

SOUTH AFRICA / JUDGMENT

## Ngobeni v S (A65/2015) [2018] ZAGPPHC 766 (12 October 2018)

[2018] ZAGPPHC 766

COURT

North Gauteng High Court, Pretoria

BEFORE

C.P. Rabie, A.C. Basson

CASE / FILE NUMBER

A65/2015

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: A65/2015

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

P.A.

NGOBENI

Appellant

and

THE

STATE

Respondent

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**JUDGMENT**

1. This is an appeal, by leave of the court a quo, against the conviction of the appellant by the Regional Court for the region of Gauteng, held in Pretoria, on 16 October 2012 on a charge of sexual penetration in contravention of section 3 of the Sexual Offences and Related Matters Act 32 of 2007. The appeal is not against the sentence imposed upon the appellant.
2. The prosecution's case against the appellant was that on or about 25 August 2009 and at or near Mamelodi, near Pretoria, he raped the complainant on more than one occasion. The appellant denied the charge against him.
3. The complainant, who was 7 years old at the time of the trial but merely 5 years old at the time of the incident, testified through an intermediary. She was in grade 2 at the time of the trial. She testified that she knew the appellant well from before the incident and that they lived in the same area. On the day of the incident she was playing in the street with her friend Mpho when the appellant called her and sent her to buy milk for him from a nearby shop. He gave her money to buy the milk. She did so and on her return to the appellant's place of residence she knocked on the door and after the

appellant opened the door, he invited her inside. After she had handed him the milk, and as she was leaving, the appellant grabbed

her and dragged her back into the house, locked the door and placed her on top of the bed. She was crying at the time because he was hurting her arm. There was nobody around when he dragged her back into the house.

4. The complainant further testified that the appellant then undressed her. He then got on top of her and put his penis into her vagina and "did naughty things on me". She said that he was holding his penis and put it into her vagina. By making use of a female doll, the pants of which the complainant had pulled down, and a male doll, she inserted the penis of the male doll inside the vagina of the female doll and she showed the up and down movements which the appellant to whom she referred as "uncle Petrus", made after he had inserted himself in her and was lying on top of her. She also testified that when he raped her "there was a plastic on his penis". The court understood this description as a reference to a condom. The complainant also said that it was "oily". She described the appellant's penis as black in colour and being

long. She saw his penis when he was undressing himself prior to raping her.

5. The complainant testified that as she left after the event, the appellant offered her R10,00 but that she refused. Then he gave her R1,00 which she accepted. She also said that he told her that if she should tell her mother or father about what had happened, he would kill them. It may be added that it would appear from the evidence that prior to raping the complainant, the appellant had her look at a pornographic video on his television.

6. The complainant further testified that as the appellant was raping her the front of her private parts was painful. At some point she testified that it had not been the first time that the appellant had raped her.
7. From the evidence it appears that soon after the event the applicant told Mpho's mother of what the appellant had done to her.
8. The second witness for the State was the complainant's mother, Me Jeanette Tholo. She was told of the rape of the complainant by her neighbour, Mampho. She testified that the complainant was afraid to tell her and instead spoke to Mampho. The complainant related the events to her a short while later. This happened when the complainant saw the appellant passing by on his bicycle and then told her that she did not want to see him. She was actually running away. On enquiring what the reason was the complainant told her that the appellant had done a very bad thing to her. She then informed Me Tholo that the appellant had made her to lie on a bed, undressed her and then penetrated her with his penis using a condom. She also told her mother that the appellant made her to watch a CD on the television and telling her that they are going to do the same thing that the people are doing on the CD. She also told her that she was crying and that the appellant gave her R10,00 and also told her that he would kill her and her parents if she told her mother and father about the event.
9. Me Tholo further testified that the complainant told her that she was feeling pain below her stomach and on inspection the vagina of the complainant appeared to have been opened. She then realised that something must have happened to the complainant.
10. According to Me Tholo she then went to Mampho and they called a person by the name of Cumdusay who took them to the police station. According to her Cumdusay was a police officer at Mamelodi. The appellant was then arrested. The complainant was later taken to the local day clinic to see a doctor. According to Me Tholo the complainant told her that the appellant had raped her four times.
11. The next witness for the prosecution was Me Asnat Evelyn Lebeso who is also known as Mampho. She testified that the complainant came to her at home and informed her that the appellant had raped her. She also said that he had done so several times before. Also that the appellant had used a condom. She testified that according to the complainant she had informed her mother but that her mother said that she must tell her if he does so again.
12. According to Mampho she then phoned Cumdusay, who was a police officer. She went with him to the complainant's house where the complainant repeated the version of events to him.
13. Mampho testified that when the complainant told her about the rape she appeared to be afraid and that she asked her not to tell anybody because she had been promised by the appellant that if she informs anyone, something will be done to her. Mampho confirmed that she informed the complainant's mother about what the complainant had told her.

14. By agreement between the parties the report of the medical examination of the complainant was received in evidence. It appears that the examination which resulted in the report was done approximately 10 days after the event. According to the report the doctor found a bump at the 3 o'clock position in the complainant's vagina and concluded that the genital examination was not suggestive of penetration beyond the hymen. The examination did not, however, exclude penetration.
15. The appellant testified in his own defence. He said that he knew the complainant but denied that he ever sent her or any other child to the shop and he also denied that he dragged her into his house or that he had raped her. He testified that he suffers from a condition which prevented him from getting an erection and which causes him pain. He further testified that he and Mampho had been in a relationship and that at the time they were in a dispute about a house which they had jointly acquired. He submitted that Mampho has a reason to lay false charges against him.
16. Dr E.G. Seller also testified on behalf of the appellant. He examined the appellant during March 2010. He stated that the appellant had a chronic skin condition on the scrotum and shaft of his penis. According to him the appellant presented with ulcerations on the penis and also a narrowed foreskin. He further testified that the condition would not prevent the appellant from getting an erection but that he would probably experience pain.
17. In her judgement the trial Magistrate was alive to the fact that the complainant was a single witness to the event and that her evidence has to be viewed with caution. The Magistrate referred to the applicable legal principles and authority and referred to the duty of the court to establish the credibility and reliability of especially the single witness in circumstances such as the present. The Magistrate also discussed the fact that the court has to consider any shortcomings or contradictions in the testimony of the witnesses in order to decide whether the same is such as to affect the credibility and reliability of the evidence. It is not necessary to say more about these issues herein save that I am satisfied that the approach of the Magistrate in regard to all these issues, cannot be faulted.
18. The Magistrate then mentioned that there were flaws in the evidence of the complainant and more particularly that she was self-contradictory with regard to whether she was penetrated vaginally or anally; whether she was raped once or on several occasions; and whether she reported the matter first to her mother or to Mampho. The Magistrate also stated that the complainant's version was contradicted by her mother and Mampho as to whether she knew what rape was and also whether she knew what a condom was and whether she was present at the time of the appellant's arrest.
19. The Magistrate, however, found that these flaws do not necessarily indicate that she was lying to her mother or to Mampho. The Magistrate found that she only described what "naughty things" had been done to her by the appellant and that after she gave the description, Mampho concluded that she had been raped. The Magistrate also referred to the fact that the complainant was very young at the time and that it would not necessarily be

expected of such a child to understand the exact meaning of the word "rape". It would rather be expected of such a child to describe what had happened to her, and that is what the complainant did. For the same reason it is not of particular importance whether the complainant used the word

"condom" or not and whether it was a word that came from one of the adults. Their memory in this regard could be fallible.

What is important is the manner in which the complainant described in court the condom which the appellant was wearing at the time. The Magistrate also found that one cannot expect a child of the age of the complainant to express yourself clearly in terms of time.

20. I agree with the aforesaid findings of the Magistrate. In fact, in my view, the contradictions referred to are, for the most, more apparent than real. Both the complainant's mother and Mampho testified that the complainant mentioned that the appellant had raped her before. However, the evidence in chief as well as the questions during cross-examination failed to refer specifically to previous events and answers by the complainant which may, on the face thereof, appear to be contradictory, in all probability referred to such other events. In my view there was no contradiction in the evidence of the state witnesses which could even remotely be said to detract from the credibility and reliability the evidence of such witnesses. The State witnesses, especially the complainant, were subjected to lengthy cross-examination and they all withstood their cross-examination perfectly well.
21. In his evidence the appellant denied that he committed the offence and believed that the charge was falsely instigated by Mampho, who was his former girlfriend. Regarding the evidence of Dr Seller it is clear that even if the appellant had suffered from the skin condition during the time of the incident, the condition would not have prevented him from getting an erection or to penetrate another person.
22. Regarding the submission of a false charge instigated by Mampho, the Magistrate correctly, in my view, rejected this suggestion. It is not necessary to refer to the Magistrate's reasoning in this regard. There was simply no room for the ill feelings or grudge against the appellant as suggested by him.
23. In this court counsel appearing on behalf of the appellant submitted that there were contradictions in the evidence of the state witnesses and that there was no harmony in their evidence. I have already referred to this issue. The issue as to how many times the complainant had been raped by the appellant, was not an issue during the trial. The complainant did mention that the appellant had raped her before, and this was confirmed by both the mother and Mampho. However, nothing further was made of this during the trial and the attention of the complainant, both during her evidence in chief and cross examination, was drawn to the particular event of which she informed Mampho and her mother about shortly before the arrest of the appellant.

24. The further criticism namely that there was a discrepancy between the evidence of the mother and Mampho because according to Mampho the complainant had informed her that she had told her mother of prior incidents, while the mother's evidence was that she only became aware of the incident when Mampho informed her thereof, is met on the same basis. The mother was asked about the last incident when she answered in this fashion, and no mention was made of previous incidents. The suggested criticism on behalf of the appellant that the corroborating evidence was not consistent, therefore, has to be rejected. The further criticism relating to how many times the complainant had been raped, consequently, is also without any foundation at all.
25. The criticism aimed at whether the complainant or the adult witnesses first referred to the word "condom" and the word "rape" is also without any substance. Having regard to all the evidence, and also the fact that the complainant testified through an intermediary, it cannot, in my view, be said that there is a discrepancy in the evidence in this regard, but even if there is, it would be one without any relevance whatsoever.
26. It is not necessary to refer to the other submissions on behalf of the appellant in this judgement. They are all without any merit. The evidence against the appellant was overwhelming and of such a quality that his version cannot be reasonably possibly true. The evidence of the complainant was particularly strong and her description of the events was such that it has to be accepted. Her description of the appellant taking his penis in hand and her description of the colour and length thereof, was such that there can be no suggestion that she had not described what had happened and what she had seen at the time. Her description that there was a "plastic" on the penis of the appellant and, what is more, that it was "oily", was clearly a description of a lubricated condom. In my view it cannot be suggested that the complainant could have given this evidence unless she had actually seen it on the appellant during the event.
27. The Magistrate delivered a comprehensive and well motivated judgement in which all the arguments put forward on behalf of the appellant were addressed. The conviction of the appellant and the outcome of this appeal rests squarely on credibility findings of the witnesses. A court of appeal will not likely interfere in credibility findings made by the trial court. I have mentioned that, in my view, the Magistrate's approach to the evidence of a single witness of the age of the complainant and in the prevailing circumstances, was correct. In my view the Magistrate did not err in her conviction of the appellant and consequently the appeal has to be dismissed.
28. In the result, the following order is made:
1. The appeal is dismissed and the conviction of the appellant is confirmed.

C.P. RABIE

JUDGE OF THE HIGH COURT

I agree:

A.C. BASSON

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Prepared on 12 October 2026 · Esheria