

SOUTH AFRICA / JUDGMENT

Kok v S (CA33/2019; RC24/2016) [2024] ZANWHC 133 (24 May 2024)

[2024] ZANWHC 133**COURT**

North West High Court, Mafikeng

BEFORE

Dibetso-Bodibe, M.E Mmolawa

CASE / FILE NUMBER

CA33/2019; RC24/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST PROVINCIAL DIVISION, MAHIKENG

Case

No.: CA33/2019

:

RC24/2016

Reportable:

NO

Circulate

to Judges:

NO

Circulate

to Magistrates:

NO

Circulate

to Regional Magistrates: NO

In

the matter between:

THABISO

KOK

APPELLANT

and

THE

STATE

RESPONDENT

JUDGEMENT

DIBETSO-BODIBE AJ

INTRODUCTION

- [1] Rape is an inhumane, heartless and gruesome silent killer. It is a horrific story to tell, even worse, if this ordeal is to be narrated by a child witness who herself is a victim. If she manages to amass her strength to tell the story, she is a warrior for it takes a courageous spirit in a child witness through the support of her guardian to undergo through such a gruesome ordeal.
- [2] On 19 February 2019, the Appellant was convicted in the Schweizer-Reneke Regional Court of the offence of rape committed on 15 July 2015. He was sentenced to 12 years imprisonment, 4 years suspended for 5 years. The Appellant was 16 years old at the time of commission of the offence and he was 19 years old when he was convicted. The Complainant was a child witness who was 8 years old in 2015 and 11 years when the Appellant was convicted. The appeal is in respect of the conviction imposed.
- [3] The grounds of appeal against the conviction are that the trial court erred in finding that the State proved its case beyond reasonable doubt and, furthermore that it erred by failing to hold a proper enquiry in terms of Section 164(1) of the Criminal Procedure Act, 51 of 1977 (“the CPA”) and therefore incorrectly admonished the minor witness.

ADMONISHMENT OF THE CHILD WITNESS

- [4] The presiding officer held an enquiry as follows before admonishing the child witness:

Court: Good day RVR

RVR: Hey

Court: Right, how old are you RVR?

RVR: I am 11 years old

Court: Do you attend school?

RVR: Yes I attend school

Court: What grade are you doing?

RVR: I am doing grade 4

Court: Who is your class teacher? You said Moatse?

RVR: That is correct

Court: Do you know the colours RVR?

RVR: Yes

Court: Which colours do you know?

RVR: Red, blue, purple and yellow

Court: Okay what is the colour of the T-Shirt you are wearing?

RVR: I am wearing a pink T-Shirt

Court: What is the colour of the chair that you sitting on?

RVR: It is blue

Court: It is blue?

Court: So if somebody says that the colour of your T-Shirt is white will that person be telling the truth?

RVR: No that person will not be telling the truth.

Court: And if he says your chair is red would he be telling the truth?

RVR: No that person would be lying.

Court: He will not be telling the truth?

Court: At school or at home what normally happens to a person who is not telling the truth?

RVR: Getting beaten up

Court: Okay, he is punished?

Court: Okay because telling the truth is important and lying is not the right thing. Do you agree?

RVR: Yes I do agree

Court: Now here in Court we also want you to tell the truth. We want you to tell us the truth, not what somebody else told you, but what you know and what you saw yourself.

Court: Okay, now you are therefore admonished to tell us the truth as I have said.

RVR: (admonished through intermediary).

[5] Section 164 of the CPA provides:

“(1) Any person who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.

(2) If such person willfully and falsely states anything which, if sworn, would have amounted to the offence of perjury, he shall be deemed to have committed that offence, and shall upon conviction, be liable to such punishment as is by law provided as punishment for that offence.”

[6] In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*[1], Ngcobo J explained the import of section 164(1) as follows:

“[163] Section 164(1) allows a court to allow a person, who does not understand the nature or the importance of an oath or solemn

affirmation, to give evidence without taking an oath or making affirmation. However, the proviso to the subsection requires the

presiding officer to admonish the person to speak the truth. It is implicit, if not explicit, in the proviso that the person must

understand what it means to speak the truth. If the child does not understand what it means to speak the truth, the child cannot be admonished to speak the truth and is therefore an incompetent witness... The child cannot testify...

[164] 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... 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 skillful questioning, that child may be able to convey in his or her own 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... the child may not know the intellectual concepts of truth or falsehood, but will understand what it means to be required to relate to what happened and nothing else.

[165] The reason for evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives that assurance that the evidence can be relied upon. It is in fact a pre-condition for admonishing a child to tell the truth that the child can comprehend what it means to tell the truth.”

- [7] There is no formula for an enquiry in terms of section 164(1) and the presiding officer need not be overly technical so as to bring about discomfort rather than a conducive environment for the child witness. The presiding officer questioned the child witness before admonishing her in order to determine her capability and maturity or intelligence if you like to differentiate between the truth and falsehood. The child witness was asked questions unrelated to the case such as her

name, age, where she is attending school and her understanding of the effect of not telling the truth. In my view, that enquiry has passed the muster in compliance with the proviso to section 164(1).

EVIDENCE OF THE COMPLAINANT AS A SINGLE WITNESS IN RELATION TO THE INCIDENT OF SEXUAL INTERCOURSE

- [8] The Complainant took the court a quo step by step of what happened on the day she was raped including the sensitive language used in a sexual intercourse related activity. The Complainant knew the Accused very well and where he stayed. On the day of the incident, about day time her brother send her to the Accused's parental home to go and call their sister but upon arrival at the Accused's parental home she found the Accused who was at that time alone at his home.
- [9] The Complainant told the court that the Accused then took her to a bedroom in a shack where he unaddressed her and had sexual intercourse with her. Her evidence was corroborated by her sister and brothers. Although the according to the trial court, the evidence of the Accused was a bare denial in as far as the incident of rape is concerned, the Accused did admit that the Complainant did come to his parental home on the day in question and that he was alone at home.
- [10] Doctor Jabuja Selamu, examined the Complainant and completed a J88 medical report form. His findings were that the Complainant has visible abrasions and tears around her genitals and visible yellowish discharge. His conclusion was that the injuries on the virginal opening and the perineum were sustained by the repetitive movement of going inside and out of the male genitals into the vagina. In other words the evidence of the Doctor was that there was an act of sexual intercourse with the Complainant.
- [11] The trial court found that the evidence of the Complainant as a single witness though contradicted in some respects was in the main reliable and that the State had proven its case beyond reasonable doubt.
- [12] The court a quo considered the issue of caution and relied on the provision of section 208 which provides that an accused may be convicted of any offence on the single evidence of any competent witness.

- [13] In RV Abdoorham[2] it was stated “The Court is entitled to convict on the evidence of a single witness if it is satisfied that the witness is speaking the truth notwithstanding that in some respects he is an unsatisfactory witness.”
- [14] “There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial judge will weigh his evidence, will consider its merits and demerits and having done so will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule may be a guide to a right decision but it does not mean that the appeal must succeed if any criticism, however slender, of the witnesses’ evidence were well founded... It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common exercise.”[3]
- [15] It is now trite that contradictions are to be expected and do not necessarily lead to the rejection of the witness’s evidence. Not every error by a witness and not every contradiction or deviation affects the credibility of a witness. As was stated in S v Bruiners:[4]

“Experience has shown that two or more witnesses hardly ever gave identical evidence with regard to the same incident or events. It is thus incumbent on the trial court to decide, having regard to the evidence as a whole, whether such differences were sufficiently material to warrant the rejection of the State’s version.”

- [16] In my view, the Complainant was a credible and reliable witness. Although she was a single witness in as far as the incident of sexual intercourse is concerned, her evidence was corroborated. Regarding apparent contradictions between the Complainant and her aunt, the trial court concluded that such contradictions were immaterial and looking at the State’s case holistically, the court a quo found that the State has proven its case beyond reasonable doubt.

CONCLUSION

- [17] The nub of the Appellant’s grounds of appeal rested on the fact that the trial court failed to hold a proper enquiry in establishing the Complainant’s ability to differentiate between the truth and falsehood. It was contended on behalf of the Appellant that if this Court finds that the Complainant was not properly admonished, then her evidence as a single witness falls by the wayside and so too the evidence of other witnesses which corroborated her evidence. Having made a ruling that there was in fact a proper enquiry prior to admonishing the Complainant, the appeal against conviction hang in the balance as not only the Complainant’s evidence was properly considered but also that of the other witnesses which corroborated

her evidence.

ORDER

[18] In the premises, the following order is made:

The appeal against conviction is dismissed.

O.Y DIBETSO-BODIBE

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree

M.E MMOLAWA

Delivered: This judgement was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties or their legal representatives by email and by release to SAFLII

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01 December 2023

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APPEARANCES

FOR THE APPELLANT: Mrs Alrie Nel INSTRUCTED BY: Legal Aid South Africa FOR THE
RESPONDENT: Adv N.B Mudau INSTRUCTED BY: The Director of Public Prosecutions

- [1] Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others (CCT 36/08) [2009] ZACC 8 (1 April 2009) (DPP, TVL)
- [2] R v Abdoorham 1954 SA 163 (N) at 165E - F
- [3] S v Sauls and Others 1981 (3) SA 172 at 180E -G
- [4] S v Bruiners 1998 (2) SACR 432 (SE) at 439

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