commenced. G K testified that on 14 March 2011 he woke up in the morning to find his wife with the complainant. The complainant was crying and said that the appellant had done something wrong to her. At his wife's request he sent the appellant away. It was later revealed that K was mistaken about the date, and that the incident was in fact reported on the 5th April 2011.
10. K testified that on 14 March 2011 he had gone to work. S was not working at that stage. During the course of the day one of S' friends, J came to visit. The two women decided to go shopping and they left complainant, her sister, and one A with appellant. Appellant took the complainant from her bed and put her on the sofa where he then raped her. Complainant was crying. When complainant asked him what he was doing he simply continued to rape her. He then left her and after a short while, S and J returned home.
11. The complainant only reported the matter to S on 5 April 2011, some three weeks later. K testified that although he did not have an independent recollection of the date of the incident, he had seen S' affidavit in which the date is recorded. He also produced a receipt that showed that someone had purchased something at Ackermans at 17h13 on 14 March 2011.
12. Appellant's counsel put it to K that S never liked the appellant and that she had plotted against him, which resulted in these charges. He denied the allegation.
13. The affidavit of S K was handed in by agreement. In the affidavit she stated that on 5 April 2011 at 08h15 the complainant came to her bedroom where she was asleep. The complainant told her that on 14 March 2011 the appellant had taken her to the couch, and had taken her panty off. Appellant did not take off all his clothes, but only unzipped his pants. Appellant then raped the complainant, and she started crying. She told him that it was painful, at which point he stopped what he was doing.
14. Finally, a J 88 report on an examination conducted by Or. E. Seller on 5 April 2011, was handed in. Seller recorded that although the complainant had no external injuries, she had a tear in her hymen that was consistent with blunt force penetration, that had occurred more than 10 to 14 days before the examination.
15. Appellant testified that the complaint was the result of a number of factors. He said that S had started disliking him. She had apparently made romantic overtures to him, which he had rebuffed. He also testified about a business transaction relating to gemstones that had gone awry, and had caused friction between him and K. He denied all the allegations against him. This concluded the evidence.
16. It is trite that the evidence of a young child must be approached with great care. Children are highly imaginative and open to suggestion.

In *Woji v Santam Insurance Co Ltd*[1] Diemont JA stated as follows: "The question that the trial court must ask itself is whether the young witness' evidence is trustworthy.

Trustworthiness....depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated."

17. Whilst there is no requirement that a child's evidence must be corroborated, each matter must be considered on its own merit and the evidence of a child must be approached with caution.[2]
18. The version of the complainant regarding the events of 14 March 2011 is markedly different to the version given by K. According to complainant, the incident happened one morning after her parents had gone to work. They returned much earlier than normal, and interrupted appellant whilst he was raping her. She even remembers that she heard her mother asking her father for the door keys.
19. As soon as appellant heard them at the door, he stopped raping her, got dressed, and went to watch television. Complainant then reported the incident to her mother.
20. On the version of K, he had gone to work that day. S was not working at the time, and he had left her with the children. During the day her friend J arrived and they decided to go shopping, leaving the children with appellant. During the time that she was away, appellant raped the complainant, and when she cried and asked what he was doing, he continued to rape her.
21. The version put forth in S' affidavit also differs from the aforesaid versions. She states that complainant told her that after she had gone shopping, appellant put her on the couch where he raped her. On this version he only took off her panty, and unzipped his pants. He did not undress both of them as complainant testified. When he saw complainant crying, and when she complained about it being painful, he stopped what he was doing.
22. The date of the incident was problematic, as K did not have an independent recollection of the date on which the incident had allegedly occurred. The State introduced a receipt issued on 14 March 2011, reflecting purchases at Ackermans, as substantiation that the incident occurred on that date. The problem is however that the receipt was issued at 17h13, contradicting complainant's version that this incident occurred in the morning.
23. Of concern is also that complainant testified that she reported the incident to her mother as soon as she entered the house, and her mother in turn reported to K. In fact, complainant only reported the incident three weeks later.
24. Considering the evidence as a whole there are a number of areas of concern, that leads to the conclusion that the evidence of the complainant is unreliable. The doctor's report is only of assistance to the State inasmuch as it shows that at some point in time, more than 10 to 14 days before the examination, complainant suffered some form of blunt

force penetration. It does not corroborate her version that she was raped on 14 March 2011.

25. Appellant was not an impressive witness, and he seemed to embellish his version with allegations of a gemstone transaction that had gone wrong. However, appellant does not have to prove his innocence. His version must only be reasonably possibly true.

26. There were material contradictions in the evidence of the State witnesses that leads to one to doubt whether the evidence of the complainant is trustworthy. The version put forth by complainant is incompatible

with that of K in a number of respects. Her version that she made an immediate report to her mother is also incompatible with the fact that she only reported the incident three weeks later.

27. In light of the material contradictions in the evidence for the State, the Court is of the view that the case against appellant was not proved beyond a reasonable doubt.

28. In the result I propose that the following order is made:

28.1 The appeal is upheld;

28.2 The conviction handed down on 13 February 2014 is set aside.

C SWANEPOEL

ACTING JUDGE

I AGREE AND IT IS SO ORDERED.

S A M BAQWA

JUDGE

[1] 1981 (1) SA 1020 (A) at 1028A-E

[2] S v Director of Public Prosecutions 2000 (2) SACR 711 (T); S v Jackson 1998 (1) SACR 470 (SCA)

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