

SOUTH AFRICA / JUDGMENT

Langa v S (CA&R2/2019; CC24/2016) [2020] ZAECHGC 20 (3 March 2020)

[2020] ZAECHGC 20

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S M Mbenenge, B M Pakati, G H Bloem

CASE / FILE NUMBER

CA&R2/2019; CC24/2016

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy

IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE NO. CA&R

2/2019

CC

24/2016

In

the matter between:

AYABONGA

LANGA

Appellant

and

THE STATE

Respondent

JUDGMENT

MBENENGE JP:

- [1] This appeal, emanating from the Bhisho Local Division of the High Court, is serving before this court by virtue of the definition of “appeal” in section 1[1] of the Superior Courts Act 10 of 2013 as read with section 315 (3)(b)[2] of the Criminal Procedure Act 51 of 1977.[3]
- [2] The appellant pleaded not guilty to, inter alia,[4] but was convicted of, having raped[5] Ms B[...] N[...] and Ms A[...] C[...] (the complainants), for which he was sentenced by the court a quo to undergo nineteen (19) years’ imprisonment.[6]
- [3] Mr Msikinya, counsel who appeared for the appellant at the trial, confirmed the plea tendered by the appellant as having been in accordance with his instruction, and proceeded, on the strength of such instructions, to outline the basis of the appellant’s defence, as follows:
- “[T]he accused pleads that he indeed was [at] the scene of crime on the day in question as he was following three of his friends from a tavern, only to find them already raping the victims next to some bushes. And then he intervened. He ... denies raping the two complainants at any stage.”*
- [4] Having been requested by the court a quo to expatiate on how he had intervened, the appellant added the following to the outline:
- “When I arrived at the scene my friends were busy raping these children. I arrived when Athule Boni wanted to take, or to rob B[...] of her new takkies. I stopped him from doing that when I said he must stop doing that and he left her and at that stage, B[...] was crying saying they must remove the weapons as they were carrying knives. They indeed removed them and I comforted B[...]. I consoled B[...] by saying that everything is going to be right, nothing is going to happen to her. They then left her and I asked B[...] to dress herself up as she was being raped on my arrival. After that I accompanied her up to next to Wine and Dine that is another shop and I end there.”*
- [5] The court a quo’s succinct summation of the facts of this case renders it unnecessary for me to repeat the facts, save for those necessary for purposes of this judgment.
- [6] The evidence established that the appellant had sexually violated the complainants. The appellant’s DNA material was found in intimate swabs taken from the complainants. Despite all these factors, the appellant’s defence was that he merely intervened and had had no complicity with the other alleged culprits in sexually

violating the complainants.

[7] During the cross-examination of Ms N[...], Mr Msikinya merely elicited confirmation that the appellant knew Ms N[...], and asked whether he had noticed that the appellant had been walking behind the persons who allegedly robbed the complainants of their cellphones and money. Ms C[...] was not cross-examined at all. She did not know, and could thus not testify in relation to the identity of, the culprits.

[8] What greatly exercised the mind of the court a quo, which also rears its head even in these proceedings, is the testimony of Ms N[...], the relevant part of which has been captured in the transcript as follows:

“... It was Ayabonga’s turn, then Ayabonga tried to stop them from doing that, but one of them said, ‘Oh, you want to cause us to be arrested’.... They then forced him[,] one of them took out a knife and pointed it to him and then he ultimately undressed himself and took out his penis and inserted it in my vagina and he did thrusting movements too ... after Ayabonga finished

he moved away and then another one came from another side now. He also took out his penis and inserted it in me and he did the thrusting movements ... after that one finished Ayabonga shook and then I heard Al[...] crying and I asked from Ayabonga where A[...] is ... Ayabonga said he does not know where she is and I said, ‘I asked you to accompany me so that we look for her.’”

[9] When the appellant testified in pursuit of his defence he lent support to the version of Ms N[...] and stated that he had been compelled to sexually assault the complainants. He said the alleged co-perpetrators had ordered him, at “gun- point”, to take off his clothes so that he could do the same thing they had done “to prevent them from being reported”, he further said that the co- perpetrators allegedly ended up forcefully taking off his clothes themselves. The appellant went on to say:

“ . . . Athule said to me, ‘because you are intervening, you want to report this, take off your pair of trousers and do it’. They took my clothes off on their own and they were telling me that they were going to shoot me and I ended up doing the same thing. ... I was just doing it for my safety and the safety of themselves, because after shooting me, I believed they were going to shoot them.”

[10] The appellant further testified that after having had sex with Ms N[...] he was ordered to have sex with Ms C[...]. He crossed the stream before reaching the part of the forest where Ms C[...] was raped and thereupon complied with the instruction to rape her. Thereafter, the appellant looked around for Ms N[...].

Upon locating her he asked her to stand up and to dress herself. He accompanied Ms N[...] away from the scene and at some point they eventually parted ways.

[11] At this unexpected turn of events, Mr Msikinya enquired from the appellant why the defence of compulsion had not formed part of the initial instructions. The following questions and answers drive the point home:

““[Y]ou recall that at the start of these proceedings I made an outline on your behalf, telling the Court that ... you did not rape any of the girls?”

“Yes that is right.”

“Is that what you told me?”

“And why you did not tell me the full story as you are doing now before this Court?”

“[B]ecause I was scared of these young men as I thought they were going to shoot me.” ...

“Okay, what has made you to tell your story now, because initially you said you know nothing about this?”

“I say this because B[...] has already stated as it is, because what B[...] said is what I know.”

“How did that change your mind?”

“I could see that B[...] is not scared of them and I’m also not scared of them, because they are in jail.””

[12] The court a quo in turn established why the appellant had not, at the outset, admitted having had sexual penetration with the complainants, and in response mention that he had been compelled to do so. He said he did not know that it was available to him to mention that he had been forced to have sexual penetration with the complainants.

[13] The question that arose for consideration by the court a quo was whether the appellant had been acting under duress, in the circumstances related by him, when he sexually penetrated the complainants, which he was constrained to concede. After embarking upon an evaluation of the evidence and making the relevant credibility findings, the court a quo said:

“[51] One of the requirements for a defence of compulsion ... is that the threat was not caused by the accused’s fault. In this instance not only was one of those armed with the knife but, knowing the violent and lawless nature of the gang of thugs and how they operated, he involved himself in their shenanigans that morning without any discernment. Instead of leaving them to their own devices or being what he observed to be unacceptable behaviour, he approached the scene, not out of concern for the complainants, but to find out who they were, whereas he was purportedly not involving himself in their business once they left the tavern that morning. It is most improbable in my view that he was approaching the crime scene to intervene and protect the complainants, a bravado inconsistent with his purported fear of his co-perpetrators on his version.

[52] On the issue of the requirement of reasonable means to avert the danger, even assuming generally that the requirements of defence might have been established, it is trite that in order to meet this requirement, the accused must do no more harm than is necessary to avoid the danger. Mr Mbusi urged upon the court to find that there were two ways in which the accused could have averted inflicting the harm having regard to the observations raised by Stretch J in a similar prosecution. The one option is that he could have fled the scene. The other is that he could have simulated sexual intercourse, given that it was dark. It would have been unlikely that it would have been detected that he was pretending to penetrate the complainants on his version if he adopted this option instead. To the contrary the accused went to the hilt of penetrating the complainants, ejaculating on both occasions thus giving

the lie to the fact that he was supposedly under constraint to harm the young women for his and their protection.”[7]

[14] Having considered the requirements of the defence of compulsion, the court a quo concluded that “sexual penetration under these circumstances can hardly be found to be in proportion to the perceived threat even for the moment assuming a threat existed on the accused’s version.” This resulted in the appellant being found guilty of having raped the complainants.

[15] Dissatisfied with the outcome of the proceedings before the court a quo, the appellant applied for leave to appeal against both the conviction and the resulting sentence. The application for leave to appeal was premised on the grounds that (a) the court a quo should have found that the element of intention had not been established beyond reasonable doubt in respect of both counts of rape;

(b) the evidence of Ms N[...] corroborated that of the appellant; (c) the appellant had shown that his version of events on

the day in question was reasonably true; (d) the state had not proved its case beyond reasonable doubt; and (e) in light of the report by the psychologist, the court a quo should have referred the accused for further evaluation and assessment as to his capacity to understand the proceedings during trial.

[16] In granting leave to appeal, the court a quo was of the view that another court may reasonably come to the conclusion,[8] especially on the basis of Ms N[...]’s evidence, that the appellant’s defence of compulsion should have succeeded. The application for leave to appeal against the sentence was dismissed.

[17] Mr Hole, who appeared for the appellant at the hearing of the appeal, advanced, as his principal contention, the submission that at the

trial before the court a quo justice had failed because the appellant’s defence was not properly conducted; the defence of compulsion was not properly

ventilated. Had legal representation been effective and competent as it ought to have been, argued Mr Hole, the court a quo would have been placed in a better position to decide whether or not the defence of compulsion was “reasonably and possibly true.” This, however, is not one of the grounds upon which leave to appeal was sought and obtained. Nor can it be said that this contention, *stricto sensu*, constitutes a pure question of law covered by the pleadings and turning on facts that had been fully canvassed,[9] certainly not when the parties did not ventilate themselves at leave to appeal stage, and the court a quo deprived of the opportunity to say a word on the subject.

[18] In any event, the appellant’s stance that he did not know that he could mention that he had been forced to have sexual penetration with the complainants is unavailing. What is singularly lacking is an explanation regarding why the appellant did not divulge this

material aspect of his defence to his counsel during the consultations that preceded the trial. At trial stage, the appellant was content to merely state that he was scared of the young men who allegedly coerced him, and feared that they might shoot him. What this has to do with divulging the full story to his counsel in whom he was expected to have reposed his trust remains a mystery. Nowhere from a reading of the record did he ever blame anything that might have gone wrong with how the trial was run on his counsel.

[19] In Matonsi[10] it was held that where an accused has not taken any steps to withdraw his counsel's mandate and expressed no disagreement with the conduct of his case until after the verdict has been given he is not entitled to challenge the correctness of the verdict on appeal on the ground that his counsel had been negligent in the conduct of his defence.[11]

[20] The followings remarks by Harms JA in Halgryn[12] are apt:

"Whether a defence was so incompetent that it made the trial unfair is a factual question that does not depend upon the degree of ex post facto dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defence counsel. The

assessment must be objective, usually, if not invariably, without the benefit of hindsight. The Court must place itself in the shoes of defence counsel, bearing in mind that the prime responsibility in conducting the case is that of counsel who has to take decisions, often with little time to reflect."

[21] In my view, if there is anyone to blame for the manner in which the proceedings were conducted, it is the appellant himself. He withheld the salient facts of his defence from his counsel, rendering counsel hamstrung in his cross- examination of the witnesses. It is hard to perceive what cross- examination Mr Msikinya could usefully have embarked upon on the basis of the alleged compulsion when, in the first place, he was never instructed about

that and thus not privy thereto; his instruction having been that the appellant had not had sexual penetration with the complainants at all.

[22] Having regard to the record, I am satisfied that the appellant's complaint is without substance, and that his trial before the court a quo was not unfair.

[23] There is also no reason to fault the findings of fact made, and the conclusions of law reached, by the court a quo on the merits of this case. The court a quo advanced full and compelling reasons why the version of the prosecution was accepted and that of the defence rejected, in so far

as it was in conflict with that of the prosecution. The defence of compulsion was found not to have passed muster as a ground for excluding culpability. The appellant could either have averted his dilemma by fleeing the scene or simulating sexual movements as though engaging in sexual activity. By not resorting to one of these avenues, even on his showing, the appellant caused more harm than was necessary in the circumstances.[13]

- [24] Before concluding this judgment there is an aspect that warrants separate treatment. In the course of analysing the facts of this case the court a quo remarked that “[t]here was further an absence of a cogent explanation from [the appellant] as to how he managed to maintain an erection and ejaculate not once, but twice, under the severe constraints he claimed himself to be under.”
- [25] The appellant sought to gain further mileage by contending that the court a quo took judicial notice of facts of which it was not entitled thereto. The remark could be perceived as disregarding the doctrine of judicial notice. Judicial notice can be taken if a matter is so notoriously or clearly established that evidence of the existence is unnecessary.[14] The circumstances under which a person may acquire or maintain a penile erection cannot be said to fall under the facts that are sufficiently notorious to be capable of judicial notice. Nor may a Court take judicial notice of the circumstances under which a person may or may not ejaculate.
- [26] The following statement by Watermeyer CJ in Tager,[15] is apposite:

“The doctrine of judicial notice is, by all the authorities on the law of evidence which I have consulted, e.g. Wigmore (secs. 2565-2570); Phipson (7th ed., pp. 19 et seq.); Taylor (12th ed., secs. 4-21); Best (10th ed., paras. 253 and 254); still to-day rightly confined within very narrow limits. Thus Phipson says that Judges and juries can only take notice of matters “so notoriously or clearly established that evidence of their existence is unnecessary. . . . Although, however, Judges and juries may, in arriving at decisions, use their general information and that knowledge of the common affairs of life which men of ordinary intelligence possess . . . they may not . . . act on their own private knowledge or belief regarding the facts of the particular case.” . . .

Wigmore in sec. 2569 (a) draws the same distinction: “It is therefore plainly accepted that the Judge is not to use on the Bench, under the guise of judicial knowledge, that which he knows as an individual observer. The former is in truth ‘known’ to him merely in the peculiar sense that it is known and notorious to all man, and the dilemma is only the result of using the term knowledge in two senses. Where to draw the line between knowledge by notoriety and knowledge by personal observation may sometimes be difficult, but the principle is plain.” I cannot help thinking that any knowledge used by the learned Judges in this case was knowledge which they possessed as the result of personal observation and not of notoriety.”[16]

- [27] I am of the view that the impugned remark, made by the court a quo, does not detract from the correctness of the conclusion reached that the requirements for the defence of compulsion were not met. The contention on the merits is, similarly, without substance, with the result that the appeal must fail.

- [28] I therefore make the following order:

The appeal is dismissed.

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

PAKATI J:

I agree.

B M PAKATI

JUDGE OF THE HIGH COURT

BLOEM J:

G H BLOEM

Attorney for the appellant : P S Hole

Instructed by

: c/o Bacela Bukula Attorneys

King Williams Town

Counsel for the respondent : H Kruger

Instructed by

: The Office of the Director of Public Prosecution, Bhisho

Date heard

: 28 January 2020

Date judgment delivered : 03 March 2020

[1] This section defines appeal in Chapter 5 of the Superior Courts Act 10 of 2013 as “not [including] an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or in terms of any other criminal procedural law.”

[2] This section provides that “[a]n appeal which is to be heard by a full court in terms of the direction under paragraph (a) of subsection (2) which has not been

set aside under paragraph (b) of that subsection, shall be heard- (a) . . .; (b) in the case of an appeal in a criminal case heard by a single judge of a local division . . ., by the full court of the provincial

division which exercises concurrent jurisdiction in the area of jurisdiction of the local division concerned; (c) . . .”

[2] This section provides that “[a]n appeal which is to be heard by a full court in terms of the direction under paragraph (a) of subsection (2) which has not been

set aside under paragraph (b) of that subsection, shall be heard-

(a) . . .;

(b) in the case of an appeal in a criminal case heard by a single judge of a local division . . ., by the full court of the provincial

division which exercises concurrent jurisdiction in the area of jurisdiction of the local division concerned;

(c) . . .”

[3] It would appear that, upon a proper interpretation of the relevant statutory provisions, a judgment of a single judge in a criminal

case emanating from any of the local divisions in the Eastern Cape is appealable to the provincial division in Grahamstown, while a judgment by a single judge in a civil case is appealable to a full court of the local division concerned; Cf *Nedbank Ltd v Norris & others*

[2016] ZAECPEHC 5; 2016 (3) SA 568 (ECP), where Goosen J held: “[14] The Superior Courts Act does away with the erstwhile distinction between a ‘provincial’ and a ‘local’ division. The Act establishes nine ‘divisions’, which correspond in name to the nine provinces. A ‘division’ means ‘any Division of the High Court’. A ‘division’ consists of the Judge President, one or more Deputy Judges President and so many other judges as may be determined by the President, each with head-quarters within the area of jurisdiction of that division. Section 6(3) deals with the area of jurisdiction of a division. Section 6(3)(c) provides that the Minister, after consultation with the Judicial Services Commission, may establish one or more local seats of a division. In terms of s[ection] 50, at the commencement of the Superior Courts Act, the High Courts of Bhisho, Mthatha and Port Elizabeth became local seats of the Eastern Cape Division and the area of jurisdiction of those courts part of the area of jurisdiction of the division. [15] The effect of these provisions is to create a single, unitary division in which, as will be demonstrated hereunder, the courts of the division exercise the jurisdiction of the division, subject only to territorial limitation based on their location at a seat of the division.”

[3] It would appear that, upon a proper interpretation of the relevant statutory provisions, a judgment of a single judge in a criminal

case emanating from any of the local divisions in the Eastern Cape is appealable to the provincial division in Grahamstown, while a judgment by a single judge in a civil case is appealable to a full court of the local division concerned; Cf *Nedbank Ltd v Norris & others*

[2016] ZAECPEHC 5; 2016 (3) SA 568 (ECP), where Goosen J held:

“[14] The Superior Courts Act does away with the erstwhile distinction between a ‘provincial’ and a ‘local’ division. The Act establishes nine ‘divisions’, which correspond in name to the nine provinces. A ‘division’ means ‘any Division of the High Court’. A ‘division’ consists of the Judge President, one or more Deputy Judges President and so many other judges as may be determined by the President, each with head-quarters within the area of jurisdiction of that division. Section 6(3) deals with the area of jurisdiction of a division. Section 6(3)(c) provides that the Minister, after consultation with the Judicial Services Commission, may establish one or more local seats of a division. In terms of s[ection] 50, at the commencement of the Superior Courts Act, the High Courts of Bhisho, Mthatha and Port Elizabeth became local seats of the Eastern Cape Division and the area of jurisdiction of those courts part of the area of jurisdiction of the division.

[15] The effect of these provisions is to create a single, unitary division in which, as will be demonstrated hereunder, the courts of the division exercise the jurisdiction of the division, subject only to territorial limitation based on their location at a seat of the division.”

[4] The appellant had also been charged with two counts of attempted robbery. These counts are not relevant for present purposes,

as indeed the appellant was not found guilty thereof.

[5] In contravention of section 3 of the Criminal Law, Sexual Offences and Related matters Act 32 of 2007.

[6] The Court further directed as follows: “On the premise of the professional report of Ms Andrews, attached marked annexure A, that the accused requires urgent psychiatric

treatment and that he cannot function among the normal prison population but should be treated as a mentally ill person. The Head of the Correctional Centre is to note the findings of Ms Andrews and to have the accused promptly assessed by both a

psychologist and psychiatrist at his admission and to render whatever treatment to him is reasonably necessary pursuant to their

recommendation.”

[6] The Court further directed as follows:

“On the premise of the professional report of Ms Andrews, attached marked annexure A, that the accused requires urgent psychiatric

treatment and that he cannot function among the normal prison population but should be treated as a mentally ill person. The Head of the Correctional Centre is to note the findings of Ms Andrews and to have the accused promptly assessed by both a

psychologist and psychiatrist at his admission and to render whatever treatment to him is reasonably necessary pursuant to their

recommendation.”

- [7] Judgment of the court a quo at paras 51-2.
- [8] The court a quo seems to have been benevolent, for it is incumbent on an applicant for leave to appeal to convince the court on proper grounds that there is a reasonable or realistic chance of success on appeal; a mere possibility of success, an arguable case is not enough. There must be a sound rational basis for concluding that there is a reasonable prospect of success on appeal (*MEC for Health, Eastern Cape v Mkhitha and another* (1221/2015) [2016] ZASCA 176 (25 November 2016) at para 17.
- [9] Cf *Alexkor Ltd and another v Richtersveld Community and others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 44.
- [10] *R v Matonsi* 1958
- (2) SA 450 (A) at 457E.
- [11] See also *S v Bennett* 1994 (1) SACR 392 (C) at 397j-398a.
- [12] *S v Halgryn*
- [2002] ZASCA 59; [2002] 4 All SA 157 (SCA); 2002 (2) SACR 212 (SCA) at para 14.
- [13] *S v Maqala* (CC11/2017) [2017] ZAECBHC 17 (1 December 2017) at para 47.
- [14] *Rex v Tager* 1944 AD 339 at 343.
- [15] *Id.*
- [16] *Id* at 343-344.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2020/20.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/langa-v-s-unknown-topic-aecghc-2020>

Prepared on 11 October 2026 · Esheria