
SOUTH AFRICA / JUDGMENT

Kwahla v S (CA&R29/2015) [2015] ZAECHGC 89 (9 September 2015) [2015] ZAECHGC 89

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G Goosen, M Lowe

CASE / FILE NUMBER

CA&R 29/2015

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R 29/2015

Date Heard: 9 September 2015

Date Delivered: 9 September 2015

In the matter between

NTABANKULU KWABLA

Appellant

And

THE STATE

Respondent

Appeal against conviction on charges of rape – state conceding that convictions ought to be set aside – trial court misdirecting itself in several respects – convictions set aside.

JUDGMENT

(delivered ex tempore)

GOOSEN, J.

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- [1] The appellant was convicted of two counts rape by the Regional Court in Port Elizabeth and sentenced to 7 years' imprisonment on each count. The sentences were ordered to run concurrently. He appeals against his conviction, with leave having been granted on petition to this court.
- [2] The appellant was charged with two counts of rape and one count of assault. On the first count of rape, it was alleged that the appellant unlawfully had sexual intercourse with the complainant, his stepdaughter, on several occasions in the period from 2003 until December 2007. Over this period the complainant was aged between 10 and 14 years. It was alleged that these assaults occurred at Motherwell in Port Elizabeth. On the second count it was alleged that the unlawful sexual intercourse occurred with the complainant, on several occasions, in the period from 17 December 2007 until November 2009. During this period the complainant was aged between 14 and 16 years. These assaults also occurred in Motherwell, Port Elizabeth. It is not necessary to consider the charge of assault since the appellant was acquitted on this charge.
- [3] The appellant and the complainant's mother were married prior to these alleged incidents. They initially lived in King Williams Town and relocated to Motherwell in Port Elizabeth prior to 2007.
- [4] It is common cause that the allegations of rape were made by the complainant during or about November 2009. This occurred on an occasion when the complainant had left her house and taken up residence with her boyfriend. Both the complainant's mother and the appellant disapproved of this behaviour. They accordingly went to fetch her home. The complainant did not want to return home and during this altercation she informed her mother that she had been raped by the appellant over a period of a number of years. It was this report that gave rise to the charges against the appellant.
- [5] The prosecution led the evidence of four witnesses during the trial, namely the complainant, her boyfriend, her mother and her younger sister. In respect of the alleged sexual assaults the prosecution case was founded, with the exception of one incident relating to the period covered by the second charge, on the evidence of the complainant as a single witness. It was the complainant's evidence that on one occasion in the period covered by the second charge her younger half-sister had witnessed her being raped. The appellant denied any sexual assaults of the complainant.
- [6] The magistrate based the conviction of the appellant upon an acceptance of the evidence of the complainant. He found that the complainant's version was corroborated by the evidence of her boyfriend and her mother. In dealing with the fact that the evidence of her sister did not corroborate the complainant's version, the magistrate came to the conclusion that her sister had attempted to protect the appellant when giving evidence.

- [7] It is in my view not necessary to set out in this judgment the evidence of each of the witnesses. Nor is it necessary to engage in a detailed analysis of the magistrate's reasoning on several of the critical issues in dispute. That is so because the state, in its heads of argument and in argument presented before this court, conceded that the magistrate had erred in several important respects. It was accordingly conceded – and properly and fairly so – that the convictions could not stand.
- [8] It suffices to highlight a few of the most telling errors and misdirections. The first of these concerns the magistrate's failure to have regard to several unsatisfactory features of the complainant's evidence. Her evidence was that the appellant had been raping her from a very tender age and that these rapes persisted over a number of years. She alleged the first rape occurred at an age when she could not recall whether she was yet attending school, when they were still living in King Williams Town. During the period over which these alleged rapes occurred there were numerous opportunities to report the rapes either to her mother or to her teachers. Indeed, the evidence of her mother was that she could not understand why it was that the complainant had not made a report to her at an earlier stage. The evidence also established that the appellant was employed during this period and often spent long periods of time away from the common home. These periods away from home created a further opportunity for the complainant to bring to the attention of her mother and other members of the family what was occurring. In dealing with the failure to report any of these incidents the magistrate went beyond the evidence and sought, in the judgment, to ascribe the failure to report to the appellant's manipulation of the complainant's fragile state of mind and his use of his position in the family to his advantage. There is however no evidence to support this conclusion.
- [9] The magistrate furthermore failed to have regard to the circumstances in which the allegations of rape were made. In particular, the magistrate failed to consider the fact that the complainant had left the home and taken up residence with her boyfriend in circumstances where the complainant's mother and the appellant disapproved of the relationship and disapproved of her conduct. It appears from the evidence that the complainant harboured considerable resentment towards the appellant because he disapproved of this relationship. The magistrate accordingly failed to have regard to the risks associated with a motive for falsely implicating the appellant.
- [10] The magistrate also had no regard to certain inherent improbabilities in the complainant's version. Thus, it was the complainant's evidence that the appellant had threatened her in June 2009 to rape her again in December when she had completed her examinations. The inherent improbabilities in this version were not considered. If indeed the appellant had been raping the complainant over a protracted period there was no reason for him to desist from doing so between June and December 2009, nor was there any reason for him to inform her that it was his intention to rape her again once her examinations were completed.

- [11] The magistrate's finding that the complainant's evidence was corroborated by the mother and her boyfriend is clearly wrong. Their evidence provides no corroboration for the alleged sexual assaults. To compound matters the magistrate paid no regard to the effect of the evidence of the complainant's younger sister. It was the complainant's version that on an occasion when she was being raped her younger sister had come into the bedroom and had therefore seen the rape taking place. The evidence of her sister, however, was that she did not witness such an event. During her evidence she stated that the complainant had told her to lie to the police in her statement. In dealing with this in the judgment, the magistrate paid no heed to this evidence and found that the younger sister had changed her evidence and given false evidence in order to save her father, the appellant. There is no basis for such a finding.
- [12] The magistrate was enjoined to consider the evidence of the complainant as a single witness critically and with caution. This was not done. Instead it appears from the magistrate's reasons that the complainant's evidence was uncritically accepted without having regard to the cautionary rule. The consequence is that the magistrate accepted the evidence, when, on a proper assessment of the evidence as a whole, the complainant's evidence was not satisfactory in every material respect. It follows that the convictions are vitiated by a material misdirection and cannot stand. Counsel for the state quite properly therefore conceded that the appeal must succeed.
- [13] I accordingly make the following order:
- The appeal succeeds and the convictions are hereby set aside.

G. GOOSEN

JUDGE OF THE HIGH COURT

LOWE, J.

I agree.

M. LOWE

APPEARANCES:

For the Appellant

Adv D. Geldenhuys

Grahamstown Justice Centre

For the Respondent

Adv N. C. Turner

Director of Public Prosecutions

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