

SOUTH AFRICA / JUDGMENT

Mokwa v S (CAF 06/2010) [2011] ZANWHC 15 (31 March 2011)

[2011] ZANWHC 15

COURT

North West High Court, Mafikeng

BEFORE

Gura, Hendricks, Kgoele

CASE / FILE NUMBER

CAF 06/2010

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NORTH WEST HIGH

COURT, MAFIKENG

CASE NO.: CAF 06/2010

In the matter between:-

KGOMOTSO MOKWA

.....Appellant

and

THE STATE

.....Respondent

CRIMINAL APPEAL (FULL
BENCH)

HENDRICKS J; GURA J;

KGOELE J

DATE OF HEARING: 10

DECEMBER 2010

DATE OF JUDGMENT: 31

MARCH 2011

COUNSEL FOR
APPELLANT:

ADV ZWIEGELAAR

COUNSEL FOR
RESPONDENT:

ADV VAN BILJON

JUDGMENT

GURA J

Introduction

- [1] The appellant was convicted of rape by the Regional Court and was thereafter (in terms of Section 52 of the Criminal Law Amendment Act, No 105 of 1997) referred to the High Court for sentence. The latter court sentenced him to imprisonment for life. He appealed against the conviction and the resultant sentence.

Factual Background

- [2] The State lead evidence of three witnesses and thereafter the appellant also testified. What follows is the account by these witnesses about the events of that day.
- [3] The complainant, Kgalalelo Marose, a 16 year old girl (who was 14 years old at the time of the incident), testified as follows: In the afternoon of 4 June 2003, around 17H30, she was alone, walking on the road, when she met the appellant. He then informed her how much he loved her. His advances unfortunately hit the rock.
- [4] Later that evening, around 20H00, whilst complainant, Lerato, Kelebogile and Papi were walking to church, they met him again. This was not per appointment but just per chance. He came following them and indicated that he wanted to have a word with the complainant. She was not interested in that.
- [5] He then picked up a stone and started to shout whilst saying an Islamic prayer. As he was doing that, he was holding the complainant whilst her companions were walking ahead of them. He then dragged her to a place where cigarettes were being sold. When she wanted to leave, he threatened her with a bottle.
- [6] She then screamed and called Lerato. He hit her with the bottle on the chest as she was busy calling Lerato. The bottle then fell to the ground and the appellant could not see it any longer. She later fled to her place (home). Lerato wanted to come to her but the appellant insulted her, telling her not to dare and approach them.
- [7] The appellant followed the complainant to her place of residence. He caught up with her inside her yard but before she could enter the house. He tripped her and she fell down. He then hit her with a kirie and kicked her with booted feet on her nose. She screamed for help but to no avail. She stood up and knocked at the door whilst her mother was peeping through the window, watching them. The appellant however, warned her mother that he would kill her if she opened the door for her daughter or if she came out of the house. Her mother neither said anything nor did anything to help her. He then grabbed her and assaulted her again. At that stage Lerato and the two others, who had been watching the incident from a distance, left to take Papi half way.

- [8] After the trio had departed, the appellant then took her to a bush at Ramosadi village where he hit her with open hands and kicked her with booted feet. He then had sexual intercourse with her forcefully. She kept on crying in the process. He undressed her and carried her clothes, being the skirt and the T-shirt, whilst she remained with her bra and panty.
- [9] They went to a certain house which has the letters “Mega City” written on it. After entering it, he started to assault her again, alleging that she had been refusing to enter those premises (the “Mega City” house). There was one sexual encounter between them inside the house. He then locked the door and slept but complainant could not fall fast asleep. Nonetheless, she spent the night there as a captive. Whenever she stood up during the night in order to escape, he grabbed her.
- [10] The following day, when they woke up, she noticed that her clothes were bloodstained. When the appellant noticed that, he regretted what he had done and pleaded with her not to lay a charge against him. He then gave her his clothes to wear because hers were soaked in blood. The blood was from the nose. She then put on his clothes being a skipper, jean and slippers. She left whilst she was carrying her bloody clothes.
- [11] From her place of detention she did not go to her parental home but she went straight to her friend’s place, Lerato, and told her what had happened. It was early in the morning. Later she went to her parental home and she was taken to the police and to the doctor. As a result of the assault, her face was swollen, her hip and the waist were painful.
- [12] Subsequent to this incident, the appellant came to complainant’s parental home to take his slippers which he had previously given to her. He was aggressive when he was demanding his items of clothing. Although his clothes were still at complainant’s place, her mother told him a lie and said they were at the police station. She gave him his slippers only.
- [13] A day after taking his slippers, he came again to complainant’s place. He offered to pay her parents so that the case may be withdrawn. Unfortunately for him, the complainant was not prepared to withdraw the charge against him.
- [14] The following evidence was elicited during cross-examination of the complainant. Lerato, Kelebogile and Papi were standing at a distance of 20 – 30 metres away from the house where cigarettes was sold as the appellant was busy buying cigarettes there. The complainant initially met the appellant at 16H00 and met him again at 20H00 on that day. Around 19H00, the complainant and Lerato went to the tavern with the purpose of looking for Papi there. She denied that the appellant was her lover, or that he bought her any drink at the tavern or that she drank anything including intoxicating liquor during that night. Prior to this incident, the appellant once proposed love to her at Montshiwa. From her place of residence, up to the bush, he kept on assaulting her. However, she did not receive medical treatment for her injuries. A day after she consulted the doctor, she was however given pain block at the clinic.

- [15] Lerato testified that she and the complainant met the appellant at the shop. The appellant then walked with the complainant ahead of her to go and buy cigarettes. Thereafter, they went to the complainant's place and the appellant assaulted her there, inside the yard but outside the house. Lerato, Kgalalelo and Papi then left because they were taking Papi half-way. On their return to the scene, this couple was no longer there.
- [16] She only met the complainant in the afternoon of the subsequent day. She told her that the appellant had sexual intercourse with her at a certain bush. She further said thereafter he took her to a certain house where he also had sexual intercourse with her. She said the appellant had fastened her hand with his pair of trousers. Lerato does not remember whether she said he fastened her legs with a skipper.
- [17] When she was being beaten by the appellant, inside her yard, she was screaming, she wanted to enter her house but her parents did not open for her. As he was busy assaulting her there, her mother was peeping through the window and he threatened to assault her (mother) if she would open.
- [18] Under cross-examination, Lerato gave the following account: There was a shop and a tavern at a certain shopping complex. Papi was at that tavern when he joined the complainant and her companions. At that stage these girls were waiting for Papi. The appellant and the complainant then walked away but they were not holding each other's hands. The appellant had an amstel beer bottle whilst the complainant had a black label beer bottle in her hand. This black label beer bottle belonged to Papi. The appellant then hit the complainant with that black label bottle. At the complainant's place, he pulled her with her top, dropped her, and caused her to fall to the ground. He then hit her with a kerie.
- [19] The complainant's mother, Joyce Marose, also testified to the effect that whilst she was inside her house that particular night, she heard a person who was screaming. She then peeped through the window and saw a group of people there. She then realised that it was the complainant who was being dragged by the appellant.
- [20] On her arrival in the morning, the complainant showed her how the appellant had assaulted her. She undressed the complainant and noticed that he had cut her finger with a knife. She saw bruises where he hit her with a brick. She sustained blue bruises on the back of the head.
- [21] The appellant's version is that he had sexual intercourse with the complainant consensually. He denied that their sexual engagement was at the bush but at his place of residence on the bed. He denied having assaulted her. In fact they had been in love since February 2003 up to the time of his arrest (the offence was allegedly committed on 4 June 2003). Even the complainant's mother was aware about their love relationship.
- [22] He denied that the complainant's clothes were bloodstained when she woke up at his place. He confirmed however that he gave her his clothes some three weeks prior to the alleged incident. When he arrived at the tavern, he discovered that Kelebogile and Lerato were in

the company of three boys. As he and the complainant were walking away from that tavern, the two girls and the three boys came following them. These boys wanted to take the complainant from the appellant, alleging that she was their lover. He told them in turn that she was his girlfriend and that he was taking her to her place of residence because she was pregnant by him. The trio then produced a firearm and threatened him therewith.

The trial court's finding

[23] The trial court identified that consent was the only element that was in dispute. It stated that for two reasons, it would treat the evidence of the victim with caution, first, she was a single witness and, secondly, she was a child. It recognised that there were contradictions in the evidence of the complainant and that of Lerato. It found that she reported the rape to her friend and also to her mother; that she was corroborated by Lerato and the complainant's mother and that she was a reliable and honest witness. The trial court concluded that according to the medical report, she was not assaulted "because the doctor concentrated on the sexual part". The said medical report is not attached to the case record. Although an attempt was made by the Public Prosecutor, to read it into the record mostly what is transcribed was inaudible.

The Issues

[24] Mrs Zwiegelaar, for the appellant raised four points in support of her submission that the conviction and the sentence should be set aside. They are:

The magistrate failed to comply with the provisions of Sections 162 and 164 of the Criminal Procedure Act, No. 51 of 1977 (the Act) in that he did not enquire from the complainant, (a 16 year old girl at the time of her evidence) whether she understood the nature and import of an oath;

The appellant did not testify under oath, this is contrary to Section 163(1) of the Act;

There were material contradictions on the evidence of the State;

On sentence: The charge sheet bears no reference to the Minimum Sentences Act yet life imprisonment was imposed.

Before administering an oath, is a judicial officer bound, to ask the witness whether or not he/she understands the nature and import of an oath?

[25] Mrs Zwiegelaar developed her argument along the following lines:

The learned Regional Magistrate failed to enquire from the complainant whether she understands the nature and import of the oath. The questions posed by the learned Regional Magistrate to the complainant before he allowed the interpreter to administer the oath to her were clearly designed to ascertain whether the complainant understands what it means to speak the truth and to shun falsehood in her evidence. The ability to distinguish between truth and falsehood relates to the competency of a witness to testify. Such ability does not lead to the conclusion that the witness understands the nature and import of the oath. The record is silent

on how the interpreter went about to administer the oath to the complainant. It is *ex facie* the record not clear whether the interpreter enquired from the complainant whether she knows and understands the oath, has any objection to take the oath or to take the oath in the prescribed form and considers same to be binding on her conscience. It is not even clear whether the interpreter administered the oath in the prescribed form to the complainant or not. In view of the aforesaid it is submitted that the learned Regional Magistrate could not have been satisfied that the complainant understood the nature and import of the oath. The possibility thus existed that the complainant did not understand the nature and content of the oath. As such the complainant should have been admonished in terms of section 164(1) of the Criminal Procedure Act, Number 51 of 1977, to speak the truth. The decision of the learned Regional Magistrate to nonetheless allow the oath to be administered to the complainant was thus irregular. Consequently the evidence of the complainant was inadmissible.

[26] Section 162 which is entitled “witness to be examined under oath”, provides:

“(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:-

‘I swear that the evidence I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God’.

- (2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so.”

Section 163 makes provision for an affirmation in lieu of an oath whilst Section 164 provides for an admonishment for someone who does not understand the nature and the import of an oath.

[27] In *S v B* 2003 (1) SASV 52 (HHA) the accused was charged with rape in the Regional Court. The complainant, a thirteen year old girl, was warned to tell the truth after she was asked whether she understood what it meant to swear to tell the truth and what it meant if a person undertook to tell the truth. It was held that the evidence of the complainant was inadmissible because the possibility existed that she did not understand the nature and import of the oath or affirmation in which case she should have sworn or affirmed that she would tell the truth.

[28] Almost three years after the above decision, the Supreme Court of Appeal had to decide the issue which is similar to the one raised in the present appeal. At 444f – 445a of the judgment, Lewis JA set out the law in the following significant passage:

“The third irregularity alleged is that the regional magistrate did not enquire whether the complainant or her brother understood the oath that was administered to them, and that therefore their evidence should have been inadmissible. There is no substance in this complaint. Section 164 of the Criminal Procedure Act permits a presiding officer to dispense with the taking of the oath where it appears that a child does not understand the nature and import of the oath. In such circumstances an enquiry should

be held as to the level of understanding of the witness, and the presiding officer must admonish the child to tell the truth. But a formal enquiry is not necessary as long as the presiding officer has formed an opinion that the witness does not understand the meaning of the oath. In this case however the oath was administered to both the complainant, who was 14 at the time of the trial, and her brother, whose age does not appear from the record. The situation is different. There is no requirement that the trial court must formally enquire whether a witness understands the oath, nor that the presiding officer must record that fact. Of course a presiding officer must be satisfied that a witness does understand the oath, but he or she may form a view in this regard without formally making an enquiry or recording his or her view. There is nothing at all in the evidence to suggest that either the complainant or her brother was ignorant of the import of the oath.”

(S v Sikhipha 2006

(2) SACR 439 (SCA)).

[29] The court therefore finds that in line with the latter decision, the point raised on behalf of the appellant should fail.

The effect of the appellant’s evidence which was unsworn

[30] For some reasons, which are to me unclear, the regional court magistrate found himself in a difficult position when the appellant stated that in terms of his religion, Islam, he could not take an oath. Seemingly, the judicial officer was unaware about the alternative to this situation, being an affirmation. When he was asked to take an oath, the appellant stated in Setswana:

“Ga gona Modimo ope o nka o obamelang ko ntle ga Modimo o le mongwe o ke ikanneng ka ene”

This “oath” was not translated and I will be forgiven for stepping into the boots of the court interpreter. It means:

“I will not obey any other God except one God to whom I have bound myself with an oath”.

He thereafter gave evidence. Clearly, this “oath” is not the one which is prescribed by the Act. His evidence is therefore inadmissible.

[32] The powers of this Court, as a full court (Full Bench) and the Supreme Court of Appeal are set out in Section 322 of the Act in the following terms:

“(1) In the case of an appeal against conviction ..., the court of appeal may –

- (a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or
- (b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or

- (c) make such other order as justice may require.

Provided that, notwithstanding that the court of appeal is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence, shall be set aside or altered by reason of any irregularity or defect in the record of proceedings unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.

- (3) Where a conviction and sentence are set aside by the court of appeal on the ground that a failure of justice has in fact resulted from the admission against the accused of evidence otherwise admissible but not properly placed before the trial court by reason of some defect in the proceedings, the court of appeal may remit the case to the trial court with instructions to deal with any matter, including the hearing of such evidence, in such manner as the court of appeal may think fit.”

[33] In a situation such as this, the conviction cannot stand because the proceedings, are marred by a gross irregularity. There are at least two options open to this Court. Firstly, the Court can direct that the evidence of the appellant be confirmed by him under oath before the trial court or, secondly, he has to give evidence de novo under oath, i.e. repeating his unsworn evidence (*S v B supra*). For reasons which will become clear later in this judgment I refrain from adopting any of the two avenues in *S v B supra*.

Alleged material contradictions in the version of the state

[34] Evidence that the victim in an alleged sexual offence made a complaint soon after its occurrence, and the terms of that complaint, is admissible to show the consistency of the victim's evidence and the absence of consent. The complaint serves to rebut any suspicion that the complainant has fabricated the allegation. The following are the requirements of admissibility of the complaint:

- (a) It must have been made voluntarily and not as the result of questions of a leading and inducing or intimidating nature; and
- (b) It must have been made without undue delay and at the earliest opportunity in all circumstances, to the first person to whom the complainant could reasonably be expected to make it.

The question as to what is a reasonable time within which the complaint should have been made is a matter for the discretion of the Judge. A great deal will depend upon the age and understanding of the complainant, and her opportunities for speaking to the person to whom the complaint might be reasonably confided (*D.T. Zeffertt et al: The South African Law of Evidence*, at page 404 to 407).

[35] The complainant's mother never testified to the effect that her daughter reported to her that she was raped. She testified only about the assault. The complainant testified that she reported this incident to Lerato in the morning when she left the “Mega City” house. Lerato, on the other hand said that the complainant reported to her about the rape only in the

afternoon. This then leads to a conclusion that the report about rape was not made at the first available opportunity. The first person to whom she should have reported the rape was at least her mother. After all, she was free to report to her about the details of the assault, to that extent, she undressed so that her mother could personally see the alleged injuries. Consequently the evidence by Lerato about the alleged rape report is inadmissible.

- [36] In evaluating the evidence of the State, the trial court found that the complainant reported the rape “to a friend . . . and at home.” This is a misinterpretation of the facts. Unfortunately, it was upon this basis that the trial court made a finding that the complainant was a reliable and honest witness. The fact is, the complainant’s evidence stands completely alone and uncorroborated on the issue of rape. Medical evidence could also not salvage the State because the doctor did not observe any sign of rape.
- [37] The complainant told her mother that she was cut on the finger with a knife and further bruised with a brick. In court, that is not how the complainant described the assault because she said the appellant used a kierie, a bottle, clenched fists and booted feet.
- [38] If one reads the evidence of the complainant carefully, one gains the impression that on the day of this incident she must have received a thorough beating from the appellant. When she was examined by the doctor, less than 24 hours after the assault, she had no injuries; not even bruises, scratches, swelling, etc. This, to me, is surprising. The trial court however found nothing sinister about this because, in its view, “the doctor concentrated only on the genital area”. What the Regional Court Magistrate overlooked was that the doctor never testified but only a medical report (J88) was handed in by consent. There is therefore no evidence that this (male) doctor’s interest was nowhere else except at the sexual organ of the victim. Why would the doctor have omitted to reflect in his report, a cut on the finger or a bruise on the body?
- [39] The complainant’s mother did not corroborate her daughter that she arrived at home wearing the appellant’s jean, skipper and slippers. In fact she said nothing relating to the appellant’s clothing. Above that, she never testified that he later wanted to bribe them so that the case may be withdrawn. The bloodstained clothes were never produced to the court despite that they were in the possession of either the complainant’s mother or the police. No explanation for this failure was given to the court. This is material evidence which could go a long way to corroborate the version of the complainant.
- [40] Rapists of the calibre of the appellant are a rare commodity in this age. He assaulted the complainant in front of her mother, took her away and spent the night raping her. Next, he gave her his clothes. He was later not afraid to go to the complainant’s parents to negotiate for the return of his items of clothing. His behaviour, after the rape, was throughout not consistent with that of a man who knew that he had committed an offence of rape.
- [41] The only area where the evidence of the complainant is corroborated by Lerato and complainant’s mother is as regards the assault on her in front of her house on the night of the incident. It is understandable that her mother was afraid to go out of the house to help

the victim as they were still there. What is surprising with her is that after the appellant, the complainant and the other people departed from the premises she never made any attempt to have her daughter rescued from the claws of her attacker. She did not ask the neighbours to assist. She did not contact the police. She went to bed, knowing that the life of her daughter was in danger. This behaviour, on her part, is not consistent with the conduct of a mother whose fourteen year old child had been beaten and abducted by a thug.

[42] Lerato and the complainant testified that she knocked at her door but the appellant threatened to kill her mother if she opened or went out of the house. The complainant's mother neither testified about the knocking at the door nor the appellant's threats.

[43] The respondent conceded, correctly in my view, that there are material contradictions and some improbabilities in the evidence of the State. In my view, the evidence of the State in relation to rape is of a low quality. Under the circumstances no reasonable court would expect the appellant to answer these allegations.

[44] In the result, the appeal must succeed. The following order is therefore issued:

"1. The appeal against the conviction is upheld.

2. The conviction and sentence are set aside."

SAMKELO GURA

JUDGE OF THE HIGH COURT

I agree.

R. D. HENDRICKS

A. M KGOELE

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