

SOUTH AFRICA / JUDGMENT

Ndlovu and Others v S (A431/2009) [2009] ZAGPPHC 141 (6 November 2009)

[2009] ZAGPPHC 141

COURT

North Gauteng High Court, Pretoria

BEFORE

B.R. Southwood, S.S. Omar

CASE / FILE NUMBER

A431/2009

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IN

THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT,
PRETORIA)

Date: 2009-11-06

UNREPORTABLE

Case Number: A431/2009

In the matter between:

REGINALD SIBUSISO NDLOVU

First

Appellant

SIPHO

MZIKAYIFANI MHLONGO Second

Appellant

BONGINKOSI

MICHAEL MKHONZA Third

Appellant

and

THE STATE

Respondent

JUDGMENT

SOUTHWOOD J

- [1] On 8 August 2008 the appellants were found guilty of rape in the Carolina regional court and were each sentenced to life imprisonment. The appellants now appeal against both the convictions and the sentences.
- [2] The prosecution arose from an incident which took place at Ekulendeni, Mpumalanga, on 14 August 2005. According to the complainant, T S, she had been at a tavern and was walking home alone at about 03h30 when the three appellants caught up with her in a dark lane, overpowered her and then took turns raping her.
- [3] The first and second appellants pleaded not guilty but admitted that they had had intercourse with the complainant. They said that this took place with her consent.
- [4] The third appellant also pleaded not guilty. His defence was a complete denial of all the allegations against him. In his plea explanation the third appellant said that on the day in question he had gone to a tavern where he had met the second appellant. He later went to another tavern and at 22h00 he went home. He did not know the complainant although he had seen her before. The third appellant also stated that after his arrest he was taken to the police station where a policeman assaulted him and forced him to make a false statement that he had had intercourse with the complainant with her consent.
- [5] At the end of the case there were three versions before the court: the complainant's version, the first and second appellants' version and the third appellant's version.
- (1) Briefly summarised, the complainant's version was as follows: at about 23h30 on 13 August 2005 she went to a tavern where she sat and talked to the other women present. She did not consume any alcohol. When the tavern closed at 03h30 on 14 August 2005 she started walking home. She was walking in a dark lane when she heard voices behind her. She turned and recognised the first and second appellants whom she knew personally, and the third appellant whom she knew by sight. The three men were talking about her. She heard the first appellant refer to the second appellant and the third appellant by name. The third appellant's name is Bonginkosi. The three men caught up with her and threw her to the ground. They took turns to rape her. Each appellant raped her while the other two held her down. When they finished they took all her clothes except for her pants and panty. She put on her pants and walked home with her panty in her hand. The second and third appellants followed her to her home and only left when she went in.
- (2) Briefly summarised, the first and second appellants' version was as follows: on the night in question they went to a tavern where they found the complainant. The first appellant and the complainant danced together and the complainant then came to sit with them. They were all drinking alcohol. When the tavern closed at about 02h00 they all walked together to the house which the second appellant was looking after. There they sat and talked and drank

until the first appellant asked the complainant whether he could have intercourse with her. The complainant agreed and she and the first appellant went into the adjoining bedroom and had intercourse. When they finished the first appellant got up, dressed, and left the bedroom leaving the complainant lying on the bed. The second appellant also wanted to have intercourse with the complainant and he went into the bedroom and asked her. After she agreed he also had intercourse with her. When they finished the second appellant dressed and left the bedroom, also leaving the complainant lying on the bed. The third appellant then entered the bedroom and according to both the first and second appellants, had intercourse with the complainant. The second appellant testified that the complainant is a prostitute and is well-known in the township. On the night in question she did not ask for money. She was happy to receive as her reward the alcohol which they had bought.

(3) Briefly summarised, the third appellant's version was as follows: on the night in question he went to the tavern where he met the second appellant. They sat and talked until about 22h00 when the third appellant went home alone. He had nothing to do with the complainant. After his arrest the policeman took him to the police station where a policeman assaulted him and forced him to make a false statement to the effect that he had had intercourse with the complainant with her consent. This was all untrue as he had not seen the complainant that night.

[6] With the consent of the appellants the J88 relating to the medico legal examination performed by Dr. S.N. Ngwenya was handed in as an exhibit and the appellants formally admitted that –

- (1) the contents of the medico legal report are true and correct; and
- (2) the medico legal report relates to the complainant.

It is not in dispute that the complainant went and reported the rape to the police on the same day as the incident and that she was examined by Dr. Ngwenya on that day. The report reflects the following:

- (i) The complainant's clothing had dust and grass on it;
- (ii) The complainant reported that she had been sexually assaulted by three men, all known to her;
- (iii) The doctor found grass on the complainant's vulva and pubic hair and semen on her vagina;
- (iv) The doctor found bruises on the complainant's clitoris and cervix;
- (v) The doctor concluded that the signs and symptoms suggest sexual assault.

[7] The third appellant's statement was received in evidence after a trial within a trial. The statement made on 25 August 2005 reads as follows:

‘Yes, I understand the allegations against me. On the said date and time I did have sexual intercourse with the victim. In actual fact she did agree because I’ve requested her before. She did not say to me she is going to lay a charge against me. That is all I can state.’

[8] In convicting the appellants the court a quo –

- (1) took into account the fact that the complainant is a single witness testifying about a sexual assault;
- (2) found that the complainant was an honest and credible witness who gave her evidence in an honest and consistent manner; that there are no inherent improbabilities in her evidence and that despite aggressive cross-examination by the defence she did not contradict herself on any substantial issues; that she did not wish to wrongly incriminate the appellants and that she did not hesitate to give evidence favourable to the appellants;
- (3) found that Dr. Ngwenya’s report was strong corroboration for the complainant’s evidence: the finding that there was grass on the complainant’s vulva and pubic hair is not reconcilable with the first and second appellant’s version that they had intercourse with the complainant on a bed;
- (4) found that the first and second appellants’ evidence that the third appellant was also present at the time of the incident and had sexual intercourse with the complainant was strong corroboration for the complainant’s evidence that the third appellant raped her;
- (5) found that the Apollo light 150 metres away from the place where the incident took place provided sufficient light for the complainant to be able to identify the third appellant;
- (6) found that the fact that the complainant pointed out the third appellant’s home to the police is a strong guarantee that the complainant positively identified the third appellant;
- (7) found that the differences between the complainant’s statement to the police and her evidence in court were not substantial and were probably due to the traumatic experience which the complainant had gone through;
- (8) found that at first blush the first and second appellants’ evidence was not susceptible to criticism: that they persisted with their versions which agreed in every material respect to the effect that they had intercourse with the complainant with her consent;
- (9) found that the first and second appellants’ evidence that they had intercourse with the complainant with her consent was not really broken down in cross-examination;
- (10) found that in one respect the first and second appellants contradicted themselves in cross-examination. The first appellant testified that there was an agreement that the complainant would have intercourse with them in exchange for drinking with them and it then appeared that the complainant was not present when this alleged agreement was reached and that she was in the toilet and it then appeared that the appellants had not talked while the complainant was in the toilet. The second appellant testified in chief that he did not know

what the complainant's occupation was but during cross-examination he agreed with the other evidence that the complainant was a sex worker or prostitute and that she was famous for this;

- (11) found that it was arguable that these contradictions were material and went to the heart of the dispute;
- (12) warned itself against attaching too much weight to the fact that the first and second appellants had contradicted themselves on this crucial issue;
- (13) found that the policemen's evidence during the trial within a trial was credible and reliable and that it was inherently improbable that the police would assault a suspect to induce him to make an exculpatory statement and that the third appellant was a very poor witness, that he put forward an incoherent version, and that during cross-examination he repeatedly contradicted himself on material issues. In this regard the regional court referred to the third appellant's admission that he had raped the complainant and his denial that he had raped her and his admission and denial that Constable Mashaba assaulted him to get him

to admit that he had raped the complainant;

- (14) found that not only did the complainant place the third appellant at the scene of the rape but the first and second appellants, his good friends, also testified that he was with them that night; and
- (15) found that the warning statement made by the third appellant was admissible in evidence.
- [9] As far as the first and second appellants are concerned the regional court correctly found that the appellants' evidence must be considered in the light of all the evidence and that the fact that when considered in isolation their evidence was not susceptible to criticism was not decisive. The regional court said if the state's evidence was very strong the appellants' evidence could not be accepted.
- [10] The regional court summarised the first and second appellants' version: that the complainant is a prostitute; that she was prepared to have intercourse with three men in exchange for the indulgence of being allowed to drink their alcohol with them; that after she had had intercourse with all three men she proceeded to drink with them and talked and laughed; that the complainant left early the next morning and there was still a good relationship between her and the appellants and that they could

think of no reason why she should go and lay a charge of rape against them. The regional court found that this version was not consistent with any logic or with the following objective facts which are not in dispute:

- (1) a few hours after the time of the incident, at 16h30 on 14 August 2005, the complainant gave a statement to the Ekulendeni police that at about 03h30 that morning she was raped by three men known to her;

- (2) after the complainant laid the charge she went to the hospital and was examined by Dr. Ngwenya who made the findings already referred to;
- (3) no motive for the complainant to lay a charge falsely implicating the appellants in raping the complainant was established;
- (4) after the complainant laid the charge she was admitted to hospital on 30 August 2005 and treated there for stress and trauma until 2 September 2005.

On the strength of these facts the regional court found that the appellants' version was so inherently improbable that it must be rejected and could not be considered to be reasonably possibly true.

[11] As far as the third appellant is concerned the regional court also considered his complete denial in the light of all the evidence. The court rejected the third appellant's version that he was by means of an assault forced to make a statement. The court found that it was highly improbable that a policeman would assault a suspect to make a statement in which a defence is created for himself and dealt with the other shortcomings in the third appellant's evidence already referred to. In addition to this evidence the regional court referred to the complainant's undisputed evidence that she was able to identify the third appellant as someone she had seen before, that she had pointed out his home to the police, that the third appellant's mother approached her a few days after she laid the charge to try to persuade her to withdraw it and that at the scene of the rape the

first appellant referred to the third appellant by name, and, finally, the evidence of the third appellant's two friends who confirmed that he had also had intercourse with the complainant. Neither had a motive to falsely implicate the third appellant.

[12] The main argument on behalf of the appellants is that the complainant was not a reliable and credible witness and that the court a quo was not justified in finding them guilty on the strength of such evidence. The third appellant's attorney conceded that, as a matter of probability, it had been established that the third appellant was a mendacious witness but that this did not justify a finding that he was guilty of rape. In *S v Mtsweni* 1985 (1) SA 590 (A) at 593I-594D the court warned against attaching too much weight to the fact that the accused had lied and inferring that because an accused is a liar he is probably guilty and emphasised that the weight to be given to the fact that the accused lied must depend on the circumstances of every case. The court mentioned two considerations which are of relevance in the present case –

- (1) the accused may think that a lie is more acceptable in the circumstances of the case;
- (2) the tendency of an accused to deny the truth out of fear that he will be involved in a crime or because of a fear that any admission of involvement in an incident or crime, however tenuous, risks an inference of participation and guilt out of all proportion to the truth.

[13] In *S v Sauls and Others* 1981

- (3) SA 172 (A) at 179G-180H the court set out the correct approach to the evidence of single witness:

‘Counsel for the first appellant, Mr. Kuschke, submitted that the trial Judge had been in error in relying on the evidence of the single witness to this murder. He referred to a well-known passage from a judgment given 50 years ago by De Villiers JP in R v Mokoena 1932 OPD 79 at 80 in which it was stated that

“the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by s284 of Act 31 of 1917, but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect.”

This passage has been the subject of much judicial comment and criticism and has not been overlooked by hard-pressed counsel. In the case of R v Abdoorham 1954 (3) SA 163 (N) at 165 Broome JP stated:

“Mr. Mall, for the appellant, relied upon the case of R v Mokoena 1932 OPD 79, which held that there where the Crown relied upon the evidence of single witness who was contradicted by the defence, the Court could only convict where the evidence of the Crown witness was clear and satisfactory in every material respect. This proposition has been followed in many subsequent cases but none of them in this Court. I am very doubtful whether, as a proposition of law, it is correct. And, in any case, I regard it as entirely unhelpful. The Court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true. The Court may be satisfied that a witness is speaking the truth notwithstanding that he is in some respect an unsatisfactory witness.”

Subsequently in a case which, by coincidence, has the same name as the case in which De Villiers JP had given judgment, Fagan JA explained that the criticism of Broome JP

“would have been justified if the sentence in the 1932 judgment had to be read as laying down a requirement of law that must be strictly complied with. It was improbable, however, that De Villiers JP intended it to be read that way.”

(R v Mokoena 1956 (3) SA 81 (A) at 85.)

In R v T 1958 (2) SA 676 (A) at 678 Ogilvie Thompson AJA said that the cautionary remarks made in the 1932 case were equally applicable to s 256 of the 1955 Criminal Procedure Code, but that these remarks must not be elevated to an absolute rule of law. Section 256 has now been replaced by s 208 of the Criminal Procedure Act 51 of 1977. This section no longer refers to “the single evidence of any competent and credible witness”; it provides merely that

“an accused may be convicted on the single evidence of any competent witness.”

The absence of the word “credible” is of no significance; the single witness must still be credible, but there are, as Wigmore points out, “indefinite degrees in this character we call credibility”. (Wigmore on Evidence Vol III para 2034 at 262.) There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in S v Webber 1971 (3) SA 754 (A) at 758). 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 the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 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 witness’ evidence were well-founded”.

(per Schreiner JA in R v Nhlapo (AD) 10 November 1952) quoted in R v Bellingham 1955

(2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.’

[14] There are a number of problems with the complainant’s evidence.

(1) Her evidence is not consistent with the statement she gave to the police at 16h30 on 14 August 2005 in the following respects:

(i) In her evidence she states that each attacker raped her once. In her statement she says that each attacker raped her twice.

(ii) In her evidence she states that after the incident the second and third appellants followed her home and left only when she entered. In her statement she says that after the rape the three men ran away.

(iii) In her evidence she says that the first appellant used the second and third appellants’ names. In her statement she does not refer to this. She merely said that the third attacker was ‘just familiar’.

(iv) In her evidence she says that when the third appellant was attempting to penetrate her he was not able to do so because of the size of his penis and that it was only when the other two appellants forced her legs apart that he was able to penetrate her. This startling fact is not referred to in the police statement.

(2) The complainant contradicted herself on a number of occasions about the identity of the third appellant. She did not tell the police that the first appellant had referred to him by name. She says she gave the police his description and the police eventually gave her the name. This does not appear from the statement.

(3) The complainant contradicted herself about the visibility in the lane. She testified that it was very dark and then she testified that there was enough light from the Apollo light which was 150 metres away for her to see the attackers.

- (4) According to the complainant she went straight home after the rape. She was dressed only in her pants and was carrying her panty. When she arrived at her home she found her boyfriend, Pat Shiba. He saw her condition – she was half-dressed, covered with grass and dirt and could see that she had been raped – yet she did not report to him what had happened. In fact there was no discussion at all. She says she just went to sleep. This is highly improbable.
- (5) The complainant testified that only after she woke up did she report to her boyfriend what had happened. This is highly improbable.
- (6) The complainant testified that when she woke up she changed her clothing – she put on a skirt and a t-shirt. The medico legal report reflects that the complainant's clothes had dust and grass on them. It is not explained how the dust and grass got onto the complainant's clothes. If the complainant put on fresh clothes as she indicated the only inference is that she deliberately put grass on them.
- (7) The complainant testified that the path where the incident took place was unpaved and stony. The medico legal report reflects that there was grass on the complainant's vulva and cervix. There is no explanation for the presence of grass on her private parts. It was striking that the complainant simply adapted her evidence on the issue. If the complainant put grass onto her clothes it is equally likely that she put grass onto her private parts.
- (8) The complainant testified that she suffered scratches on her back during the rape. The medico legal report does not refer to such injuries.
- (9) The complainant testified that the contradictions in her statement were due to her emotional state. The medico legal report which must have been completed at about the same time as her statement reflects no comment by the doctor.
- (10) The complainant testified that she went to the tavern at about 23h30 and stayed there until about 03h30 and during that time did not consume any alcohol. This is most improbable. If the complainant does not drink alcohol why did she go to the tavern.
- [15] In my view the contradictions between the complainant's evidence and police statement are material and required a proper explanation. This was not forthcoming. There are also a number of other contradictions and improbabilities which affect her credibility.
- [16] In my view the third appellant's warning statement was correctly admitted in evidence but its significance was not properly appreciated by the court a quo. The third appellant, an 18 year old youth, made the statement freely and voluntarily shortly after he was arrested and without legal assistance. It is clearly exculpatory and if true provides a complete defence. It is also consistent with the versions of the first and second appellants. It seems clear that the third appellant's denial that he made the statement freely and voluntarily and that it is true is due to the third appellant considering that the truth is not good enough and attempting to put distance between himself and the alleged crime.

[17] The court a quo was not able to make pertinent findings that the first and second appellants were not credible and reliable witnesses and based the conviction on the probabilities without carefully considering the complainant's evidence to satisfy itself that she was worthy of belief. In my view the court a quo erred in this regard. In the light of the shortcomings in the complainant's evidence the court could not be satisfied that the truth had been told. The appellants were therefore wrongly convicted.

Order

[18] The appeal is upheld and the convictions and sentences are set aside.

B.R. SOUTHWOOD

JUDGE OF THE HIGH COURT

I agree

S.S. OMAR

ACTING JUDGE OF THE HIGH COURT

CASE NO: A431/2009

HEARD ON: 2 November 2009

FOR THE 1st and 2nd APPELLANTS: ADV. F. VAN AS

INSTRUCTED BY: Legal Aid Board

FOR THE 3RD APPELLANT: MR. C. JORDAAN

INSTRUCTED BY: Coert Jordaan Inc Attorneys

FOR THE RESPONDENT: ADV. G.J.C. MARITZ

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 6 November 2009

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